BAND 57 NOMMER 1 FEBRUARIE 1994

JOURNAL OF CONTEMPORARY ROMAN-DUTCH LAW

THR

Tydskrif vir Hedendaagse Romeins-Hollandse Reg

Butterworths

BAND 57 NOMMER 1 FEBRUARIE 1994

THRHR

BAND 57 NOMMER 2 MEI 1994

THRHR

BAND 57 NOMMER 3 AUGUSTUS 1994

HR
HR

BAND 57 NOMMER 4 NOVEMBER 1994

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Suid-Afrikaanse deeleiendom en Belgiese *appartementseigendom**

CG van der Merwe
BA Hons BCL LLD
Professor in die Privaatreg, Universiteit van Stellenbosch

SUMMARY

South African sectional ownership and Belgian *apartementseigendom*

The Belgian act of 1924 on *apartementseigendom* is the pioneering legislation of the twentieth century on sectional ownership. The act is based on section 664 of the French *Code Napoleon* and comprises only five short sections dealing mainly with joint ownership.

The South African Sectional Titles Act differs radically from the Belgian legislation. Our act is based mainly on the Strata Titles Act of 1961 of the Australian State of New South Wales, and is one of the lengthiest in the world on sectional ownership.

The purpose of this contribution is to compare the divergent Belgian and South African legislation with a view to ascertaining the reciprocal lessons to be learnt. Because the Belgian act is so brief, legal theory and the courts in that country had to rely on the basic principles of the law of property to find practical solutions. Since both Belgian and South African sectional ownership originated from the Roman-law tradition, these insights may be helpful in developing the dogmatic foundation of sectional ownership in South Africa. On the other hand, it is clear that the Belgian act is too compact to do justice to the complex legal relationships that flow from sectional ownership; legislative reform is therefore necessary to promote legal certainty.

1 INLEIDING

Die Belgiese wet op *appartementseigendom* wat op 8 Julie 1924 gepromulgeer is,[1] is die baanbrekerswet van die twintigste eeu op die gebied van deeleiendom.[2] Hierdie wet is soos verskeie ander moderne Europese wette[3] op die lees van artikel 664 van die Franse *Code Napoleon* geskoei.[4] Hoewel dit slegs vyf

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* Die skrywer wil hiermee sy opregte dank uitspreek teenoor Joost Pauwelyn wat 'n *Licenciaat in de Rechtsgeleerdheid* aan die Katholieke Universiteit van Leuven verwerf het. Hy was vanaf Julie tot September 1992 eerste navorsingsassistent in 'n termynpos wat aan die skrywer deur die Universiteit van Stellenbosch toegeken is. Die gedeelte oor die Belgiese reg is grootliks gebaseer op die resultate van sy diepgaande navorsing.

1 Die wet is gepubliseer in die *Belgisch Staatsblad* van 1924-07-13 en opgeneem in die Belgiese Wetboek as a 577*bis* §1 – 11. Die wet wysig oa die *Hypoteek Wet* van 1851-12-16 ten einde die registrasie van *appartementseigendom* te reël.

2 Gedurende die 19de eeu is deeleiendom deur enkele artikels in wetboeke gereël, soos a 664 van die Franse *Code Civil* van 1804 en a 396 van die Spaanse *Còdigo Civil* van 1888. Die enigste ander land wat ook soortgelyke wetgewing in 1924 afgekondig het, was Hongarye (sien Bärmann, Pick en Merle *Wohnungseigentumsgesetz* (1980) 241).

3 Oa die Franse wet oor deeleiendom van 1938-06-28.

4 Die *Code Napoleon* is in 1804 vir die Franse Ryk (wat België ingesluit het) afgekondig.

kort artikels bevat wat hoofsaaklik oor mede-eiendomsreg handel,[5] is die beknopte wetsbepalings deur die regspraak, die regsliteratuur en veral deur die arbeid van regspraktisyns vir die praktyk bruikbaar gemaak. Dit geld veral die regspraktisyns wat in samewerking met die Belgiese boubedryf 'n volledige stel modelreëls (*modelreglement van medeëigendom*) vir *appartementseigendom* uitgewerk het.[6] Anders as in meeste ander Europese lande[7] is die beknopte wetsbepalings van 1924 tot op hede nie deur latere wetgewing aangevul nie. Twee wetsvoorstelle, naamlik dié van Pede-Pierson in 1974[8] en dié van Mundeleer-Gol van 1989,[9] het wel beoog om die komplekse regsverhoudings tussen deeleienaars uitvoeriger te reël, maar is nooit deur die Belgiese parlement aangeneem nie. Beide wetsvoorstelle wou *appartementseigendom* ten volle van mede-eiendomsreg skei en eersgenoemde uitvoerig in 'n nuwe hoofstuk behandel. Hoewel die voorstelle nooit wet geword het nie, bied hulle nietemin 'n aanduiding van toekomstige ontwikkeling in België. Hulle sal dus saam met die Belgiese wetsartikels en die bepalings van die *modelreglement* as bronne van Belgiese *appartementseigendom* behandel word.

Die Suid-Afrikaanse Wet op Deeltitels verskil radikaal van die Belgiese wetgewing. In die eerste plek stam die Suid-Afrikaanse wet nie uit artikel 664 van die *Code Napoleon* of die Europese regstradisie nie. Inteendeel, die Suid-Afrikaanse wet is grootliks op die lees van die Strata Titles Act van die Australiese staat Nieu-Suid-Wallis van 1961 gebaseer wat 'n *common-law* tradisie verteenwoordig.[10] In die tweede plek is die Suid-Afrikaanse wet, anders as die Belgiese wet, nie 'n beknopte wet nie maar soos sy Nieu-Suid-Walliese voorganger, een van die langste wette oor deeleiendom in die wêreld.[11]

Die doel met hierdie bydrae is om hierdie twee uiteenlopende wette met mekaar te vergelyk ten einde te bepaal watter wedersydse lesse daar te leer is. Juis omdat die Belgiese wet so bondig is, moes Belgiese regspraak en regswetenskap op basiese sakeregtelike beginsels terugval om oplossings in die praktyk te verskaf. Aangesien die Belgiese en die Suid-Afrikaanse sakereg uit Romeinsregtelike tradisies stam, kan hierdie insig help om Suid-Afrikaanse deeleiendom dogmaties te fundeer. Aan die ander kant sal dit duidelik uit die vergelyking blyk dat die Belgiese wetgewing gewoon te beknop is om reg te laat geskied aan die komplekse regsverhoudings wat uit deeleiendom spruit en dat wetsvernuwing noodsaaklik is om regsekerheid te bevorder.

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5 Slegs a 577*bis* §11 handel uitsluitlik oor *appartementseigendom*.

6 Die beste weergawe hiervan is vervat in Aeby, Gevers en Trombroff *La propriètè des appartements: ses aspects juridiques et practiques* 550 – 657. In hierdie bydrae sal na hierdie reglement as die modelreglement van Aeby verwys word.

7 Die oorspronklike Franse wet van 1938-06-28 is bv deur die wet van 1965-06-10 en die dekreet van 1967-03-17 vervang en aangevul. Die oorspronklike wet van Luxembourg van 1975-05-16 is later aangepas deur die wet van 1985-04-22.

8 Wetsvoorstel van Pede-Pierson, Senaatsitting 1970 – 1971 nr 85 van 1970-11-26 (hierna Pede-Pierson) 1 – 14.

9 Wetsvoorstel van Mundeleer-Gol, Parlementêre stukke, sitting 1988 – 1989 nr 862/1 – 88/89 van 1989-06-21 (hierna Mundeleer-Gol) 1 – 38.

10 Sien Van der Merwe en Butler *Sectional titles, share blocks and time-sharing* (1985) 4.

11 Die Strata Titles Act 68 van 1973 (soos herdruk op 1991-02-13) bestaan uit 160 artikels en beslaan saam met die modelreëls 220 bl. Die Wet op Deeltitels 86 van 1985 bestaan uit 61 artikels en beslaan 88 bl (dus 44 vir elke amptelike taal), terwyl die regulasies ingevolge dié wet 84 bl (dws 42 vir elke amptelike taal) beslaan.

2 HISTORIESE AGTERGROND

Die Belgiese *appartementseigendom* vind sy oorsprong in middeleeuse regsgebruike en die vroeë Franse gewoontereg.[12] Die eerste spore van *appartementseigendom* word in die Brusselse *Statuyt van de Meeringhe* van 19 April 1657 aangetref.[13] Hierdie statuut reël die eiendomsreg van die verskillende verdiepings in 'n veelverdiepinggebou op die lees van middeleeuse voorgangers. Hiervolgens mag nóg die eienaar van die boonste verdieping, nóg die eienaar van die grondverdieping veranderings aan hul verdiepings aanbring wat tot nadeel van enige verdiepingeienaar strek. Wat bydraes tot gemeenskaplike koste betref, bepaal die statuut dat al die eienaars moet bydra tot die onderhoud en herstel van die steungewelwe, die solderbalke, die draagbalke en die dak. 'n Opgeskrewe gewoonteregsreël van Antwerpen uit dieselfde tydperk[14] laat die eienaar aan wie die grootste gedeelte van die gebou behoort, toe om sonder toestemming van die ander eienaars herstelwerk aan die gebou te verrig mits dit in ooreenstemming met die bestemming van die gebou is. Die uitgawes word dan later eweredig tussen al die eienaars ooreenkomstig die grootte van elkeen se gedeelte van die gebou verdeel. Soortgelyke bepalings word aangetref in die gewoonteregsreëls van Leuven, Gent en Ieper.[15]

Aangesien België tot met sy onafhanklikheid in 1830 dikwels deel van die Franse Ryk was, het die *Code Napoleon* van 1804 ook in België gegeld.[16] Artikel 664 van hierdie kode het die instelling van verdiepingeiendom of *appartementseigendom* gesanksioneer en veral aangedui hoe die instandhoudingskoste van die gebou tussen die onderskeie eienaars verdeel moet word. Ten spyte van hierdie statutêre grondslag was *appartementseigendom* nie so gewild in België as in Frankryk en Switserland nie en was dit 'n seldsame verskynsel in België gedurende die 19de eeu.[17] Die groot woningsnood in België na die Eerste Wêreldoorlog het dit egter dringend noodsaaklik gemaak dat 'n breë statutêre grondslag vir *appartementseigendom* ontwerp moes word. Die resultaat was die wet van 1924 wat grotendeels gebaseer was op artikel 664 van die Napoleontiese wetboek soos aangevul deur Franse gewoontereg, regspraak en regsleer van die 19de eeu.[18]

Wat Suid-Afrika betref, het die resepsie van die Romeinse stelreël *superficies solo cedit* in die Romeins-Hollandse reg van die 17de en 18de eeu 'n einde gemaak aan enige Germaansregtelike vorm van verdiepingeiendom wat as model vir 'n latere Suid-Afrikaanse instelling van deeleiendom kon dien.[19] Hierdie

12 Sien veral Julliot *Traitè-formulaire de la division des maisons par ètages et par appartements* (1922) 44. Julliot 45 verwys na vbe van verdiepingeiendom in die 15de eeuse gewoonteregsboeke van Auxerre (a 116), Orlèans (a 215) en Parys (a 187 205).

13 Sien Poirier *Le propriètaire d'appartements* (1937) 22 – 23.

14 Sien Defacqz *Ancien droit de Belgique* II (1873) 172 ev.

15 Defacqz 173 verwys na a 29, a XVIII 20 en a XVI 21 van die gewoonteregsreëls van Leuven, Gent en Ieper onderskeidelik.

16 Buiten tydelike anneksasies deur Spanje, Oostenryk en Nederland was die huidige staat België tot 1830 so dikwels deel van die Franse Ryk dat die volgende spreuk ontstaan het: "As dit reën in Parys, val die druppels in Brussels." België was tussen 1804 en 1810 'n integrale deel van Frankryk.

17 Laurent *Principes de droit civil* VII 558.

18 Aeby *et al Propriètè* nr 12 – 13.

19 Sien oa Grotius 2 1 13; Van Leeuwen *RHR* 2 16; Van der Keessel *Praelectiones* 2 1 13; Paulus Voet *De mobilium et immobilium natura* 2 5 2; Joubert "Aanhegtings: roerend of onroerend" 1957 *THRHR* 235.

stelreël bepaal dat alles wat op grond gebou word aan die eienaar van die grond behoort en dat verskillende persone nie tegelyk eienaars van die gebou en die grond of van verskillende gedeeltes (verdiepings of woonstelle) in 'n gebou kan wees nie. Die stelreël is in die Suid-Afrikaanse regspraak oorgeneem[20] en in die Registrasie van Aktes Wet van 1937 bevestig.[21] Juis om hierdie gemeenregtelike reël te deurbreek, moes die wetgewer ingryp en 'n splinternuwe statutêre grondslag vir deeleiendom skep.

Die beginsel van individuele eiendomsreg ten opsigte van verskillende gedeeltes van 'n gebou is reeds sedert die vyftigerjare in die Suid-Afrikaanse parlement bespreek. Die gedagte het egter eers werklik vlam gevat nadat 'n kommissie van ondersoek in 1958 verslag gedoen het dat die enigste alternatief vir deeleiendom, naamlik aandeleblokskemas, groot finansiële risiko's vir die Suid-Afrikaanse publiek inhou.[22] Nadat die wetgewing van die Australiese staat Nieu-Suid-Wallis deeglik ondersoek is, is die eerste Wet op Deeltitels op 30 Junie 1971 gepromulgeer[23] en op 30 Maart 1973 in werking gestel.[24] Ten einde die bepalings van die eerste wet te stroomlyn en voorsiening te maak vir moderne ontwikkelings op die gebied van deeleiendom, is 'n tweede geslag Wet op Deeltitels op 17 September 1986 afgekondig[25] en op 1 Julie 1988 in werking gestel.[26]

3 DEELEIENDOM IN DIE PRAKTYK

In België het die instelling van deeleiendom goed ingepas by die oogmerke van die *Code Napoleon* wat weggedoen het met feodalisme, die verdeling van rykdom voorgestaan het en private eiendomsreg van onroerende sake wou bevorder. Die liberaal-individualistiese filosofie van die Franse Revolusie van 1789 wat 'n eie huis en tuin as ideaal vir die massa voorgehou het, was egter lynreg in stryd hiermee.

Die Eerste Wêreldoorlog het uiteindelik hierdie ideaal 'n onbereikbare droom vir die meeste Europeërs gemaak. Die massale verwoesting gedurende die oorlog en die feit dat die oprig van geboue na die oorlog drasties ingekort is weens die stygende pryse van grond, boumateriaal, grondbelasting en lewenskoste in die algemeen, het 'n nypende tekort aan bekostigbare wonings laat ontstaan.[27] Hierbenewens het die stygende graad van verstedeliking as gevolg van duisende vlugtelinge wat 'n heenkome in die stede probeer vind het, die behoefte aan stadsvernuwing en die vestiging van groot owerheidsbestuursliggame in middestede, die staat verplig om woningsbou op een of ander manier te stimuleer.[28] Ten einde die verkryging van 'n eie woonstel binne die finansiële

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20 Sien oa *MacDonald Ltd v Radin and the Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454; *Van Wezel v Van Wezel's Trustee* 1924 AD 409.

21 Sien r 28(2) ingevolge die Registrasie van Aktes Wet 47 van 1937, bespreek deur Odendaal "Praktiese prosedure by die registrasie van 'n deeltitelskema" 1977 *TSAR* 14.

22 Sien Van der Merwe en Butler 5 – 7.

23 RK 3169 van 1971-06-30.

24 Prok R18 RK 3776 van 1973-02-02.

25 RK 1044 van 1986-09-17.

26 Prok 62 RK 11240 van 1988-04-08.

27 Poirier 8; Aeby *et al Propriètè* nr 14; De Page en Dekkers *Traitè èlementaire de droit civil belge* V nr 1139. Vir die na-oorlogse situasie in Parys sien Julliot 5.

28 Sien Beekhuis "Ontwikkeling van het appartementsrecht in Nederland" 1981 *Tijdschrift voor Privaatrecht* 353 vir die na-oorlogse toestand in Nederland wat deur die repatriasie van duisende Nederlanders uit die vroeëre Nederlands-Oos-Indië vererger is.

bereik van die meeste Belge te plaas, is die wetgewing oor *appartementseigendom* in 1924 in België afgekondig.

Die woningsnood wat in Suid-Afrikaanse stede ontstaan het as gevolg van sowel die toenemende verstedeliking van die bevolking as die stygende koste van boumateriaal en boupersele, was ook een van die belangrikste redes waarom die Wet op Deeltitels in 1971 in Suid-Afrika ingevoer is.[29] Hierbenewens maak ekonomiese oorwegings in sowel België as Suid-Afrika deeleiendom 'n aantreklike alternatief. Omdat deeltitelwoonstelle deel van 'n groter gebou uitmaak, kan dit veel goedkoper per woonstel opgerig word as dieselfde aantal huise op afsonderlike erwe. Gemeenskaplike fasiliteite soos tuine, swembaddens en 'n sentrale verwarmingstelsel is makliker bekostigbaar in deeleiendomskemas as by individuele huise. Bowendien voel baie mense veiliger in eiendomswoonstelle en kan veiligheidsmaatreëls makliker en goedkoper opgeskerp word. Ten slotte het ondersoeke in sowel Suid-Afrika as België getoon dat geldleningsinstansies eerder eiendomswoonstelle (*appartementseigendom*) finansier as huurwoonstelle as gevolg van huurderbeskermingsmaatreëls wat die vryemarkmeganisme by die verhuur van huurwoonstelle aan bande lê.[30]

Volgens statistieke was daar in Maart 1981 reeds 843 869 woonstelblokke in België wat huisvesting aan ongeveer twee miljoen mense verskaf het.[31] Aangesien bykans 30% van hierdie woonstelblokke *appartementseigendom* is, word bereken dat ongeveer 584 506 persone, ruim 6% van die Belgiese bevolking, in deeltitelwoonstelle gehuisves word. Gedurende 1970 is 20 838 woonstelle teen 'n bedrag van 54 miljard Belgiese frank van die hand gesit.[32]

Teen die einde van 1983 was daar reeds ongeveer 2 700 deeltitelskemas in Suid-Afrika opgerig. Daar word bereken dat hierdie getal met ongeveer 1 000 per jaar vermeerder wat beteken dat ongeveer 13 000 skemas reeds deur Suid-Afrikaners bewoon word. Alhoewel hierdie statistieke indrukwekkend is, is die voorspelling tydens die tweede lesingsdebat van die wet dat daar in 1980 meer woonstelle as huise aan Suid-Afrikaners sal behoort, vandag nog nie bewaarheid nie.[33]

4 DOGMATIESE STRUKTUUR VAN DEELEIENDOM

In sowel die Suid-Afrikaanse as die Belgiese reg word deeleiendom (*appartementseigendom*) as 'n soort saamgestelde eiendomsreg beskou. Die individuele eiendomsreg van gedeeltes van die gebou wat vir die uitsluitlike gebruik van deeleienaars toegewys is (woonstelle of sakelokale), word as hoofsaak beskou en die daaraan gekoppelde mede-eiendomsreg aan die gemeenskaplike gedeeltes

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29 Sien in die algemeen Van der Merwe en Butler 7 – 8.

30 Sien in die algemeen vir België: Derine, Van Neste en Vandenberghe *Zakenrecht* II A nr 116; Verslag van die permanente komitee vir die Raad vir Wetgewing (Masson) *Pasinomie* 1924 343 kol 1; Verslae namens die permanente kommissie van die Senaat (Van Dievoet en Vauthier) *Pasinomie* 1924 345 kol 1 en 355 kol 2). Sien vir Suid-Afrika: Van der Merwe en Butler 7 – 11; Cowen "The South African Sectional Titles Act in historical perspective: an analysis and evaluation" 1973 *CILSA* 2 – 4.

31 Nationaal Instituut voor de Statistieken "Algemene volks- en woningtelling op 1 Maart 1981, algemene resultate" 13 ev.

32 *Idem* "Verkopen van onroerende goederen in 1990" 1991 ev.

33 Sien in die algemeen Van der Merwe en Butler 19.

van die skema as bysaak.[34] Die mede-eiendomsreg ten opsigte van die gemeenskaplike gedeeltes word volgens 'n bepaalde sleutel (in die Suid-Afrikaanse wet, die deelnemingskwota) in abstrakte breukdele verdeel en aan die eienaars van die onderskeie woonstelle of sakelokale (*appartementen*) toegeken.

Bostaande konstruksie dui op 'n dualistiese siening omtrent die juridiese struktuur van deeleiendom. Dit verskil van die juridiese konstruksie van deeleiendom in Switserland, Nederland en Oostenryk waar 'n unitêre of monistiese standpunt omtrent deeleiendom gehuldig word. Hierdie regstelsels onderwerp die hele deeltitelskema aan mede-eiendomsreg. Die mede-eienaars kombineer dan 'n uitsluitlike gebruiksreg op bepaalde private gedeeltes van die gebou of die grond met 'n beperkte gebruiksreg op die gemeenskaplike gedeeltes.[35] Deur hierdie kombinasie van 'n eksklusiewe gebruiksreg of verdeelde bevoegdhede ten opsigte van sekere gedeeltes en gemeenskaplike of onverdeelde bevoegdhede ten opsigte van ander gedeeltes, verval die monistiese stelsel in 'n vorm van dualisme wat gebruiksregte ten opsigte van deeleiendom betref.[36]

Aan die ander kant beskou die voorstanders van 'n dualistiese teorie die individuele eiendomsreg van 'n woonstel as die stamreg waarop 'n verpligte mede-eiendomsreg ten opsigte van die gemeenskaplike gedeeltes ingeënt is.[37] Die woonsteleienaar verkry egte eiendomsreg van sy woonstel wat onlosmaaklik aan 'n mede-eiendomsaandeel in die gemeenskaplike gedeeltes verbonde is. Die unitariste werp daarteen op dat dit moeilik is om te bepaal watter gedeeltes van die gebou aan individuele eiendomsreg onderworpe is en dat uitsluitlike eiendomsreg in die praktyk tot eiendomsreg van 'n kubieke lugruimte vervaag. Bowendien beklemtoon hulle dat individuele eiendomsreg in 'n groot mate begrens word deur die regte en pligte wat uit die regsverhouding tussen deeleienaars voortvloei.[38]

Belgiese regsgeleerdes kritiseer die feit dat die private oppervlakte van die gebou (woonstelle of sakelokale) as hoofsaak beskou word waaraan die gemeenskaplike gedeeltes onlosmaaklik as bysaak verbonde is. Eerstens keer dit die stelreël *superficies solo cedit* ingevolge waarvan die grond as hoofsaak en aanhegtings daaraan as bysaak beskou word, op sy kop.[39] Tweedens is die gedeeltes van die gebou wat aan individuele eiendomsreg onderworpe is, onder

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34 Sien in die algemeen vir Suid-Afrika: Van der Merwe en Butler 32 – 39. Die Belgiese regsposisie blyk uit die volgende twee bepalings van die Belgiese Wetboek: a 577*bis* §11 ("wanneer de onderscheidende verdiepingen of gedeelte van verdiepingen van een huis aan verschillende eigenaars toebehoren . . .") en a 577*bis* §9 ("Onverdeelde onroerende goederen echter die als bijzaak bestemd zijn tot gemeenschappelijk gebruik zijn niet vatbaar voor verdeling . . .."). Sien verder Pede-Pierson a 577*ter* §3: "Ieder van de kavels omvat een privatief gedeelte en een onverdeeld aandeel in de gemeenschappelijke saken." Mundeleer-Gol beskryf 'n *kavel* soos volg: "[D]ie ieder een gebouwd privatief gedeelte en een aandeel in de gemeenschappelijke onroerende bestanddelen bevatten" (a 577 – 3).

35 Sien in die algemeen Van der Merwe en Butler 32; Asser-Beekhuis *Handleiding tot de beoefening van het Nederlands burgerlijk recht* 3 II 258; Mertens *Appartementsrecht en de welstandsbepalingen* (1989) 329 – 333.

36 Sien veral Derine *et al Zakenrecht* 122.

37 *Idem* 120.

38 Sien Mertens *Appartementsrecht* 333.

39 Sien oa Aeby *et al Propriètè* nr 37 224 – 225 wat a 577*bis* §9 as 'n uitsondering op die nie-dwingende a 552 beskou. *Contra*: Hansenne *La servitude collective* (1969) nr 182; Janssens "L'accession et la propriètè horizontale" 1969 *Revue Practique du Notariat belge* 47 ev.

andere in die geval van gemeenskaplike stutmure, so nou met die gemeenskaplike gedeeltes van die gebou verknoop dat dit onsinnig is om die private gedeelte daarvan as hoofsaak en die gemeenskaplike gedeelte as bysaak te beskou.[40] Die suiwerste oplossing is om te aanvaar dat die wetgewing oor deeleiendom nie slegs 'n splinternuwe vorm van saamgestelde eiendomsreg soos hierbo uiteengesit geskep het nie, maar ook 'n splinternuwe saamgestelde saak die lig laat sien het. Hierdie saak bestaan uit 'n private gedeelte van die gebou (woonstel of sakelokaal) tesame met 'n abstrakte aandeel in die gemeenskaplike gedeeltes wat daaraan toegeken is. Sosiale en ekonomiese faktore (die groot woningsnood) het die wetgewer gedwing om die stelreël *superficies solo cedit* te deurbreek en 'n splinternuwe wetgewende basis vir deeleiendom te skep.[41]

'n Basiese strukturele verskil tussen die Belgiese en die Suid-Afrikaanse wetgewing is dat eersgenoemde in beginsel reëlend (suppletief) van aard is, terwyl die bepalings van die Wet op Deeltitels dwingend van aard is. Die Belgiese wetgewing skep slegs die wetlike raamwerk vir deeleiendom en laat dit aan die deeleienaars oor om in 'n groot mate hul onderlinge regte en verpligtinge deur ooreenkoms te reël. Daarenteen is die bepalings van die Wet op Deeltitels dwingend vir sover die onderlinge regte en verpligtinge van deeleienaars vrywel uitvoerig in die wet self gereël word en die deeleienaars nie toegelaat word om wetlike bepalings deur middel van eiesoortige reëls te wysig nie.[42] Weens die ingewikkeldheid van die onderlinge regsverhoudings tussen deeleienaars, bevat beide die Belgiese wetsvoorstelle waarna hierbo verwys is, aanbevelings dat die onderlinge regte en verpligtinge van deeleienaars uitvoeriger deur wetgewing gereël word en dat dié wetgewing dwingend van aard moet wees.[43]

5 VERGELYKING TUSSEN SEKERE ASPEKTE VAN DIE BELGIESE EN DIE SUID-AFRIKAANSE WETGEWING

5 1 Vereistes vir vestiging van deeleiendom

Ingevolge die Belgiese wetgewing moet drie voorwaardes vervul word voordat *appartementseigendom* gevestig kan word.

Ten eerste moet daar 'n *huis* wees wat uit verskillende *verdiepings* of gedeeltes van 'n *verdieping* bestaan. Die begrip *huis* word ruim geïnterpreteer as 'n gebou wat vir 'n bepaalde gebruik soos bewoning, handelsondernemings, kantore, winkels of motorhuise bestem is. Slegs 'n gebou wat 'n strukturele eenheid vorm, word as 'n *gebouw* in juridiese sin beskou. 'n Aantal afsonderlike geboue kan egter ook deur die wil van die partye tot 'n eenvormige bestemming verbind word om sodoende *appartementseigendom* te vorm. Die woord *verdieping* het geen prinsipiële betekenis nie. Daarom kan *appartementseigendom* deur sowel vertikale as horisontale verdeling van 'n gebou bewerkstellig word. Solank daar 'n gebou of geboue bestaan wat materieel of deur die wil van die partye as 'n eenheid beskou word, maak dit nie saak of hierdie gebou of geboue in afsonderlike verdiepings, woonstelle of kamers verdeel word nie.

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40 Vileyn "Het appartementenrecht en de medeeigendom" 1983 *Tijdschrift voor Privaatrecht* 27.
41 Sien in die algemeen Van der Merwe en Butler 29 – 32 en literatuur daar aangehaal.
42 *Idem* 221 – 222.
43 Sien Pede-Pierson a 577*ter* §1 met die *Toelichting* daarop.

Ten tweede moet die sogenaamde intellektuele voorwaarde vervul word. Die eiendomsreg van die gebou moet onder twee of meer persone verdeel word in die vorm van individuele eiendomsreg ten opsigte van die private gedeeltes van die gebou (woonstelle of sakelokale) en gemeenskaplike eiendomsreg ten opsigte van die gemeenskaplike gedeeltes.

Ten derde moet die *appartementseigenaars* ooreenkom dat die gemeenskaplike gedeeltes in gebonde mede-eiendomsreg aan die verskillende eienaars behoort. Dit impliseer dat enige mede-eienaar nie te eniger tyd 'n verdelingsaksie kan instel om die gemeenskaplike gedeeltes fisies onder die eienaars te verdeel nie. Sonder 'n andersluidende ooreenkoms word gemeenskaplike eiendom vermoed gemeenskaplik en onverdeeld te wees.[44]

Ingevolge die Suid-Afrikaanse wetgewing moet die *grondstuk* en die *geboue* wat deel van die ontwikkelingskema uitmaak aan sekere vereistes voldoen. Die grondstuk moet binne die regsgebied van 'n plaaslike bestuur geleë wees[45] en indien die skema op meer as een grondstuk ontwikkel word, moet dié grondstukke eers gekonsolideer of notarieel met mekaar verbind word.[46] Verder mag slegs die persoon wat die geregistreerde eienaar van die grondstuk is, die ontwikkelingskema van stapel stuur.[47] Grondstukke in Kaapstad, Kimberley, Johannesburg en die Natalse kus wat nog volgens die ou erfpag of huurpagstelsel van grondbesit gehou word, mag dus nie as 'n deeltitelskema ontwikkel word nie. 'n Uitsondering op hierdie reël is geskep in die Wet op die Ontwikkeling van Swart Gemeenskappe[48] wat die ontwikkeling van deeltitelskemas op huurpaggrond in swart stedelike gebiede veroorloof.[49] Ten slotte mag die voorgestelde ontwikkelingskema nie met die titelvoorwaardes van die grond of 'n geldende dorpsaanlegskema bots nie.[50]

Volgens die Wet op Deeltitels moet die deeltitelgebou 'n bouwerk van permanente aard wees.[51] Dit impliseer dat die gebou op 'n stewige fondament opgerig moet word van boumateriaal wat redelik duursaam is. Daarom sal woonwaens of voorafvervaardigde huise wat maklik afgetakel kan word, nie as geboue vir doeleindes van die wet beskou word nie. Die wet vereis verder dat die gebou of geboue waaruit die skema bestaan in twee of meer individuele dele verdeel word. Elke gebou hoef egter nie meer soos ingevolge die ou Wet op Deeltitels in twee of meer dele verdeel te word nie. Indien 'n skema uit meer as een gebou bestaan, kan 'n enkele gebou as geheel 'n deel wees.[52] 'n Deeltitelskema kan dus net soos in België uit 'n aantal losstaande rondawels bestaan. Net soos in

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44 Aeby *et al Propriètè* nr 45 47 52; Derine *et al Zakenrecht* 123 – 124.
45 A 1(1) *sv* "ontwikkelaar", gelees met a 4(1).
46 A 4(2).
47 A 1(1) *sv* "ontwikkelaar".
48 4 van 1984 a 55.
49 Sien Van der Merwe en Butler 52 – 53. In die Belgiese reg word die persoon met 'n reg van opstal (*superficies*) ook toegelaat om *appartementseigendom* tov die betrokke gebou te ontwikkel. Dit is onseker of 'n persoon met 'n reg van erfpag ook hierdie bevoegdheid het. Sien Pede-Pierson a 577*ter* §3.
50 A 1(1) *sv* "ontwikkelaar" gelees met a 4(5)(a) – (c). Sien verder Van der Merwe en Butler 56 – 60.
51 A 1(1) *sv* "gebou".
52 A 1(1) *sv* "ontwikkelaar", "ontwikkelingskema" gelees met a 4(2). Sien verder Van der Merwe en Butler 60 – 61.

België moet daar egter 'n *huis* of gebou wees wat verdeel word. Bootvasmeerplekke in 'n marine of woonwastaanplekke op 'n kampeerterrein kan nie as 'n deeltitelskema of *appartementseigendom* ontwikkel word nie.[53]

5 2 Ontstaan van *appartementseigendom* of deeleiendom

Hoewel die Belgiese wetgewing geen bepalings daaromtrent bevat nie, word algemeen aanvaar dat *appartementseigendom* in die praktyk meestal deur die wilsbesluit van 'n ontwikkelaar (gewoonlik 'n *bouwpromotor*) of mede-eienaars van 'n gebou ontstaan.[54] Die inhoud van die wilsbesluit is dat die gebou in verdiepings of *appartementen* verdeel word en dat 'n *appartementseigendomsregime* ten opsigte van die gebou gevestig word. Hoewel die akte waarin die wilsbesluit vervat is nie aan vormvereistes hoef te voldoen nie, vereis die Hypoteekwet soos gewysig deur die Appartementseigendomswet van 1924 dat die akte notarieel verly moet wees en in die hypoteekregisters oorgeskryf moet word om afdwingbaar teenoor derdes te wees.[55] Sommige skrywers meen dat *appartementseigendom* ontstaan sodra die verdelings- of splitsingsakte opgestel is. Ander skrywers huldig die standpunt dat *appartementseigendom* eers ontstaan nadat die eerste eenheid deur 'n ontwikkelaar aan die eerste koper of deur mede-eienaars aan een uit hul geledere oorgedra is.[56]

Daarbenewens kan *appartementseigendom* ook in uitsonderlike gevalle deur onteiening van 'n gedeelte van 'n gebou of deur verkryging van 'n gedeelte van 'n gebou deur verjaring ontstaan.[57] Daar word egter algemeen aanvaar dat *appartementseigendom* normaalweg deur wilsbesluit ontstaan. Hoewel dit dikwels in die verlede gebeur het dat mede-eienaars besluit het op verdeling van 'n gebou wat in mede-eiendom aan hulle behoort, word *appartementseigendom*, net soos in Suid-Afrika, hedendaags meestal deur ontwikkelaars van stapel gestuur deur die opstel van 'n eensydige splitsingsakte.

Volgens Belgiese reg word 'n ontwikkelaar of mede-eienaars van 'n grondstuk nie verhinder om geboue wat nog nie opgerig of heeltemal voltooi is volgens bouplanne of argitekstekeninge te verdeel nie (sogenaamde *papieren splitsing*). Die eiendomsreg in die individuele *appartementen* ontstaan egter eers nadat die gebou voltooi is. 'n *Appartement* wat nog gebou moet word, kan eweneens verkoop word (sogenaamde *operaties op plan*). Die koopkontrak het egter slegs verbintenisregtelike gevolge ten aansien van die onvoltooide *appartement*. Om te voorkom dat individuele kopers wat 'n woonstel op papier koop finansiële nadeel ly deur die insolvensie of wanprestasie van bou-aannemers of boupromotors, is wetgewing in 1971 in België afgekondig. Ingevolge artikel 12 van hierdie wet en die daarby behorende *Koninklijke Besluit* moet die verkoper onder andere sekuriteit verskaf vir betalings wat van kopers ontvang is.[58]

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53 Van der Merwe *Sakereg* (1989) 414.

54 Derine *et al Zakenrecht* nr 776; Aeby *et al Propriètè* nr 63. Mandeleer-Gol a 577 – 4 vereis dat 'n akte van splitsing en 'n reglement van mede-eiendom dwingend opgestel moet word en dat die wilsbesluit daarin vervat moet wees.

55 Hypotheek Wet van 1851-12-16 (soos gewysig deur die wet van 1924-07-08) a 2.

56 Aeby *et al Propriètè* nr 81 – 83.

57 *Ibid.*

58 Sien die Woningbouwwet van 1971-07-09 (*Wet Breyne, Belgische Staatsblad* van 1971-09-11). Sien verder Mertens *Appartementsrecht* 194; Suray *Vente et enterprise des immeubles* (1972).

Die Suid-Afrikaanse Wet op Deeltitels volg die moderne Belgiese praktyk deur die inisiatief vir die ontwikkeling van 'n deeltitelskema uitdruklik in die hande van 'n eiendomsontwikkelaar te plaas.[59] Die funksie van die ontwikkelaar is om die skema deeglik te beplan en dan aan die betrokke plaaslike owerheid vir goedkeuring voor te lê.[60] Daarna moet hy 'n konsepdeelplan ingevolge waarvan die grond en geboue in individuele dele en gemeenskaplike gedeeltes verdeel word, deur 'n argitek en/of landmeter laat voorberei[61] en deur die landmeter-generaal laat goedkeur.[62] Indien 'n ontwikkelaar 'n bestaande huurwoonstelblok in deeltitels wil omskep, moet hy die bepalings ter beskerming van die inwonende huurders nakom. Hy moet 'n vergadering met die huurders belê en op die vergadering die voorgenome skema aan hulle verduidelik en hulle in kennis stel dat hulle 'n voorkoopsreg ten opsigte van hul woonstel het.[63] Laastens moet die ontwikkelaar by die registrateur van aktes aansoek doen om die deelplan te registreer, 'n deeltitelregister te open en deeltitelsertifikate ten opsigte van elke eenheid aan die ontwikkelaar uit te reik.[64] Ten einde voornemende kopers te beskerm, mag 'n ontwikkelaar nie 'n eenheid in 'n gebou wat voor 25 Februarie 1981 opgerig is, adverteer of verkoop alvorens 'n deeltitelregister ten opsigte van die gebou geopen is nie.[65] Aangesien 'n deelplan slegs van werklike opmetings opgestel mag word, moet 'n gebou grotendeels voltooi wees voordat 'n deeltitelregister ten opsigte daarvan geopen kan word. Die Wet op Vervreemding van Grond[66] is van toepassing op 'n gebou wat na 25 Februarie 1981 opgerig is. Indien eenhede in so 'n gebou verkoop word, mag die ontwikkelaar behoudens sekere uitsonderings, nie vergoeding wat ingevolge die koopkontrak ontvang is tot sy eie voordeel gebruik alvorens die betrokke eenheid registreerbaar is nie.[67]

5 3 Die reglement van *medeëigendom* of die reëls van 'n skema

Aangesien die beknopte bepalings van die Belgiese wetgewing kwalik die komplekse regsverhouding tussen deeleienaars onderling en die bestuur en beheer van die skema kan reguleer, word hierdie aangeleenthede oor die algemeen in 'n reglement van *medeëigendom* gereël.[68] Die reglement, ook *basisakte* of *onroerende statuut* genoem, berus op 'n ooreenkoms tussen die deeleienaars wat 'n wye diskresie het om self die inhoud van die reglement te bepaal. Aangesien die Hypoteekwet vereis dat die reglement in die openbare registers ingeskryf moet word, moet dit notarieel verly word.

In die praktyk vorm die reglement 'n aanhangsel tot die splitsingsakte. Die reglement bevat 'n beskrywing van die individuele en gemeenskaplike gedeeltes

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59 Sien Van der Merwe *Sakereg* 427 – 428 oor die stappe wat die ontwikkelaar moet doen ten einde deeleiendom tov grond met 'n gebou daarop te vestig.
60 A 4.
61 A 5.
62 A 7.
63 A 4(3).
64 A 11 12.
65 A 9.
66 Wet 68 van 1981 a 26.
67 Sien Van der Merwe en Butler 123 – 127.
68 A 577*bis* §1 maak uitdruklik daarvoor voorsiening dat die "eigendom van een zaak die onverdeeld aan verscheidene personen toebehoort" verder deur "overeenkomsten" en "bijzondere bepalingen" gereël mag word.

van die skema, omskryf die genots- en gebruiksbevoegdhede ten opsigte van elkeen van hierdie gedeeltes en reël die beheer en bestuur van die skema.[69] Aangesien die Belgiese notariaat byna oorwegend die modelreglement van die bekende skrywer Aeby gebruik, toon die tekste van die reglemente in die praktyk groot eenvormigheid.[70]

Die Belgiese regsleer maak 'n onderskeid tussen saaklike en persoonlike bepalings van die reglement van mede-eiendom. Saaklike bepalings hou regstreeks verband met die deeleiendom en die gebruik of genot van die individuele en gemeenskaplike gedeeltes. Persoonlike bepalings het daarenteen betrekking op die inwendige ordening van die deeleiendomsgemeenskap. Voorbeelde is reëls omtrent openings- en sluitingsure van die gebou of 'n gemeenskaplike swembad en reëls omtrent die gebruik van hysbakke en parkeerplekke. Saaklike bepalings moet in die hypoteekregisters oorgeskryf word en geld daarom ook teenoor derdes. Persoonlike bepalings is slegs bindend op die kontrakspartye. Indien persoonlike bepalings geregistreer is, kan dit ook teen regsopvolgers afgedwing word omdat vermoed word dat hierdie persone stilswyend of uitdruklik tot die bepalings ingestem het. In die algemeen verwys die koopkontrak van 'n eenheid (*kavel*) egter duidelik na die reglement sodat verkrygers daaraan gebonde is. Ook huurooreenkomste bevat gewoonlik 'n bepaling dat die huurder aan die reëlings in die reglement gebonde is. Saaklike bepalings is egter altyd teen huurders afdwingbaar. Saaklike bepalings word gewoonlik in die reglement opgeneem terwyl persoonlike bepalings in 'n besondere reglement, die huishoudelike reglement, opgeneem word.[71]

In beginsel word eenparigheid vir die wysiging van die reglement vereis. Die partye kan egter ooreenkom om wysiging van 'n gekwalifiseerde meerderheid afhanklik te maak. Die wysiging van saaklike bepalings moet in 'n notariële akte vervat wees en in die openbare registers geregistreer word.[72]

Die wetsvoorstel van Mundeleer-Gol verplig die partye om 'n akte van splitsing en 'n reglement van *mededeigendom* op te maak. Die reglement moet die saaklike bepalings van die skema bevat, notarieel verly en geregistreer word. Daarnaas kan die partye ook 'n huishoudelike reglement met persoonlike bepalings opstel. Die huishoudelike reglement hoef nie notarieel verly te word nie, maar moet by die bestuurder van die vereniging van deeleienaars ingedien word om sodoende *vis-à-vis* die partye afdwingbaar te word. Volgens die wetsvoorstel kan enige belanghebbende regstreeks aksie instel teen enigeen wat die bepalings van die reglement of huishoudelike reglement oortree.[73]

Anders as ingevolge die Belgiese wetgewing word 'n standaardreglement ingevolge die Wet op Deeltitels dwingend vir alle Suid-Afrikaanse deeltitelskemas

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69 Derine *et al Zakenrecht* nr 779. Sien verder oor die inhoud van die reglement van mede-eiendom Pede-Pierson a 577*sexies* en Mundeleer-Gol a 577 – 4 §1 3.

70 Vir die teks van die modelreglement, sien Aeby *et al Propriètè* 550 – 657; sien verder De Page en Dekkers *Traitè Elèmentaire* VI nr 1176.

71 Derine *et al Zakenrecht* nr 778; Aeby *et al Propriètè* nr 417 ev 440 ev; De Page en Dekkers *Traitè Elèmentaire* VI nr 498.

72 Derine *et al Zakenrecht* nr 780; Atias "Le pouvoir de la majoritè d'autoriser un changement de la destination des parties privatives" 1981 *JCP* nr 3018. Volgens Mundeleer-Gol a 577 – 10 §1 is wysiging van die huishoudelike reglement afdwingbaar sodra die bestuurder van die skema die wysigings ontvang het.

73 Sien Mundeleer-Gol a 577 – 4 577 – 10.

voorgeskryf vir sover dit nie aanvanklik deur die ontwikkelaar of later deur die deeleienaarsvergadering gewysig is nie.[74] Hierdie standaardreglement is vervat in Bylaes 8 en 9 van die regulasies ingevolge die Wet op Deeltitels.[75] Bylae 8 bevat voorgeskrewe bestuursreëls omtrent die trustees van die regspersoon, bestuursagente en die werking van die algemene vergadering. Bylae 9 weer bevat voorgeskrewe gedragsreëls omtrent die genot en gebruik van individuele en gemeenskaplike dele van die skema. Die ontwikkelaar kan reeds by sy aansoek om die opening van die deeltitelregister sowel sommige voorgeskrewe bestuursreëls as alle voorgeskrewe gedragsreëls vervang, aanvul, wysig of herroep.[76] Die regspersoon kan enige bestuursreël by eenparige besluit wysig nadat ten minste 50% van die eenhede aan buitestanders vervreem is of enige gedragsreël te eniger tyd by spesiale besluit (75% van die lede in getal en waarde) wysig.[77] Geen gewysigde gedragsreël mag met 'n voorgeskrewe bestuursreël bots nie[78] en enige gewysigde bestuurs- of gedragsreël moet redelik wees en in gelyke mate op alle eienaars van eenhede wat wesenlik vir dieselfde doel benut word, van toepassing wees.[79]

Die voorgeskrewe of gewysigde bestuurs- en gedragsreëls is vanaf die datum van die instelling van die regspersoon van krag en dit bind sowel alle deeleienaars as persone soos huisbewoners en huurders wat dele okkupeer.[80] Die regspersoon moet die registrateur van aktes van enige wysiging van bestuurs- of gedragsreëls in kennis stel en hierdie reëls verkry eers regskrag nadat dit in die aktekantoor aangeteken is.[81] Daarbenewens word die regspersoon verplig om alle geldende reëls in 'n protokol te bewaar en dit op versoek aan 'n deeleienaar of saaklik geregtigde beskikbaar te stel.[82] Indien die regspersoon nie optree teen 'n persoon wat die reëls oortree nie, kan enige deeleienaar namens die regspersoon 'n geding teen die oortreder instel.[83]

5 4 Deel en gemeenskaplike eiendom (*privatieve en gemeenschappelijke delen*)

Soos in Suid-Afrika, maak die Belgiese wetgewing 'n onderskeid tussen die gedeeltes van 'n skema wat vir individuele gebruik (*privatieve delen*) en vir gemeenskaplike gebruik (*gemeenschappelijke delen*) afgesonder is. Om gemeenskaplike gedeeltes te bepaal, gebruik die wetgewer die kriterium van *gemeenschappelijk gebruik*[84] en noem die volgende voorbeelde van gemeenskaplike sake: die grond, fondamente van die gebou (*grondvesten*), stutmure (*zware muren*), die dak, binneplase, putte, trappe, hystoestelle (*lifts*) en kabels (*leidinge*).[85] Hierdie lys word verder aangevul in die modelreglement van

74 A 35(2).
75 RK R664 *SK* 11245 van 1988-04-08 (RegK 4193).
76 A 35(2) gelees met a 11(3)(e).
77 A 35(2) gelees met reg 30(4).
78 A 35(2)(b).
79 A 35(3).
80 A 35(4).
81 A 35(5) gelees met a 11(3)(e).
82 A 35(6) gelees met Aanhangsel 8 32.
83 A 41(1).
84 A 577*bis* §11: "[D]e zaken die tot gemeenschappelijk gebruik van de onderscheidene verdiepingen of gedeelten van verdiepingen bestemd zijn."
85 A 577*bis* §11.

Aeby.[86] Die gemeenskaplike gedeelte word verder verdeel in algemene gemeenskaplike gedeeltes en *particuliere* gemeenskaplike gedeeltes afhangende daarvan of dié gedeeltes vir gebruik van alle of slegs sommige deeleienaars is.[87]

Die Belgiese wet bevat geen beskrywing van die *privatieve* dele nie. Om te bepaal watter gedeeltes van die gebou as *privatief* beskou word, moet die akte van splitsing en die reglement van mede-eiendom deeglik nagegaan word.[88] In hierdie opsig bevat die modelreglement van Aeby 'n uitvoerige omskrywing van wat alles as *privatieve* sake beskou word. Aangesien die Suid-Afrikaanse praktyk dit problematies vind om sommige van hierdie gedeeltes te klassifiseer, volg hier 'n paar voorbeelde van gedeeltes wat ingevolge die modelreglement van Aeby as *privatief* beskou word: vloere, teëls en ander vloerbedekkings; muurbedekkings en plafonne; vensters, insluitende die raam, glas, luike en sonblindings; binnemure, kosyne en deure met uitsluiting van steunmure, betonfondamente en balke; die bedekking van balkonne en terrasse; portaaldeure, binnedeure van die woonstel en van private kelder- en soldervertrekke; solders; skrynwerk en ysterwerk; sanitêre installasies, parlofone en sowel deuroopmaakapparate as geleidinge wat tot uitsluitlike gebruik van die binneste gedeeltes van die woonstel bestem is. Sekere toebehore tot gebruik van die woonstel word ook as *privatief* beskou hoewel hulle buite die woonstel geleë is, byvoorbeeld parlofoon- en deuroopmaakapparate, die klokkies by die ingangsdeure van woonstelle en die briewebusse in die gemeenskaplike portaal, behalwe die gedeeltes van hierdie elemente wat die gemeenskaplike gebruik dien.[89]

Volgens die Pede-Pierson wetsvoorstel word alle gedeeltes wat tot die uitsluitlike gebruik van die deel (*kavel*) bestem is, vermoed privaat te wees. Alle orige gedeeltes word as gemeenskaplik geklassifiseer, met die verdere verfyning dat alle gedeeltes wat onmisbaar is vir die bestaan van die gebou, dwingend as algemene gemeenskaplike gedeeltes beskou word. Die moontlikheid om by wyse van ooreenkoms van bogenoemde kriteria af te wyk, word egter steeds oopgelaat.[90] Die wetsvoorstel van Mundeleer-Gol bestee minder aandag aan die onderwerp maar bevestig die bestaan van algemene en beperkte gemeenskaplike gedeeltes.[91]

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86 A 2.03 – 2.04. Dié reglement beskryf oa die volgende gedeeltes as gemeenskaplik: die buite messelwerk, die kelderverdieping buiten die private kelderkamers; die solder buiten die private lokale; die bedekking en versiering van die gewels; die messelwerk van balkonne en terrasse asook die borswerings, leunings en traliewerk; die skoorsteenpype; die gewelwe; die dak met sy bedekking en afvoerpype; die rioleringspype en die putte; die stoorplek vir kinderwaentjies en die parlofoon, deuroopmaakapparaat en klok by die hoofingangsdeur.

87 Derine *et al Zakenrecht* nr 783; Aeby *et al Propriètè* nr 102 – 103. Die modelreglement van Aeby a 2.05 noem as vbe tuingrond en dakterrasse wat slegs aan sekere *appartementen* grens en vir die uitsluitlike gebruik van daardie *appartementen* gereserveer is. A 2.04 §2 gee die verdere vbe: die verwarmingstoestel met sy olietenk wat bestem is om al die kommersiële *appartementen* in die gebou te bedien; die trappe, hysers, hyserskagte met toebehore wat sommige *appartementen* uitsluitlik dien; en die radio- en televisie-antennas wat slegs aan bepaalde *appartementen* gemeenskaplik is.

88 Derine *et al Zakenrecht* nr 782; Aeby *et al Propriètè* nr 90 – 91.

89 Sien modelreglement van Aeby a 2.02.

90 A 577*ter* §4 – 5. Die reserwefonds van die skema word ook as verplig gemeenskaplik beskou: a 577*ter* §4 2.

91 A 577 – 3 3.

Die Suid-Afrikaanse Wet op Deeltitels omskryf 'n deel as "'n deel wat as sodanig op die deelplan getoon word".[92] Die deelplan onderskei elke deel deur middel van 'n nommer[93] en toon die vloeroppervlakte van elke deel korrek tot die naaste vierkante meter aan.[94] Die grense van elke deel is die skeidingsmuur, -vloer en -plafon tussen 'n deel en 'n ander deel of die gemeenskaplike eiendom.[95] 'n Stoep, plafon, portaal, voorhof of projeksie kan ook as deel van 'n deel op die deelplan aangetoon word.[96] Daarbenewens kan 'n deel ook uit nieaangrensende gedeeltes van die gebou bestaan, soos 'n motorhuis of pakkamer in die kelderverdieping, mits dit dieselfde as die deel op die deelplan genommer is.[97]

Die Wet op Deeltitels omskryf gemeenskaplike eiendom as die grond waarop die gebou geleë is en die gemeenskaplike gedeeltes van die gebou wat nie by 'n deel ingesluit is nie.[98] Dit behels dus beboude en onbeboude gedeeltes van die grond soos binneplase, motorafdakke, 'n gemeenskaplike swembad of tennisbaan en ander ontspanningsgeriewe. Daarbenewens omvat dit die gemeenskaplike gedeeltes van die gebou soos die buitenste huls van die gebou, die voorportaal, gange, hysbakke en ventilasieskagte; gedeeltes van die gebou wat vir gemeenskaplike gebruik afgesonder is soos gesamentlike waskamers en parkeerplekke en aparte gedeeltes van die gebou en selfs aparte geboue wat as winkel of woonstel aan derdes verhuur word of as opsigterswoning gebruik word.[99]

Hoewel die Wet op Deeltitels nie tussen algemene en beperkte gemeenskaplike eiendom onderskei nie maak dit wel voorsiening vir uitsluitlike gebruiksgebiede, naamlik 'n gedeelte of gedeeltes van die gemeenskaplike eiendom soos parkeerareas en stukkies tuingrond vir die uitsluitlike gebruik van een of meer deeleienaars.[100] Uitsluitlike gebruiksgebiede word deur die ontwikkelaar by die opening van die deeltitelregister gereserveer of deur eenparige besluit van die regspersoon geskep en daarna aan individuele eienaars oorgedra.[101] Hierdie gebiede word duidelik op die deelplan aangetoon en op 'n spesiale wyse genommer met aanduiding van die doel waarvoor dit gebruik word.[102] Uitsluitlike gebruiksgebiede kan slegs aan deeleienaars in dieselfde skema oorgedra word.[103]

In die praktyk is dit belangrik om presies te bepaal watter gedeeltes van 'n skema deel van 'n deel dan wel deel van die gemeenskaplike eiendom vorm.[104] Redes hiervoor is onder andere omdat 'n deeleienaar verantwoordelik is vir die

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92 A 1(1) *sv* "deel".
93 A 5(3)(d).
94 A 5(3)(e).
95 A 5(4).
96 A 5(5)(b). Hierdie gedeeltes moet soos by regulasie voorgeskryf op die deelplan aangedui word.
97 A 5(6). Sien verder ivm 'n deel Van der Merwe en Butler 45–49.
98 A 1(1) *sv* "gemeenskaplike eiendom".
99 Sien Van der Merwe en Butler 49–50.
100 A 1(1) *sv* "uitsluitlike gebruiksgebied". Sien in die algemeen Van der Merwe en Butler 177–180; Van der Merwe "Die vestiging van uitsluitlike gebruiksgebiede deur 'n ontwikkelaar in 'n deeltitelskema" 1989 *De Rebus* 829–834.
101 A 27(1) en (2).
102 A 5(3)(f).
103 A 27(4).
104 Sien Van der Merwe en Butler 50–51.

instandhouding van sy deel[105] terwyl die regspersoon (vereniging van medeeienaars) die instandhouding van die gemeenskaplike eiendom behartig;[106] omdat 'n deeleienaar groter genots- en gebruiksbevoegdhede ten opsigte van sy deel[107] as ten opsigte van die gemeenskaplike eiendom kan uitoefen;[108] en omdat 'n deeleienaar gewoonlik self versekering ten opsigte van sy deel moet uitneem aangesien die regspersoon slegs verplig is om die gebou te verseker.[109]

Daarom behoort die deelplan of akte van splitsing en die reglement van *medeëigendom* die onderskeie gedeeltes van die skema presies af te baken. Desnieteenstaande sal dit steeds 'n probleem in die Suid-Afrikaanse reg bly om pilare, vensters, deure en dubbelplafonne, asook gemeenskaplike drade, pype, kabels en installasies wat binne die grense van 'n deel val, korrek te klassifiseer. Hierdie probleem word in die Belgiese praktyk ondervang deurdat die reglement van *medeëigendom* op die lees van die modelreglement van Aeby normaalweg 'n uitvoerige lys van *privatieve* gedeeltes bevat. Die feit dat *partikuliere* gemeenskaplike eiendom en uitsluitlike gebruiksgebiede ingevolge die Belgiese en Suid-Afrikaanse reg erken word, vergemaklik die proporsionele verdeling van instandhoudingskoste van hierdie gedeeltes tussen die betrokke eienaars.

5 5 Deelnemingskwota

Ingevolge die Belgiese wetgewing word die onverdeelde aandele van die onderskeie deeleienaars in die gemeenskaplike eiendom weerlegbaar vermoed gelyk te wees.[110] In die praktyk word onverdeelde aandele normaalweg op die basis van relatiewe waarde aan die onderskeie eienaars in die reglement van medeeiendom toegeken. Faktore soos ligging, vloeroppervlakte en uitleg van die eenheid word dikwels ook in aanmerking geneem.[111] Die praktiese gebruik van die eenheid asook latere verbeterings aan die eenheid word buite rekening gelaat. Die oorspronklike proporsionele waardeskatting is dus onveranderlik.[112]

Hierdie benaderingswyse word in die wetsvoorstel van Pede-Pierson saamgevat. Die onverdeelde aandeel van elke eienaar in die gemeenskaplike eiendom moet op die datum van vestiging van deeleiendom aan die hand van die proporsionele waarde van die eenheid (*kavel*) bepaal word. Die waarde volg uit die omvang, grootte en ligging van die *kavel* ongeag die wyse waarop die *kavel* gebruik word.[113]

Die Wet op Deeltitels bepaal daarenteen uitdruklik dat die deelnemingskwotas van residensiële en nie-residensiële dele op twee verskillende maniere bereken moet word. Die deelnemingskwotas van residensiële dele word bereken deur die vloeroppervlakte van 'n deel korrek tot die naaste vierkante meter deur die

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105 A 44(c).
106 A 37(1)(a).
107 Dit volg uit a 2(b).
108 A 2(c) en 16(1) gelees met a 44(1)(d).
109 A 45(1).
110 A 577*bis* §2.
111 Sien Vileyn "Het appartementsrecht en de medeëigendom" 1983 *Tijdschrift voor Privaatrecht* 42.
112 Derine *et al Zakenrecht* nr 787; Aeby *et al Propriètè* nr 234 – 235.
113 Pede-Pierson a 577*ter* §6.

totale vloeroppervlakte van al die dele in die gebou te deel ten einde 'n desimale breuk afgerond tot vier syfers te verkry.[114] Aangesien relatiewe waarde, ligging en samestelling van 'n deel 'n belangrike rol by nie-residensiële (kommersiële en industriële) dele kan speel, word die ontwikkelaar toegelaat om die deelnemingskwota van elke nie-residensiële deel korrek tot vier desimale syfers te bepaal.[115] In die geval van 'n gemengde skema bestaande uit sowel residensiële as nie-residensiële dele, moet die ontwikkelaar aandui watter persentasie kwotas aan residensiële dele toegeken word en dan hierdie kwotas onder dié dele volgens vloeroppervlakte verdeel.[116] Die deelnemingskwota van elke deel soos op die deelplan aangeteken, word in die afwesigheid van enige teenbewys vermoed korrek te wees.[117]

Ingevolge die Wet op Deeltitels bepaal die deelnemingskwota normaalweg die volgende aangeleenthede:

(a) die waarde van die stem van 'n deeleienaar op 'n algemene vergadering wanneer eenparige of spesiale besluite geneem word of 'n stemming per stembrief aangevra word;

(b) die onverdeelde aandeel van die deeleienaar in die gemeenskaplike eiendom; en

(c) die proporsionele bydraes van deeleienaars tot die koste van die instandhouding en bestuur van die gemeenskaplike eiendom[118] asook die proporsionele aanspreeklikheid vir die vonnisskuld[119] van die regspersoon.[120]

Die Belgiese wetgewing en die modelreglement van Aeby gebruik die kwota op 'n soortgelyke wyse. Wat besluite van algemene belang betref, soos besluite wat oor algemene gemeenskaplike sake handel, bepaal die modelreglement dat die waarde van 'n stem volgens aandeel in die gemeenskaplike eiendom bereken word.[121] In beginsel word die koste verbonde aan die behoud, onderhoud, beheer, belastings en versekeringspremies ten opsigte van algemene gemeenskaplike sake proporsioneel tot die aandeel van elke deeleienaar in die gemeenskaplike eiendom bereken.[122] Die inkomste uit algemene gemeenskaplike gedeeltes, soos waar 'n gemeenskaplike vertrek as winkel verhuur word, word op soortgelyke basis tussen die eienaars verdeel.[123] Die reglement van Aeby bevat spesiale reëls omtrent die verdeling van koste en inkomste wat met *partikuliere* gemeenskaplike eiendom verband hou.[124] Daarbenewens aanvaar die Belgiese praktyk dat *frekwensie van gebruik* eerder as proporsionele verdeling volgens aandeel in die gemeenskaplike eiendom die verdelingsleutel behoort te wees by die koste verbonde aan gemeenskaplike verwarming, beligting, personeel en eetmale en die instandhouding van gemeenskaplike geriewe soos trappe, hysers

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114 A 32(1).
115 A 32(2).
116 A 32(2)(a).
117 A 32(5).
118 Sien a 37(1)(a).
119 Sien a 47(1).
120 A 32(3)(a)–(c).
121 Modelreglement van Aeby a 7.05. Sien ook Mertens *Appartementsrecht* 197.
122 A 588*bis* §7, 9 2.
123 Mertens *Appartementsrecht* 202.
124 A 4.03. Sien verder a 4.01–4.10 wat oor die verdeling van gemeenskaplike laste en inkomste handel.

en swembaddens.[125] Die wetsvoorstel van Pede-Pierson aanvaar as uitgangspunt dat laste eweredig volgens die aandeel van die *kavel* in die gemeenskaplike dele verdeel moet word. Indien bepaalde gedeeltes van die gemeenskaplike eiendom, bepaalde installasies of uitrusting egter van geen nut of slegs van beperkte nut vir 'n *kavel* is, moet daarmee volgens dié wetsvoorstel rekening gehou word by die verdeling van laste.[126]

Die Wet op Deeltitels maak in 'n beperkte mate voorsiening vir spesiale reëlings. Ingevolge die wet kan die ontwikkelaar reeds by sy aansoek om opening van die deeltitelregister spesiale reëls omtrent die waarde van stemme van deeleienaars en hul proporsionele bydrae tot gemeenskaplike koste en die onvoldane skuld van die regspersoon by die akteskantoor indien.[127] Daarbenewens kan die regspersoon, nadat 30% van die eenhede aan buitestanders vervreem is, by spesiale besluit die kwotas ten opsigte van bogenoemde aangeleenthede wysig. Indien 'n deeleienaar deur die besluit benadeel word, word sy skriftelike toestemming tot die wysiging vereis.[128] Hierdie reëling is myns insiens te rigied. Die Suid-Afrikaanse wetgewer behoort te erken dat frekwensie van gebruik as basis vir die verdeling van gemeenskaplike koste in sekere gevalle 'n billiker oplossing in die hand sal werk.[129]

Ingevolge die Wet op Deeltitels is die deelnemingskwota as sodanig onveranderlik en kan dit nie as gevolg van veranderde omstandighede, soos verbeterings, binne die deel aangepas word nie.[130] Die Pede-Pierson wetsvoorstel maak voorsiening vir die wysiging van aandele in die mede-eiendom met die toestemming van alle eienaars wat regstreeks by die wysiging betrokke is. Daarbenewens kan elke deeleienaar by die hof aansoek doen om wysiging van sy aandeel indien dit op 'n onjuiste manier bepaal is of indien dit later onjuis word weens verbeterings aan sy deel en sy aandeel met 25% uit is.[131] Indien 'n kwota ingevolge die Wet op Deeltitels oorspronklik verkeerd bereken is, kan by die akteskantoor om wysiging van die kwota aansoek gedoen word.[132]

(*word vervolg*)

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125 Sien Derine *et al Zakenrecht* nr 796 met vn 256 wat na die Franse wetgewing en regsleer verwys. Gebruik van sentrale verhitting, warm water ens kan maklik gemeet word deur afsonderlike meetapparate vir elke deel te installeer. Dit is moeiliker om die gebruik van trappe en hysers te bepaal. In hierdie verband word faktore soos die ligging van die deel, die aantal persone wat normaalweg daarin gehuisves kan word en die bestemming (woon- of kommersiële doeleindes) van die *appartement* in aanmerking geneem (sien Aeby *et al Propriètè* nr 342).

126 A 577 *quinquies* § 9.

127 A 32(a).

128 *Ibid.*

129 Kragtens r 33(3) van die bestuursreëls in Aanhangsel 8 moet die trustees, indien skriftelik versoek deur 'n meerderheid van eienaars, op onkoste van die regspersoon, afsonderlike meters laat installeer om die verbruik van krag, water en gas tov elke afsonderlike eenheid en die gemeenskaplike eiendom te meet. Tot tyd en wyl afsonderlike meters ingestel is, word die bydraes wat deur elke eienaar betaalbaar is volgens r 33(4) ooreenkomstig die deelnemingskwota bereken. Sien ook r 31; sien verder Van der Merwe "The allocation of quotas in a sectional-title scheme" 1987 *SALJ* 70 – 87.

130 A 32(1) (2) gelees met a 32(4).

131 A 577*ter* §6. Mundeleer-Gol a 577 – 7 §3 vereis eenstemmigheid vir die wysiging van die onverdeelde aandele van *appartementseigenaars* in die gemeenskaplike dele.

132 A 14(1).

Whither *Khanyile*? The remnants of the right to legal representation in criminal cases

Mike Cowling
BA LLM MPhil
Senior Lecturer in Law, University of Natal (Pietermaritzburg)

OPSOMMING

Reste van die reg op regsverteenwoordiging in strafsake

Artikel 73(2) van die Strafproseswet 51 van 1977 maak voorsiening vir regsverteenwoordiging by strafverrigtinge. Op die oog af lyk dit of hierdie artikel niks anders beteken nie as die maak van 'n blote aanspraak op regsverteenwoordiging. Met ander woorde, 'n beskuldigde is wel op 'n regsadviseur geregtig indien hy dit kan bekostig. Vanuit die oogpunt van 'n strafhof skep hierdie bepaling 'n plig om te sorg dat daar geen struikelblokke geplaas word in die weg van die verskyning van 'n regsadviseur namens 'n beskuldigde in 'n strafsaak nie. In die gewone loop van sake beteken dit dat 'n voorsittende beampte die beskuldigde moet inlig dat hy op regsverteenwoordiging geregtig is en, indien nodig, moet die saak uitgestel word om die beskuldigde 'n redelike kans te gee om 'n regsadviseur te bekom (*S v Mthethwa; S v Khanyile* 1978 2 SA 773 (N)). In *S v Radebe; S v Mbonani* 1988 1 SA 191 (T) bepaal die hof dat in geskikte sake waar beskuldigdes klaarblyklik nie in staat is om regsadviseurs te bekostig nie, hulle na die Regshulpraad verwys moet word.

Aan die ander kant *bestaan* die probleem dat 'n groot getal beskuldigdes wat daagliks voor die strafhowe verskyn nie in staat is om regsadviseurs te bekostig nie. Hulle kwalifiseer egter ook nie vir regshulp ingevolge die Regshulp Wet 22 van 1969 nie omdat hulle om welke rede ook al nie aan die voorvereistes voldoen nie. Regter Didcott het in *S v Khanyile* 1988 3 SA 795 (N) voor hierdie probleem te staan gekom; daar word beslis dat in sekere sake die afwesigheid van 'n regsverteenwoordiger tot 'n verydeling van die reg sal lei. Die toets wat die hof in die verband formuleer, is gerig op ernstige en komplekse sake waar die beskuldigde, weens ongeletterdheid of 'n gebrek aan kennis, nie in staat is om homself behoorlik te verdedig nie.

Hierdie beslissing, wat 'n breë benadering ten opsigte van regsverteenwoordiging aandui, skep heelwat probleme in die praktyk. Hierdie probleme word ondersoek en ontleed binne die konteks van die beslissing van die appèlafdeling in *S v Rudman; S v Mthwana* 1992 1 SA 343 (A) waar die hof die *Khanyile*-uitspraak uitdruklik verwerp. Die appèlhof volg dus die eg tradisionele benadering waarvolgens die reg op 'n regsverteenwoordiger as 'n blote aanspraak beskou word, en nie as 'n *reg in juridiese sin* nie. Dit beteken dat die probleem ten opsigte van die onverdedigde beskuldigde op 'n ander manier opgelos moet word.

INTRODUCTION

Almost a decade ago the Hoexter Commission warned that any

> "state that prides itself on a democratic way of life should not regard legal representation of parties before its courts as a pure luxury or a fortuitous benefaction of the Government, but as an essential service".[1]

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1 Final Report (Hoexter) *Commission of enquiry into the structure and functioning of the courts* (RP 78/1983) Vol 1 Part II par 6 4 1.

Few participants in any legal process would deny the correctness of this assertion, since legal representation is the only means of ensuring effective access to the courts. However, the exact nature and extent of the right to legal representation in criminal cases in South Africa has become the subject of considerable controversy in recent times.

This revolved around the question of who should ensure that all accused persons in criminal trials – even those unable to afford it – are legally represented, and how this is to be achieved. The recent decision of the Appellate Division in *S v Rudman; S v Mthwana*[2] has seemingly resolved a dispute concerning the right to legal representation that has raged in the provincial divisions over the past few years. Now that the dust is beginning to settle, it seems apposite to subject this issue to detailed analysis in order to ascertain the exact nature of the right to legal representation in criminal cases in South Africa.

Right at the outset it must be borne in mind that the right to legal representation in criminal cases operates on two distinct levels. In its narrow sense it amounts to nothing more than an entitlement.[3] This means in practical terms that accused persons may be legally represented *if they can afford it*. This is like saying that one is free to own a luxury motor car *if one can afford it*. However, just as certain individuals can be assisted to acquire luxury cars (through loan schemes or employment conditions), so can accused persons in criminal trials be assisted to secure a legal representative. The most common means of achieving this in South Africa is through the Legal Aid Act.[4] However, it is important to note that the granting of legal aid is at the discretion of legal aid officers and the scheme does not purport to supply all accused persons in criminal cases with a legal representative if they are unable to afford it themselves.[5]

Initially South African courts accepted that, as a result of the fact that the right to legal representation in terms of section 73 of the Criminal Procedure Act[6] did not impose a direct and positive duty on the state (or any other body or institution for that matter), it amounted to a negative entitlement only.[7] Over the years the courts have gone to great lengths to give effect to this right. Thus in *S v Mthethwa; S v Khanyile*[8] it was held that it is desirable for presiding judicial officers to ask an accused prior to commencement of the trial whether he wishes to engage the services of a legal adviser. This was taken a good deal further in *S v Radebe; S v Mbonani*[9] where Goldstone J (as he then was) held that in certain circumstances (that is, complexity of the charge; seriousness of the case etcetera) a failure to inform an accused of his right to legal representation may be construed as a failure of justice. This could also apply, in appropriate circumstances, to advising the accused that he is entitled to apply to the Legal Aid Board for assistance.[10]

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2 1992 1 SA 343 (A).
3 S 73(1) and (2) of the Criminal Procedure Act 51 of 1977 refer respectively to an accused being "entitled to the assistance of" and "entitled to be represented by his legal adviser".
4 22 of 1969.
5 Report of the Legal Aid Board for the period 1989-04-01 – 1990-03-31 4.
6 51 of 1977.
7 *S v Chaane* 1978 2 SA 891 (A).
8 1978 2 SA 773 (N).
9 1988 1 SA 191 (T).
10 196F – I.

Nienaber J (as he then was) consolidated this approach in *S v Davids; S v Dladla*[11] where he held as follows:

> "Save where there are indications that the accused, in all probability, did know better, it is in my view not only salutary but essential that the Court should canvass the question at the outset of the trial.[12] Thereafter the accused must be afforded every reasonable opportunity to arrange for his representation."[13]

The effect of this, according to Shearer J in *S v Mkhize*,[14] is to "elevate what was thought to be desirable (that is *Mthethwa*'s case) into practice . . ."[15] Thus it is possible to trace an evolutionary process whereby the courts have made it incumbent upon presiding judicial officers to ensure that accused are made aware of the possibility of engaging a legal representative and further that no obstacles are placed in the way of this endeavour.

THE *KHANYILE* RULE

But the essence of the problem of legal representation in its broader sense concerns the indigent accused for whom a legal representative is a luxury beyond his means. One way of addressing this problem is to inform the accused that he is entitled to apply for legal aid in terms of the Legal Aid Act.[16] It would appear that this, too, has become obligatory. This seems to be evident from the pronouncement of Shearer J in *S v Mkhize*[17] where it was held that the obligation to inform an accused of his right to legal representation should include, in appropriate cases, information about the possibility of legal aid.[18] However, the granting of legal aid remains at best a possibility and therefore criminal courts in South Africa are confronted on a daily basis with the nightmare problem of having to try an indigent and illiterate accused, charged with a serious or complex offence and who would dearly like to be legally represented but is unable to afford it.

It was into this dark void that the brief and flickering flame of *S v Khanyile*[19] attempted to bring light. The allusion to the flame of *Khanyile* being brief and flickering arises from the fact that that decision has generally been rejected by the courts. However, it remains a landmark decision and it is therefore intended to analyse it at length in order to determine the precise reason for its rejection as well as the impact that it has had on South African criminal procedural jurisprudence.

What Didcott J did in *Khanyile*'s case was to broaden the whole debate concerning legal representation by examining it not as a mere entitlement[20] but rather as a positive right. Thus although the judge held that this case could be

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11 1989 4 SA 172 (N).
12 194G.
13 194I.
14 1990 1 SACR 620 (N).
15 621.
16 22 of 1969.
17 *Supra*.
18 622C.
19 1988 3 SA 795 (N).
20 As described in s 73(1) and (2) of Act 51 of 1977.

decided on the basis of *S v Radebe; S v Mbonani*[21] (where the trial magistrate neither informed the accused that they were entitled to legal representation nor offered them an opportunity to obtain it), Didcott J inquired into the problem of how criminal courts should approach a situation where an accused has been advised of his right to a legal representative but is unable to afford it.[22] This, of course, is the crux of the problem concerning the right to legal representation in the broad sense in the absence of a truly comprehensive legal aid scheme. In this respect Didcott J was actually building upon the foundation laid by Goldstone J in *S v Radebe; S v Mbonani*[23] where the latter found that the "evolutionary process of broadening and extending the right to legal representation has continued and is still operating".[24]

In so doing Didcott J fashioned a right to legal representation in the broad positive sense that incorporated a right to be represented notwithstanding inability to pay. After an exhaustive analysis of foreign authorities (particularly American) and quoting at length from the seminal case of *Gideon v Wainwright*[25] the judge concluded that, as a matter of judicial policy, criminal courts could not justify distinguishing between a person who cannot afford to hire a legal representative and one who can but is not allowed the chance.[26]

EVALUATION

This judgment was at one and the same time both a small step and a giant leap. It was a small step in the sense that it constituted the next logical stage in the evolutionary process described by Goldstone J in *Radebe*'s case.[27] However, it was also a giant leap because by converting the entitlement in terms of section 73 into a positive right, it shifted the whole question of legal representation beyond the parameters of section 73 of the Criminal Procedure Act. It was in this latter sense that the decision in *Khanyile*'s case raised a fair amount of dust in legal circles. In general terms this decision has received a fairly hostile reception from both provincial divisions and the Appellate Division.[28] In fact, it may be argued that *S v Rudman; S v Mthwana*[29] has finally, in practical terms, laid the spirit of *Khanyile* to rest.

However, it is submitted that at this stage it would be apposite to analyse the whole debate concerning the right to legal representation – including the controversy surrounding the *Khanyile* case. This is because, whether it was intended or not, the *Khanyile* principle has raised important questions concerning the relationship between courts and the government – especially as far as judicial decisions having budgetary implications are concerned. It has also raised the

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21 *Supra*.
22 800.
23 *Supra*.
24 192H – I.
25 372 US 335 (1963).
26 811D.
27 *Supra*. In fact Didcott J perceived it as such where he held that the *Khanyile* rule was "not so much a fresh journey as the due completion of one commenced already" (810B).
28 See eg *S v Rudman* 1989 3 SA 368 (E); *S v Mthwana* 1989 4 SA 361 (N); *Nakani v Attorney-General, Ciskei* 1989 3 SA 655 (Ck).
29 1992 1 SA 343 (A).

very important procedural issue of what constitutes a fair criminal trial and how far courts can go to ensure that every accused is afforded such a fair trial. Finally, there are important questions surrounding the right to legal representation itself. Is it desirable or (more importantly) practically possible to extend the right of legal representation in the manner prescribed by *Khanyile*?[30] All of these questions were canvassed by the Appellate Division in *Rudman*'s case. It is also necessary to ascertain precisely what remains of the right to legal representation as a result of the Appellate Division overruling *Khanyile*'s case.

DEMISE OF THE *KHANYILE* RULE

The first shot fired at *Khanyile* occurred in the judgment of Cooper J in *S v Rudman; S v Johnson; S v Xaso; Xaso v Van Wyk*[31] where a Full Bench of the Eastern Cape Division criticised the decision on the grounds that it was based on an American doctrine that had been transplanted without any foundation into the South African legal system. Didcott J was able to counter this attack in *S v Davids; S v Dladla*[32] which, it is submitted, he did most effectively.[33] The judge specifically used the opportunity provided by *Davids*'s case to take a fresh look at the *Khanyile* judgment, since the latter had been written without the benefit of argument.

It is clear from Didcott J's arguments in *Davids*'s case that the *Khanyile* rule is fairly narrowly prescribed. It does not appear to impose a direct duty or obligation on the state to provide accused persons at criminal trials with legal representation.[34] Rather it postulates that in certain circumstances a criminal trial will miscarry in the absence of a legal representative.[35] Such circumstances themselves are strictly confined to serious cases of a complex nature in which it appears likely that the accused, taking account of his intellectual capacity and level of education, would not be able to defend himself properly. The underlying principle appears to be based on the fact that the conducting of a trial in such circumstances would be "intolerably unfair".[36] This would constitute an irregularity that would result in a failure of justice. This *dictum* was supported by Bristowe J[37] who held that

> "there are some cases – not necessarily capital cases – where an unrepresented accused is at such a disadvantage that the trial becomes intolerably unfair, even though in practice no legal representative would be likely to secure a different outcome".[38]

In a dissenting judgment in *Davids*'s case Nienaber J (as he then was) adopted the narrow approach to the right to legal representation. Thus an accused must be afforded every opportunity to obtain a legal representative but does not enjoy

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30 And even if the courts consider it desirable to have the capacity to introduce such a rule?
31 1989 3 SA 368 (E).
32 1989 4 SA 172 (N).
33 181 – 185.
34 In fact, Didcott J was at pains to move away from the Hohfeldian framework of reciprocal rights and duties. Thus he held that the issue was not one of fashioning rights but rather of laying down standards. See *Davids*'s case 175 – 176.
35 176F.
36 Didcott J adopted this test in favour of that of "palpably and grossly unfair" which he had used in *Khanyile*'s case. See *Davids*'s case 185B – C.
37 Who concurred with Didcott J in *Davids*'s case.
38 205D.

a right to be provided with one.[39] Within this context the judge concluded that the fact that an accused was required to defend himself (as he was unable to afford a legal representative) would not be "regarded as an irregularity at all, let alone an irregularity hatching a mistrial".[40] This latter view was accepted and adopted by the unanimous decision of a Full Bench of the Natal Provincial Division in *S v Mthwana*.[41] Howard JP (who delivered the judgment) held that no rule of law, practice or procedure would be transgressed if a court proceeded with a trial in a matter both complex and serious after the accused sought and was given the opportunity, but lacked the means to obtain legal representation.[42]

THE APPELLATE DIVISION AND THE *KHANYILE* RULE

The first whiff of grapeshot to emanate from the Appellate Division in this matter occurred in *S v Mabaso*.[43] This case concerned the failure of a magistrate to inform accused persons of their right to legal representation prior to their pleading and making a statement in terms of section 119 of the Criminal Procedure Act. Although this case did not bear directly on the *Khanyile* issue it did concern an aspect of the exercise of the right to legal representation in the negative sense, namely, at what stage should an accused be informed of his right to legal representation?

The majority decision (per Hoexter JA) adopted a narrow approach to the whole question of legal representation by holding that a failure on the part of a presiding judicial officer to inform an accused person of his right to legal representation prior to pleading did not constitute a fatal irregularity. Thus the fact that an accused might find himself in a tactically disadvantageous position at a subsequent trial as a result of his pleading guilty and making certain admissions in terms of section 119 proceedings is irrelevant in legal terms.[44]

This decision revealed that the Appellate Division did not view the right to legal representation in the broad and innovative terms characterised by the *Khanyile* decision. This was, to a certain extent, borne out by the dissenting (minority) opinion of Milne JA who held that the failure to inform the accused of their right to legal representation as well as the failure to inform them of their right to remain silent constituted a fatal irregularity. It is interesting to note that in this respect Milne JA was linking the right to legal representation to the right to remain silent. Thus the right to legal representation is viewed in a much broader context, since account is also taken of its positive consequences; in this case, therefore, the fact that legal representation at the appropriate time would have enabled the accused to preserve their right to silence.

Thus Milne JA held that he could not find any difference in principle between the witness who is not warned of his right not to answer incriminating questions and the accused who is not advised of his right to legal representation.[45] He

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39 197 – 198.
40 198H – I.
41 1989 4 SA 361 (N).
42 366E.
43 1990 3 SA 185 (A).
44 209F – G.
45 211 – 212.

then emphasised that, in the absence of legal representation, a choice between a plea of guilty and one of not guilty in the case of an illiterate and unsophisticated layman is "a totally uninformed one".[46] From this it can be concluded that, according to Milne JA, the guidance of counsel is essential to enable an accused to plead intelligently as well as to ensure the protection of other important rights – such as the right to remain silent.

No-one would deny that the ghost of *Khanyile* pervaded the proceedings in *Mabaso*'s case despite the fact that the Appellate Division declined to offer any opinion on the correctness of the former. However, *Mabaso* none the less gave an important signal concerning the attitude of the Appellate Division towards the principle of a positive right to legal representation as enunciated in *Khanyile*. And in this respect Grant[47] has argued that the majority decision was extremely disappointing because "it did not come out unequivocally in favour of a positive right to be informed in all cases". This did not bode well for the much broader principle developed in *Khanyile*. The minority decision of Milne JA is more encouraging and has been described by Grant[48] as "a very important intermediate step". Thus in very general terms, the majority decision seemed to adopt a narrower and more conservative attitude to the question of legal representation, whereas the minority appeared to take a broader and more progressive approach.

The decision in *S v Rudman; S v Mthwana*[49] therefore did not come as much of a surprise. This case placed the *Khanyile* rule squarely before the Appellate Division. The case for the appellants was compellingly argued by counsel along the lines of the fundamental importance of the right to legal representation in criminal trials. This in turn impacted on the principle of equality since it was argued that justice should not turn on the state of wealth or poverty of a particular individual in the sense of the type of justice depending upon the amount of money available. This was particularly so in the case of uneducated and unsophisticated accused who were confronted by the skills and resources at the disposal of the state as well as a complicated criminal process. It was also argued that the adversarial nature of the South African criminal procedure system rendered it impossible for the presiding judicial officer effectively to assist an unrepresented accused.

However, it is submitted that the underlying principle upon which the argument in favour of the *Khanyile* rule was based, is that of fairness. In more specific terms, it can be described as an attempt to give effect to the right to a fair trial in the sense that, in certain circumstances, the absence of legal representation will result in an accused being regarded as having not been properly tried. In this way, it can be argued that the *Khanyile* rule is an example of the courts merely exercising their inherent power to regulate their own procedure in such a way as to insist upon procedural safeguards essential to a fair trial.

However, right at the outset the court in *Rudman*'s case (per Nicholas AJA) refused to recognise any inherent powers guaranteeing procedural fairness in the South African criminal procedure system. In fact, the test for setting aside

46 212A.
47 1990 *SACJ* 359–360.
48 *Idem* 360.
49 1992 1 SA 343 (A).

criminal convictions is dependent upon the existence of a failure of justice.[50] This in turn depends upon whether there are any irregularities or illegalities of procedure – something that is much narrower than the general test of notions of basic fairness and justice as enunciated by Didcott J in *Khanyile*'s case. Although the procedural rules, formalities and principles have been designed to ensure a fair trial, the court held that Didcott J was in error when he said that an irregularity encompassed every flaw in the way a criminal trial is run which renders it truly unfair.[51] Thus the crux of the matter was not whether the absence of legal representation could, in the circumstances, be termed unfair, but whether any rule or principle exists in South African criminal procedure which entitles an accused to be afforded legal representation in cases where he would desire it but is himself unable to obtain it by reason of his indigence.

In this respect Nicholas AJA concluded in *Rudman*'s case that no such right to legal representation – in the positive sense – existed in South African criminal procedure. This meant that the absence of representation could not, under normal circumstances, be construed as a failure of justice in the technical sense. The effect of this is that the Appellate Division has adopted the narrow approach to the question of a right to legal aid,[52] and has hence overruled *Khanyile*. However, in his judgment Nicholas AJA did not confine himself to the technical question of whether or not there had been a failure of justice but also looked at the broader issues concerning the recognition by the courts of a positive right to legal representation. It is submitted that an analysis of these issues would provide a valuable insight into the attitude of the Appellate Division – not only in respect of the right to legal representation but in other related matters as well. This is because the question of a judicially created positive right to legal representation brings into focus such issues as the law-making powers of the judiciary, the ability of the courts to make decisions having fiscal implications and the relationship between the judiciary and other branches of government.

PROBLEMS WITH THE *KHANYILE* RULE

As far as the law-making powers of the judiciary are concerned, counsel for the state relied on the maxim *judicis est jus dicere*. Nicholas AJA concluded that this did not pose any obstacle to the adoption of the *Khanyile* rule.[53] This reaffirms the role of the courts in ensuring that, by way of progressive development, the law will keep pace with modern requirements – especially in the field of procedure.[54] Thus the court recognised that the question of a right to legal aid had developed as a result of an evolutionary process,[55] but there were compelling reasons why the courts should stop short of upholding the *Khanyile* rule.

What were these reasons? As far as the fiscal or financial aspect is concerned, the court canvassed the question how the *Khanyile* rule would work in practice. Even if the fairly narrowly prescribed parameters in *Khanyile*'s case (that

50 In terms of s 309(3) of the Criminal Procedure Act 51 of 1977.
51 377A – D.
52 This accords with the line of thinking in *Mabaso*'s case.
53 382H.
54 See *Henderson v Hanekom* 1903 20 SC 513.
55 383 – 384.

is that the case must be complex and serious and the accused lacking in "personal equipment" to defend himself properly in the circumstances – thereby rendering the trial palpably and grossly unfair[56]) were to be strictly applied, the number of cases requiring legal representation throughout the length and breadth of this country would be overwhelming. It can therefore be argued that there are neither the financial means nor enough lawyers to take on this load. The result would be that administrative problems arising from overburdening and delays together with the fact that convictions could be overturned on appeal or review purely by reason of the absence of legal representation, would drastically undermine the entire criminal process.

At present, virtually the only way in which an indigent accused can secure a legal representative is through the assistance of the Legal Aid Board in terms of the Legal Aid Act.[57] But the Legal Aid Board itself acknowledges that its funds are totally inadequate to provide a comprehensive legal aid system for indigent accused.[58] It has been estimated that a mere 20% of the more than two million accused tried each year by South African criminal courts are legally represented and that more than 100 000 unrepresented accused are sent to prison annually.[59] These figures should obviously induce a sense of shock in any South African – especially those dealing in any way with the criminal process – but they also give an indication of the vast sums of money and manpower required to implement a system of comprehensive legal aid. This point was raised by Nicholas AJA in *Rudman*'s case.[60]

This leads to the question of the effect and implications of the recognition by the courts of a positive right to legal representation. In the absence of any statutory authority, such a step would undoubtedly require a considerable measure of judicial activism. Didcott J answered this by holding that the *Khanyile* principle was not concerned with fashioning a specific right to legal representation but was rather concerned with laying down standards for a fair trial in the circumstances of each case.[61] However, be this as it may, the Appellate Division none the less regarded itself bound to give consideration to the implications that would arise from a decision of this nature.

In the first place Nicholas AJA held that the effect of the *Khanyile* rule would be coercive in the sense that it would

> "constitute notice to the Government that if legal aid on the required scale is not provided, the prospect will have to be faced of numerous criminal trials being delayed and many convictions being upset on appeal because of the failure to provide the accused person with legal representation".[62]

The judge concluded that this was tantamount to the court issuing a *mandamus* on the government to provide legal aid – something which the court does not have the power to do.[63] In this sense it would appear that the Appellate

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56 *Khanyile*'s case *supra* 815.
57 22 of 1969.
58 See the Report of the Legal Aid Board for the period 1989-04-01 – 1990-03-31 4.
59 *Ibid.*
60 386–387.
61 *Davids*'s case *supra* 176F.
62 386G.
63 *Ibid.*

Division is classifying the right to legal aid as a so-called "second generation" right (that is socio-economic rights such as rights to housing and education etcetera) which is not justiciable by courts of law.[64]

This leads to the next obstacle raised by the court, namely the feasibility of the implementation of the *Khanyile* rule by the courts. In other words, how can the courts ensure that indigent persons are guaranteed legal representation in deserving cases without financial support from the government? The Appellate Division ruled that in the short term, the inevitable delays and uncertainties arising from an attempt at immediate implementation would lead to administrative chaos resulting in the undermining of the entire judicial process. From a long-term point of view the *Khanyile* rule would require the court to make a budgetary decision without any expert evidence about the availability of funds; the extent to which the provision of legal aid could be considered a priority (in relation to other demands for public expenditure such as housing, education, welfare etcetera); or any means of determining the most efficient and appropriate method of employing legal aid (that is by extending the services of the present Legal Aid Board or creating a system of public defenders etcetera).[65] It was on this basis that the Appellate Division felt compelled to overrule the *Khanyile* decision.

SUMMARY

The dispute surrounding the *Khanyile* rule resembles a tussle between an elephant and a whale. Each side sticks to its own territory and steadfastly refuses to engage in the opponent's arena. Thus supporters of *Khanyile* emphasise the notion of a right to a fair trial which entails that courts should refuse to recognise or have any dealings with proceedings that are inherently unfair. And in this respect the absence of legal representation on grounds of indigency will result in intolerable unfairness in certain cases. In fact, so the argument goes, there is no difference between a situation where an accused who, desiring a lawyer and being able to afford it, is not given the opportunity to engage such lawyer, and an accused who is denied a legal representative because he is unable to afford it.

On the other hand, opponents of the *Khanyile* rule, while supporting the ideal for which it stands in principle, point to the fact that a positive right to legal representation is not recognised by South African law. In addition, the concept of fairness is viewed in narrow terms in the sense that unfairness in itself is not sufficient to vitiate criminal proceedings. Instead, what must be established is

> "whether there has been an irregularity or illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted".[66]

This should result in a failure of justice before the courts will take remedial steps. This group also emphasises the broader implications and effects of the *Khanyile* rule. Thus the issue of how the rule is to be implemented and financed

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64 For a description of the concept of first and second generation rights see Sachs *Protecting human rights in a new South Africa* (1990).

65 387 – 389.

66 *S v Rudman; S v Mthwana supra* 377B – C.

(something that is downplayed by the supporters) is considered a serious obstacle. In similar vein, opponents maintain that, within the present constitutional structure, the courts do not have the capacity to invoke the *Khanyile* rule. This is something that must be settled by the legislature.

Both arguments have their strengths and weaknesses. The main point in favour of the *Khanyile* rule is the idea that it represents. It cannot be denied that legal representation is a fundamental requirement for a just and fair legal system – particularly in the criminal sphere. In fact, even *Khanyile*'s opponents expressed support for the ideals and principles behind the rule.[67] After all, few would argue that the extent of justice available to an accused should depend upon the measures of his wealth. And yet, in the absence of a right to legal representation, this is what the effect will be. This is especially exacerbated in South Africa where a large proportion of the population not only lacks the financial means to secure legal representation, but also lacks sufficient education and sophistication to provide themselves with even the most rudimentary of defences. The *Khanyile* rule, on the other hand, goes a long way towards overcoming this problem and hence will bring the criminal process in line with basic notions of equality.

In the light of this, it could be argued that opponents of *Khanyile* were too cautious in their approach and that their emphasis on the unworkability of the rule amounts to mere speculation. Didcott J in *David*'s case[68] pointed out that certain American judges had similar misgivings when the rule in *Gideon v Wainwright*[69] (that is to the effect that the courts required state-funded legal representation in the case of all indigent accused facing prison or death sentences) was first laid down by the courts. These were subsequently found to be misplaced and the rule has made a very positive impact on the functioning of the American criminal procedural system in accordance with the fundamental tenets of due process. It can also be argued that the *Khanyile* approach is keeping pace with changing standards in that it represents the direction in which our criminal process is going to have to move.

However, the above can be countered by assertions that the courts lack the authority and are simply not equipped to deal with matters of this nature. A major problem in this respect is funding. This was something that did not seem to concern the American courts, since the question of funding the endeavour of the courts to secure legal representation for indigent accused appears never to have been raised in any of the cases. Instead there seemed to be an assumption that the federal government would foot the bill. No doubt the existence of the American bill of rights – especially the due process (Sixth Amendment) and equality (Fourteenth Amendment) clauses – strengthened the courts' hand. Although Didcott J conceded that the resources in the United States are "immeasurably greater"[70] than in this country, he went on to hold that the same applied to the volume of cases for which the American rule was designed

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67 See eg the remarks of Nienaber J in *Davids*'s case *supra* 200E – F. See also the comments of Corbett CJ in *S v Rudman; S v Mthwana supra* 392F – H and Cooper J in *S v Rudman supra*.

68 *Supra* 185 – 186.

69 372 US 335 (1963).

70 *Davids*'s case *supra* 186A.

to cater. However, it is submitted that this does not alter the fact that the lack of resources is a very real and serious problem – more especially if no money has been voted to this end by the legislature. This could well result in what Nienaber J referred to as a "judicial impasse" where the courts will be enjoined not to proceed with the trial without legal representation and no machinery exists for procuring or compelling such representation.[71]

Another practical problem is that the *Khanyile* rule is not capable of easy implementation. During its limited lifetime its mere application managed to stir up some controversy. Didcott J, in determining whether a case was sufficiently serious and complicated to qualify for legal representation, emphasised the existence of expert witnesses. Thus in both *Khanyile* and *Davids* the judge found a legal representative to be necessary in order to challenge a fingerprint expert. However, one of the cases on review in *Davids*'s case concerned a charge of rape with the defence being consent. Didcott J concluded that in this latter case legal representation was not vital to the fairness of the trial on the basis that the case was simple and straightforward.[72]

This can be contrasted with the view of Nienaber J, who stated in *Davids*'s case that, in his opinion, fingerprint cases are not especially complex since it was up to the court to scrutinise evidence of this nature and to eliminate error as far as possible.[73] On the other hand, it could be argued that a rape case is not only serious (a point readily conceded by Didcott J) but also complex. This is because it could require a considerable amount of skill to cross-examine a complainant falsely implicating the accused and a presiding judicial officer is in a less favourable position than in the case of a fingerprint expert to render assistance because he is likely to be unaware of certain relevant facts – such as motive.

This also raises the question of how far the rule should extend in practical terms. If it is to operate on the basis of equality it could be argued that the type of legal representative to be provided by the state becomes an issue. Thus: Would it be considered fair to provide an accused with an inexperienced junior counsel in a very serious and complex case with a very experienced and senior state advocate conducting the prosecution? Or would justice require some measure of comparability between the quality of legal representation and that of the other side?

CONCLUSION

For those favouring the *Khanyile* approach the *Rudman* decision must obviously come as something of a disappointment. Even though *Khanyile* has been overruled, however, it is submitted that the spirit of *Khanyile* has none the less had a positive and permanent influence on the whole question of legal representation. In *Rudman*'s case the Appellate Division confirmed that the right to legal representation in this country at present stretches no further than the provisions of section 73 of the Criminal Procedure Act,[74] which provides for a

71 *Idem* 198C.
72 192G.
73 200F. See also the remarks of Howard JP in *S v Mthwana supra* 369–370.
74 51 of 1977.

right to "arrange" legal representation as opposed to a positive right to legal representation. Thus, according to Nienaber J in *Davids*'s case[75] the obverse of this right is the negative duty to respect the right, and not the positive duty to provide the representation.[76]

But it cannot be denied that the *Khanyile* case has pushed back the frontiers of the legal representation question to the extent that it will be impossible ever to roll them back to the situation prior to the judgment. As a result, the debate about legal representation has acquired a new dimension. For the first time in South African legal history, the legal system has had to grapple with the idea of compulsory state-funded legal representation on a vast scale. This will obviously result in altered perceptions. In fact, in response to the *Khanyile* decision, the Legal Aid Board has commented that the ideal that the "right to legal representation" is not merely a formal right but one which actually affords the indigent individual a claim to state-provided legal assistance in certain circumstances, is fast gaining support.[77] Further, the Legal Aid Board has taken cognisance of these trends and has undertaken to "act proactively" to provide for the increased demand for its services.[78]

On the other hand, the response of even those courts refusing to adopt the *Khanyile* rule has none the less been to ensure that maximum effect is given to section 73 by determining that every opportunity should be given to accused persons to arrange for legal representation. The important breakthrough in *S v Radebe; S v Mbonani*[79] (to the effect that an accused should be informed of his right to legal representation) has been considerably strengthened by subsequent decisions that did not follow *Khanyile*. Thus, for example, Nienaber J in *Davids*'s case[80] held that presiding judicial officers must not simply assume that accused persons are aware of this right to arrange legal representation.[81] He went on to hold that unless there are

> "indications that the accused, in all probability, did know better, it is in my view not only salutary but essential that the court should canvass the question at the outset of the trial".[82]

It was further held that it is also part of the court's duty after informing him of his right to arrange legal representation, to enquire from an accused whether he wants to utilise it.[83]

Thus there is no question that a duty exists on the part of the presiding judicial officers to inform accused persons of the right to arrange legal representation as well as to take all reasonable steps to facilitate that right. This includes advising an indigent accused to apply for legal aid through the legal aid office.[84] A final

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75 *Supra.*
76 198B.
77 Report of the Legal Aid Board for the period 1989-04-01 – 1990-03-31 2.
78 *Ibid.*
79 *Supra.*
80 *Supra.*
81 194F – G.
82 *Ibid.*
83 195C.
84 *S v Mkhize supra* 622C.

and, it is submitted, important example of this tendency towards bolstering section 73 arises from the Appellate Division in the *Rudman* case[85] where Nicholas AJA departed from the pronouncement of Hoexter JA in *Mabaso*'s case[86] (with which he had initially concurred) to the effect that a failure to inform an accused of his right to representation before pleading would amount to an irregularity only if the accused were shown to be ignorant of that right. In *Rudman*'s case Nicholas AJA went further and postulated that failure to inform an accused of his right to representation is an irregularity unless it is apparent to the presiding judicial officer, for good reason, that the accused is aware of his rights.[87]

Although the judge goes on to say that the difference between the two views does not appear to be one of substance and the result would be the same in either case,[88] it is submitted that this is not entirely accurate since the latter view is far stricter and sounds a warning to presiding judicial officers that they should generally, as a matter of course, inform accused of the right to legal representation.

Another important practical spin-off from *Khanyile* has been the raising of consciousness of key participants in the criminal process – such as presiding judicial officers and prosecutors. Legal aid officers report that they are not receiving an increasing number of applicants who have been directly referred to them by the courts. This was fairly rare prior to *Khanyile*, probably because these officials believed that the question of legal representation was not their concern. These developments have also had an impact on lawyer's organisations (such as Lawyers for Human Rights, NADEL and the Black Lawyers Association) who have had to consider setting up *pro-bono* schemes in response to the challenge laid down by *Khanyile*.

In similar vein, the courts have been forced to concede that the unrepresented accused is at a disadvantage and that something needs to be done to remedy the situation. Thus Cooper J in *S v Rudman*[89] referred to the "State's regrettable failure to remedy the serious shortage of funds for legal aid" and expressed the hope that the provision of adequate funds for legal aid would be given a "high priority".[90] Likewise, Nienaber J in *Davids*'s case mentioned the "sad commentary on our inability to provide adequate and comprehensive legal aid to all in need of it" and that this afforded "proof of yet another of the iniquities of poverty".[91] These sentiments were echoed in *Rudman*'s case by Corbett CJ who held that the "provision of free legal representation to all indigent persons accused of serious crimes" is a "*sine qua non* of a complete system of criminal justice".[92] Two points of interest arise from this: first, none of the judges expressing their sentiments supported the *Khanyile* rule; secondly, none of these pronouncements was forthcoming prior to *Khanyile*.

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85 *Supra*.
86 *Supra* 204G.
87 391G.
88 391H.
89 *Supra*.
90 385B – C.
91 200E.
92 392F – G.

Therefore, as a result of the *Khanyile* decision, it has become necessary for the courts to lend support to the principle of state-provided legal representation in deserving cases. The point of divergence between supporters and opponents of *Khanyile* is that the latter believe that the implementation of such a rule is a function of the state and not the courts. This serves to place tremendous pressure on the state to provide legal representation. The options are either to increase the budget of the Legal Aid Board (and thereby extend the present system)[93] or to set up a public defender system. To determine which is the most effective and appropriate of these options, falls outside the scope of this article. However, it would not require too much by way of speculation to deduce that the *Khanyile* decision must have played a considerable role in the recent setting up of a public defender pilot project in Johannesburg.[94]

In conclusion, it is clear that despite its early demise, *Khanyile* has had a significant and enduring impact on the issue of legal representation. Its chief legacy is a raising of debate and consciousness to the extent that the idea that illiterate accused should be left to fend for themselves in complicated and serious cases (thereby risking imprisonment) is becoming increasingly unacceptable. This is not as revolutionary as it may seem, since state-funded legal aid is already available in all cases where an accused risks the death penalty. Despite the *dictum* in *S v Chaane*[95] (where it was held that no rule of law existed to the effect that accused facing the death penalty should be legally represented) it is submitted that the possibility of an accused in such circumstances appearing unrepresented is virtually unthinkable nowadays.

This was confirmed by Nienaber J in *Davids*'s case,[96] where he described the possibility of an unrepresented accused receiving the death penalty as a "fanciful example" since both the Bar and the state had assumed the burden of providing legal representation in such cases.[97] However, the Deputy Attorney-General (who appeared for the state in *Davids*'s case) conceded that, whereas in the past an unrepresented accused sentenced to death would probably not have succeeded on appeal purely on grounds of lack of representation, the situation had subsequently changed and he would be "hard put nowadays to offer much resistance" to such an appeal.[98] So what once started out as a commendable practice has evolved into some form of principle, since it is difficult to envisage any court proceeding without legal representation in such circumstances; and if it did, it is submitted that, in accordance with the concession made by the Deputy Attorney-General,[99] an appeal court would probably upset any conviction.

This would operate very much like the *Khanyile* rule as outlined by Didcott J. In fact, it could be argued that the latter would be the next logical step in this

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93 In terms of the Legal Aid Act 22 of 1969.
94 This project was instituted under the auspices of the Legal Aid Board with the active support and assistance of the Association of Law Societies, the General Council of the Bar, NADEL, BLA, LHR and LRC. Thus the entire spectrum of the legal profession is behind this development.
95 1978 2 SA 891 (A) 897A – D.
96 *Supra.*
97 198I.
98 178H.
99 Referred to above.

evolutionary process. But the fact that the courts have generally felt that the implementation of the *Khanyile* rule is premature at this stage does not mean that that is the end of the matter. The enactment of a bill of rights in the near future will in all probability make provision for some form of legal representation. The South African Law Commission's draft bill of rights refers to indigent accused being "defended by legal representatives remunerated by the State"[100] while the ANC draft stipulates that the state shall provide or pay for a competent defence "if the interests of justice so require".[101]

But even in the absence of a bill of rights and notwithstanding the Appellate Division decision in *Rudman*, the door still remains open for a measure of judicial activism in the future. The Appellate Division never doubted that it enjoyed powers to formulate rules to assist the undefended accused and thus to reduce the risk of an unfair trial.[102] This forms part of the evolutionary process which in turn is an integral aspect of the progressive development of the law enabling it to keep pace with the changing requirements of modern society.[103] South African society and its legal system has embarked on a course of fundamental change. At the moment the legal system is confronted with a crisis of confidence and it is submitted that a proper functioning comprehensive legal aid system would go a long way towards addressing this problem.[104] It is therefore conceivable that some time in the near future the courts will have to re-evaluate the whole question of legal representation. Nienaber J in *Davids*'s case specifically left the door open when, in commenting on the *Khanyile* rule, he stated that "our law had not yet scaled that evolutionary peak". This does not shut the door on changes taking place at the initiative of the courts at some later stage.

While it is generally recognised that leaving unskilled and incompetent persons to defend themselves in criminal trials is manifestly unfair, the courts are not prepared at this stage to hold that such unfairness is so fundamental as to result in a failure of justice. This is likely to change in the future and, unless the legislature sets up a workable scheme, the courts might have to respond in activist fashion – moving beyond the parameters of section 73 of the Criminal Procedure Act.[105] It has been pointed out that South Africa's expenditure on legal aid is approximately 35c per citizen per annum.[106] This is extremely low and the state must be pressurised into increasing this amount considerably, otherwise the courts may well feel compelled to act. After all, it is only when the accused is properly represented that reference can be made to equality, and without equality there cannot be justice. It is for this reason that the present Chief Justice has stated that any legal system lacking the provision of free legal representation to all indigent persons accused of serious crimes "is flawed".[107]

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100 S 25(d).
101 Art 2(20).
102 381D.
103 *Henderson v Hanekom supra* 519.
104 Steytler *The undefended accused* (1988) 11. The author suggests that the reason for this perception among the majority of black South Africans is that the absence of legal representation has rendered the legal system inaccessible to them.
105 51 of 1977.
106 McQuoid-Mason 1991 *SACJ* 271.
107 *S v Rudman; S v Nthwana supra* 392G.

Klassifikasie en kenmerke van mineraalregte*

PJ Badenhorst
BLC LLM LLM LLD
Professor in die Privaatreg, Universiteit van die Noorde

SUMMARY

Classification and characteristics of mineral rights

In terms of the theory of mineral rights complete ownership of land has as its content the entitlement to exploit minerals. This entitlement may be separated from the ownership of land in various ways. Upon separation a new private-law right, namely a mineral right, is created. This article focuses on the nature, classification and characteristics of a mineral right. A mineral right is recognised as a real right. The four different approaches to the classification problem are examined and an attempt is made to reconcile the different approaches. The characteristics of a mineral right are also described.

1 INLEIDING

Ingevolge die teorie van mineraalregte[1] omvat eiendomsreg, waarna vervolgens as volledige eiendomsreg verwys sal word, onder andere die bevoegdheid om minerale te ontgin.[2] In die Suid-Afrikaanse reg kan die ontginningsbevoegdheid egter op verskillende wyses van die eiendomsreg van die grond afgeskei word.[3] Die volgende wyses van afskeiding word aangetref, naamlik indien: (a) die houer van volledige eiendomsreg van grond of die staat as houer van volledige eiendomsreg van staatsgrond 'n sertifikaat van regte op minerale bekom ten aansien van onderskeidelik private grond of staatsgrond;[4] (b) die (voormalige) houer van volledige eiendomsreg van private grond of die staat as (voormalige) houer van volledige eiendomsreg van staatsgrond die grond oordra onderworpe

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* 'n Verwerkte en verkorte weergawe van hoofstuk 8 van die outeur se doktorale proefskrif *Die juridiese bevoegdheid om minerale te ontgin in die Suid-Afrikaanse reg* (UP 1992). Erkenning word verleen aan die finansiële bystand verleen deur die Universiteit van die Noorde.

1 Sien in die algemeen Badenhorst "Towards a theory on mineral rights" 1990 *TSAR* 239 465; Badenhorst *Bevoegdheid om minerale te ontgin.*

2 Vir 'n nadere identifisering van die onderskeie subontginningsbevoegdhede deur die howe en die wetgewer, sien *Lazarus and Jackson v Wessels, Olivier and the Coronation Freehold Estates, Town and Mines Ltd* 1903 TS 499 509; *Le Roux v Loewenthal* 1905 TS 742 745; *Van Vuren v Registrar of Deeds* 1907 TS 289 294; a 5(1) van die Mineraalwet 50 van 1991. Sien voorts Badenhorst *Bevoegdheid om minerale te ontgin* 118 – 119 vir 'n skema van ontginningsbevoegdhede ingevolge die leerstuk van subjektiewe regte.

3 Sien in die algemeen Badenhorst *idem* 16 – 75.

4 A 70(5) en 72(2) onderskeidelik van die Registrasie van Aktes Wet 47 van 1937 (hierna aangehaal as die Akteswet).

aan die voorbehoud van die ontginningsbevoegdheid in die guns van die oordraggewer en/of 'n sertifikaat van mineraalregte uitgeneem het;[5] (c) die (voormalige) houer van volledige eiendomsreg 'n dorp stig onderworpe aan 'n voorbehoud van die ontginningsbevoegdheid tydens die opening van die register van die dorp en/of 'n sertifikaat van regte op minerale gelyktydig daarmee uitneem;[6] (d) die staat die blote eiendomsreg van grond (met uitsluiting van die mineraalregte) onteien;[7] (e) die (voormalige) medehouers van volledige eiendomsreg van grond sodanige grond verdeel en die ontginningsbevoegdheid uitsluit van die verdeling van die mede-eiendomsreg van grond en 'n sertifikaat van regte op minerale uitneem;[8] (f) die (voormalige) houer van volledige eiendomsreg 'n sessie van die ontginningsbevoegdheid aan 'n ander persoon registreer;[9] (g) die staat 'n mineraalreg (met uitsluiting van die blote eiendomsreg) onteien;[10] (h) die ontginningsbevoegdheid kragtens wetgewing oorgedra word;[11] en (i) 'n akte van transport geregistreer word waarin 'n testamentêre bepaling dat die blote eiendomsreg van die grond en die "mineraalreg" aan verskillende persone bemaak word, vervat is.[12]

Tydens sodanige afskeiding word die ontginningsbevoegdheid omvat deur 'n nuwe subjektiewe reg.[13] Vir doeleindes van hierdie artikel slaan die begrip "mineraalreg" dus slegs op die reg wat tot stand kom by die afskeiding van die ontginningsbevoegdheid, op welke wyse ook al, van die blote eiendomsreg van die grond; daar word gepoog om die aard, kategorie en kenmerke van sodanige reg te identifiseer. Ten einde die aard van die omvattende subjektiewe reg te bepaal, moet die volgende regsvrae uitgemaak word: (a) Watter soort subjektiewe reg is voorhande? (b) Indien dit 'n saaklike reg is, watter kategorie saaklike regte is aanwesig? (c) Wat is die kenmerke van die betrokke reg? Die vrae word afsonderlik beantwoord.

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5 A 71(1) 71(2) en 72(2) onderskeidelik. Terwyl die verkryging van 'n sertifikaat van regte op minerale na inwerkingtreding van die Akteswet verpligtend is vir private houers van volledige eiendomsreg, het dit nie gegeld vir sodanige voorbehoud voor inwerkingtreding van die Akteswet nie en geld dit steeds nie vir 'n voorbehoud deur die Minister van Landbou namens die staat nie. Die ontstaan van die ontginningsbevoegdheid is in eg geval afhanklik van registrasie van die sertifikaat van regte op minerale. Lg persone kan egter daarvoor aansoek doen.

6 A 71(1) en 71(2)(*bis*)(a). Terwyl die verkryging van 'n sertifikaat van regte op minerale na inwerkingtreding van die Akteswet verpligtend is, het die voorskrif nie gegeld by dorpstigting onderworpe aan sodanige voorbehoud voor inwerkingtreding van die Akteswet nie. Die ontstaan van die ontginningbevoegdheid is in eg geval afhanklik van registrasie van die sertifikaat van regte op minerale. In lg geval kan egter daarvoor aansoek gedoen word.

7 A 8(1) van die Onteieningswet 63 van 1975; sien ook a 24 van die Mineraalwet 50 van 1991.

8 A 73(1) (2) en 70(1) van die Akteswet; sien verder a 26(1)(*bis*).

9 A 16 en 70(1).

10 A 8(1) van die Onteieningswet; sien ook a 24 van die Mineraalwet.

11 Sien bv a 12(1) van die Lebowa-wet op die Minerale Trust 9 van 1987.

12 *Schultz v Schuurman* 1915 TPD 345; *Ex parte Geldenhuys* 1921 TPD 72; *Du Preez v Beyers* 1989 1 SA 320 (T); *Beyers v Du Preez* 1989 1 SA 328 (T); sien egter Badenhorst *Bevoegdheid om minerale te ontgin* 74 – 75.

13 Sien Badenhorst *idem* 75 – 80.

2 SOORT SUBJEKTIEWE REG

Van die vroegste tye af het die howe,[14] die wetgewer[15] en akademici[16] 'n mineraalreg as 'n saaklike reg beskou.[17] Hierdie beskouing word deur die howe[18] en die wetgewer[19] gehandhaaf.

'n Saaklike reg kan kortliks omskryf word as

> "'n subjektiewe reg wat tot inhoud het dat die reghebbende een of ander regsbeskermde aanspraak op, of beheer oor, 'n bepaalde saak geniet".[20]

Oor die presiese eienskappe van 'n saaklike reg en 'n persoonlike reg word uitsluitsel in standaardwerke oor die sakereg gegee.[21] Daar word volstaan deur te verwys na van die kenmerkende eienskappe van saaklike regte wat bewustelik en selfs onbewustelik 'n rol gespeel het by die identifisering van 'n mineraalreg as 'n saaklike reg:[22] (a) Die voorwerp van 'n saaklike reg is 'n saak;[23] (b) 'n saaklike reg verskaf 'n direkte gebruiks- en beskikkingsbevoegdheid ten opsigte van 'n saak;[24] (c) 'n mineraalreg behels die uitoefening van bevoegdhede wat

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14 Vgl in die algemeen *Taylor and Claridge v Van Jaarsveld and Nelmapius* (1886) 2 SAR 137; *McDonald v Versefeld* (1888) 2 SAR 234; *Pearce v Olivier and Noyce* (1889) 3 SAR 79; *Van Vuren v Registrar of Deeds supra* 289. In *Lazarus and Jackson v Wessels, Olivier and the Coronation Freehold Estates, Town and Mines Ltd supra* 510, *Cullinan v Registrar of Deeds* 1903 ORC 63 64 en *Rocher v Registrar of Deeds* 1911 TPD 311 315 word mineraalregte uitdruklik as saaklike regte (serwitute) erken.

15 A 363 van die Volksraadsbesluit van die ZAR gedateer 1881-11-08; a 14 van Wet 7 van 1883; a 30 – 32 van die Registration of Deeds and Titles Act 25 van 1909 (T); a 41 van De Wet op Registrasiekantoren van Aktenwet 13 van 1918.

16 Sien die bespreking in par 3 1 en 3 2 hieronder.

17 Wilmans *Minerale, mineraleregte en verbandhoudende kontrakte* (LLD-proefskrif Unisa 1977) 99; Van der Merwe *Sakereg* (1989) 553.

18 Sien bv *Ex parte Pierce* 1950 3 SA 628 (O) 634C; *Manganese Corporation Ltd v South African Manganese Ltd* 1964 2 SA 185 (W) 189A; *Erasmus v Afrikander Proprietary Mines Ltd* 1976 1 SA 950 (W) 956D – E; *Apex Mines Ltd v Administrator, Transvaal* 1986 4 SA 581 (T) 591C – D; *Government of the Republic of South Africa v Oceana Development Investment Trust plc* 1989 1 SA 35 (T) 36H.

19 A 3(1)(m) en 70(1) van die Akteswet.

20 Delport en Olivier *Sakereg vonnisbundel* (1985) 1; sien voorts Van der Vyver en Joubert *Persone- en familiereg* (1991) 13; Van Zyl en Van der Vyver *Inleiding tot die regswetenskap* (1982) 421.

21 Sien Van der Merwe *Sakereg* 58 – 88; Silberberg en Schoeman *The law of property* (1983) 38 – 58; Olivier, Pienaar en Van der Walt *Sakereg studentehandboek* (1993) 28 – 33; Delport en Olivier *Sakereg vonnisbundel* 1 – 14; Sonnekus *Sakereg vonnisbundel* (1980) 3 – 12.

22 Vgl in die algemeen Van der Merwe *Die beskerming van vorderingsregte uit kontrak teen aantasting deur derdes* (1959) 147 – 155; Van der Merwe *Sakereg* 63 – 64.

23 Sien gesag in die volgende vn aangehaal.

24 In *Lazarus and Jackson v Wessels, Olivier and the Coronation Freehold Estates, Town and Mines Ltd supra* 510 wys Innes HR soos volg daarop: "After all, the right in question involves the taking away and appropriation of portions of realty . . ." In *Van Vuren v Registrar of Deeds supra* 294 laat Innes HR hom soos volg uit: "The person in the enjoyment of them [the mineral rights] is entitled to go upon the property to which they relate to search for minerals, and, if he finds any, to sever them and carry them away." Lg *dictum* is insgelyks ter motivering in *Rocher v Registrar of Deeds supra* 316, *Ex parte Pierce supra* 634C en *Erasmus v Afrikander Proprietary Mines Ltd supra* 956D – E aanvaar.

eie is aan eiendomsreg;[25] (d) 'n saaklike reg is in beginsel absoluut[26] en gee aanleiding tot 'n absolute opvorderingsreg; (e) 'n saaklike reg ontstaan uit 'n regsfeit soos oordrag en gaan gepaard met publikasie;[27] en (f) die wetgewer beskou sodanige reg as 'n saaklike reg.[28]

Ook die "subtraction from the dominium"-toets[29] wat in die presedentereg ontwikkel en aangewend is ten einde te bepaal of 'n reg vir doeleindes van die Registrasie van Aktes Wet 47 van 1937 saaklik en derhalwe registreerbaar is al dan nie,[30] is gebruik om die standpunt te regverdig dat 'n mineraalreg 'n saaklike reg is.[31]

Ondanks die feit dat regter Goldstone in *Government of the Republic of South Africa v Oceana Development Investment Trust plc*[32] 'n mineraalreg ook as 'n saaklike reg beskou, beslis hy voorts dat mineraalregte onroerende onliggaamlike sake is.[33] By 'n strenge toepassing van die leerstuk van subjektiewe regte sou hierdie stelling neerkom op die gelykstelling van 'n mineraalreg met 'n regsobjek (en daarmee gepaardgaande 'n negering van die saaklike reg-begrip). Daar word aan die hand gedoen dat hierdie stelling eerder as 'n alternatiewe benadering tot die begrip mineraalreg en nie as 'n negering van die bestaan van 'n subjektiewe reg beskou moet word nie, welke benadering geriefshalwe hieronder behandel sal word.

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25 *Lazarus en Jackson v Wessels, Olivier and the Coronation Freehold Estates, Town and Mines Ltd supra* 510.

26 Vgl *Government of the Republic of South Africa v Oceana Development Investment Trust plc supra* 36H.

27 *Van Vuren v Registrar of Deeds supra* 295; vgl *Government of the Republic of South Africa v Oceana Development Investment Trust plc supra* 36H.

28 In *Lazarus and Jackson v Wessels, Olivier and the Coronation Freehold Estates, Town and Mines Ltd supra* 510 word die volgende motivering deur Innes HR verskaf: "[I]t is treated by the Proclamation as a real right and is ordered to be registered against the title."

29 Sien Silberberg en Schoeman *Property* 47; Van der Merwe *Sakereg* 74; Van der Vyver "The doctrine of private-law rights" in Strauss (red) *Huldigingsbundel vir WA Joubert* (1988) 243–244; Badenhorst en Coetser "The subtraction from the *dominium* test revisited" 1991 *De Jure* 380–382 388–389.

30 *Consistory of Steytlerville v Bosman* (1893) 10 SC 67 69; *Hollins v Registrar of Deeds* 1904 TS 603 607; *Ex parte Geldenhuys* 1926 OPD 155 162 164; *Executors, Estate Napier v Trustee, Estate Weir* 1927 SR 33 44; *Commissioner for Inland Revenue v Estate Hobson* 1933 CPD 386 394; *Schwedhelm v Hauman* 1947 1 SA 127 (OK) 135; *Fine Wool Products of South Africa Ltd v Director of Valuations* 1950 4 SA 490 (OK) 499B 509E; *Odendaalsrust Gold, General Investments and Extentions Ltd v Registrar of Deeds* 1953 1 SA 600 (O) 606A–E 610F–G; *Hotel De Aar v Jonordon Investment (Edms) Bpk* 1972 2 SA 400 (A) 405D; *Lorentz v Melle* 1978 3 SA 1044 (T) 1050D–F; *Kain v Kahn* 1986 4 SA 251 (K) 256B–C 257B–E; *Pearly Beach Trust v Registrar of Deeds* 1990 4 SA 614 (K) 617I.

31 In *Ex parte Pierce supra* 634C laat Brink R hom soos volg uit: "There can be no doubt, however, that a grant of mineral rights confers real rights, because it entitles the holder to go on to the property to search for minerals and to remove them: there is clearly a subtraction from the full *dominium* of the owner of the land concerned."

32 *Supra* 36H.

33 36I; sien verder die bespreking van Goldstone R se *dictum* in dié verband in par 3 3 hieronder.

3 KATEGORIE SAAKLIKE REG

Alhoewel daar in 'n groot mate eensgesindheid bestaan dat mineraalregte saaklike regte is, is daar 'n onderlinge verskil van mening tussen regters en akademici oor die juridiese klassifikasie daarvan. Hierdie probleem kan veral daaraan toegeskryf word dat nóg die Romeinse nóg die Romeins-Hollandse reg die ontwikkelingstadium bereik het om mineraalregte van die blote eiendomsreg van die grond te skei.[34] In die afwesigheid van so 'n onafhanklike saaklike reg het die identifikasie- en klassifikasieprobleem derhalwe nooit kop uitgesteek nie. Suid-Afrikaanse regters is egter vroeg reeds daarmee gekonfronteer.

In dié verband kan verskillende benaderings tot die probleem van klassifikasie uitgelig word:

3 1 Saaklike reg analoog aan serwituut

In die soeke na 'n geskikte nis vir mineraalregte het regters vroeg reeds gaan kers opsteek by die serwituut as begrip. Gedurende 1903 het hoofregter Innes in *Lazarus and Jackson v Wessels, Olivier and the Coronation Freehold Estates, Town and Mines Ltd*[35] in die afwesigheid van gemeenregtelike aanknopingspunte[36] daartoe verplig gevoel om 'n mening uit te spreek oor die kategorieë waarin die uitsluitlike reg om te prospekteer, die reg om minerale te verwyder, asook die opsie om mineraalregte te koop, tuishoort.[37] Oor die kategorie waarin die reg om vir 'n tydperk van vyf jaar te soek en te myn na minerale tuishoort, laat hy hom soos volg uit:[38]

> "I must confess to having at first experienced considerable difficulty – a difficulty which pressed me during the argument – in finding an appropriate juristic niche in which to place this right. Rights of that nature are peculiar to the circumstances of the country, and do not readily fall under any of the classes of real rights discussed by the commentators. They seem at first sight to be very much of the nature of personal servitudes; but then they are freely assignable."

Hierdie rigtinggewende, dog versigtige tree deur hoofregter Innes het nie alleen die *locus classicus* oor die kategorie van 'n mineraalreg geword nie, maar 'n uiters belangrike rol gespeel in die ontwikkeling van mineraalregte na analogie van serwitute. Hoofregter Innes beslis voorts dat die opsie om mineraalregte te koop bloot 'n persoonlike reg uitmaak.[39] Alhoewel voorgaande *dictum* nie uitdruklik op mineraalregte as sodanig van toepassing was nie, kan dit by wyse van analogie daarop toegepas word omdat die bevoegdheid om te prospekteer en die bevoegdheid om te myn van die belangrikste bevoegdhede uitmaak wat 'n mineraalreg omvat. Dit word in *Van Vuren v Registrar of Deeds*[40] ook by implikasie deur hoofregter Innes self gedoen waar hy ter inleiding oor die aard en omvang van 'n mineraalreg wat tydens die uitsluiting van 'n mineraalreg by die verdeling van mede-eiendomsreg ontstaan het, daarop wys dat hy niks te

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34 Joubert "Die regte op minerale" 1959 *THRHR* 29; Viljoen *The rights and duties of the holder of mineral rights* (LLD-proefskrif Leiden 1975) 1 – 12; Van der Merwe *Sakereg* 552.
35 *Supra*.
36 Ook die standaardwerk van daardie tyd, Maasdorp *The institutes of Cape law: the law of property* vol II (1903), het nie hierdie probleem aangespreek nie.
37 509.
38 510.
39 510.
40 *Supra*.

voeg het tot sy standpunt uitgespreek in die *Lazarus*-saak nie.[41] Hoofregter Innes kategoriseer 'n mineraalreg soos volg:[42]

> "Such a right, if constituted in favour of the beneficiary personally, and not in his capacity as owner of another property, would be of the nature of a personal servitude, but freely assignable and passing to his heirs."[43]

Deur sy standpunt te kwalifiseer, naamlik dat indien die saaklike reg soos 'n persoonlike serwituut (ten gunste van die houer in sy persoonlike hoedanigheid) geskep word, sodanige reg gelykstaande aan 'n persoonlike serwituut is, laat hoofregter Innes (dalk onbewustelik) die agterdeur oop vir die beskouing dat 'n mineraalreg moontlik 'n ander tipe saaklike reg kan wees. Hoofregter Innes se waarneming aangaande die oorerflikheid van mineraalregte is egter wel 'n uitbreiding op sy standpunt in *Lazarus and Jackson v Wessels, Olivier and the Coronation Freehold Estates, Town and Mines Ltd.*[44]

Die baanbrekerswerk van hoofregter Innes is daarna deur ander regters gebruik vir hulle standpunt dat 'n mineraalreg as 'n *quasi*-serwituut,[45] 'n saaklike reg analoog aan 'n serwituut[46] of, meer in besonder, 'n persoonlike *quasi*-serwituut[47] gekategoriseer behoort te word. Hierdie siening word dan ook die sogenaamde konvensionele benadering oor die kategorie waartoe 'n mineraalreg behoort. Die feit dat 'n mineraalreg oordraagbaar en oorerflik is, het as motivering gedien vir die konvensionele benadering dat 'n mineraalreg analoog aan veral 'n persoonlike serwituut is, dog daarvan verskil.[48] Die analogie met 'n serwituut het egter nie beteken dat 'n mineraalreg deur die howe as 'n erfdiensbaarheid beskou is nie aangesien 'n mineraalreg nie ten gunste van 'n eienaar van 'n *praedium* geskep word nie.[49] Franklin en Kaplan[50] wys daarop dat vanweë die algehele afsonderlike en permanente titel waaronder 'n mineraalreg gehou word, dit onwaarskynlik is dat 'n mineraalreg die vorm van 'n *quasi*-erfdiensbaarheid sal aanneem. Akademici[51] het aanvanklik ook die

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41 294.

42 294.

43 Op 295 verwys Innes HR ook na 'n mineraalreg as 'n "personal servitutal right" en 'n "personal *quasi*-servitude".

44 *Supra*.

45 *Rocher v Registrar of Deeds supra* 316; *Webb v Beaver Investments (Pty) Ltd* 1954 1 SA 13 (T) 25A; *Ex parte Marchini* 1964 1 SA 147 (T) 149G 151B – C; *Nolte v Johannesburg Consolidated Investment Co Ltd* 1943 AD 295 307; *South African Railways and Harbours v Transvaal Consolidated Land and Exploration Co Ltd* 1961 2 SA 467 (A) 481G – H; *Du Preez v Beyers* 1989 1 SA 320 (T) 324G; vgl ook *Coronation Collieries v Malan* 1911 TPD 577 591.

46 Vgl *Witbank Colliery Ltd v Malan and Coronation Colliery Co Ltd* 1910 TPD 667 676.

47 *Webb v Beaver Investments (Pty) Ltd supra* 25A – B 33 – 36; *Ex parte Marchini supra* 150G; *Manganese Corporation Ltd v South African Manganese Ltd* 1964 2 SA 185 (W) 189A; *Jonordon Investment (Pty) Ltd v De Aar Drankwinkel (Edms) Bpk* 1969 2 SA 117 (K) 126D; sien ook *Aussenkjer Diamante (Pty) Ltd v Namex (Pty) Ltd* 1980 3 SA 896 (SWA) 902C – 903B.

48 *Webb v Beaver Investments (Pty) Ltd supra* 25A – B; vgl *Ex parte Marchini supra* 151C; *Ex parte Pierce supra* 634C; *Du Preez v Beyers supra* 324H – I.

49 *Van Vuren v Registrar of Deeds supra* 295; *Shandoss v Registrar of Deeds* 1912 TPD 407 415; *Rocher v Registrar of Deeds supra* 315; *Webb v Beaver Investments (Pty) Ltd supra* 25A – B;

50 *The mining and mineral laws of South Africa* (1982) 600.

51 Hall en Kellaway *Servitudes* (1942) 148 163; Maasdorp-Hall *The institutes of South African law: the law of property* vol II (1971) 162; Lee *An introduction to Roman-Dutch law* (1953) 182; Wille-Gibson *Principles of South African law* (1970) 219; Hahlo en Kahn *Union of South Africa: The development of its laws and constitution* (1960) 763 – 764.

standpunt dat 'n mineraalreg 'n *quasi*-serwituut of *quasi*-persoonlike serwituut is, gesteun. Die tradisionele standpunt word vandag ook nog steeds deur akademici[52] nagevolg met die voorbehoud dat die verskille tussen mineraalregte en persoonlike serwitute en erfdiensbaarhede voor oë gehou moet word.

'n Mineraalreg kan in der waarheid nie as 'n persoonlike serwituut in die ware sin van die woord beskou word nie, en wel om die volgende redes: (a) anders as 'n persoonlike serwituut, is 'n mineraalreg vryelik oordraagbaar en oorerflik;[53] (b) anders as 'n persoonlike serwituut, word 'n mineraalreg nie beëindig hetsy by die afsterwe van die reghebbende as natuurlike persoon, hetsy by ontbinding van die reghebbende regspersoon of na 'n verloop van een honderd jaar, welke termyn die kortste is nie;[54] (c) anders as 'n persoonlike serwituut, word 'n mineraalreg nie met behoud van die wese van die saak uitgeoefen nie.[55]

'n Mineraalreg kan insgelyks nie as 'n erfdiensbaarheid in die ware sin van die woord beskou word nie, en wel om die volgende redes: (a) anders as 'n erfdiensbaarheid, word 'n mineraalreg ten gunste van 'n persoon of 'n regspersoon gevestig en nie tot voordeel van 'n persoon in sy hoedanigheid van eienaar van 'n heersende erf nie;[56] (b) anders as 'n erfdiensbaarheid, word 'n mineraalreg afsonderlik van die grond waarop dit rus, vervreem;[57] (c) anders as 'n erfdiensbaarheid, is 'n mineraalreg, onderworpe aan die voorskrifte van wetgewing wat die vermeerdering van houers van mineraalregte verbied,[58] deelbaar deurdat die houer 'n onverdeelde aandeel in 'n mineraalreg kan verkry of vervreem;[59] (d) anders as 'n erfdiensbaarheid, kan 'n mineraalreg, indien eenmaal van die volledige eiendomsreg van die grond geskei, nie met die blote eiendomsreg van die grond saamsmelt indien beide regte in die hande van een houer sou vestig nie;[60] (e) anders as 'n erfdiensbaarheid, hoef 'n mineraalreg nie ingevolge die *utilitas*-beginsel slegs tot voordeel van 'n persoon in sy hoedanigheid van eienaar van 'n heersende erf uitgeoefen te word nie.[61]

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52 Joubert 1959 *THRHR* 31; Dale *An historical and comparative study of the concept and acquisition of mineral rights* (LLD-proefskrif Unisa 1979) 104 – 105; Franklin en Kaplan *Mineral laws* 14.

53 *Lazarus and Jackson v Wessels, Olivier and the Coronation Freehold Estates, Town and Mines Ltd supra* 510; *Van Vuren v Registrar of Deeds supra* 294; *Ex parte Pierce supra* 634C; *Du Preez v Beyers supra* 324H – I; Van der Merwe *Sakereg* 560; Silberberg en Schoeman *Property* 424; Franklin en Kaplan *Mineral laws* 15; Viljoen *Mineral rights* 33; Viljoen en Bosman *A guide to mining rights in South Africa* (1979) 20.

54 *Ex parte Marchini supra* 150G 151B – C; Viljoen *Mineral rights* 33; Viljoen en Bosman *Mining rights* 20; sien Van der Merwe *Sakereg* 540.

55 Franklin en Kaplan *Mineral laws* 15; Van der Merwe *Sakereg* 560; Viljoen *Mineral rights* 33; Viljoen en Bosman *Mining rights* 20; Silberberg en Schoeman *Property* 425.

56 Franklin en Kaplan *Mineral laws* 14; Van der Merwe *Sakereg* 560; Viljoen *Mineral rights* 33; Viljoen en Bosman *Mining rights* 20.

57 *Ibid.*

58 Sien a 20 en 21 van die Mineraalwet.

59 Franklin en Kaplan *Mineral laws* 15; Van der Merwe *Sakereg* 560; Viljoen *Mineral rights* 33; Viljoen en Bosman *Mining rights* 20.

60 A 70(4) van die Akteswet; *Beyers v Du Preez* 1989 1 SA 328 (T) 336D; Franklin en Kaplan *Mineral laws* 15; Van der Merwe *Sakereg* 560; Viljoen *Mineral rights* 33; Viljoen en Bosman *Mining rights* 20; Badenhorst "Minerale regte en eiendomsreg – skeiding en samesmelting" 1989 *De Jure* 383 – 385 391.

61 Van der Merwe *Sakereg* 560.

3 2 Eiesoortige saaklike reg

Die tweede fase in die kategorisering van 'n mineraalreg het in 1943 aangebreek toe De Wet[62] hom soos volg uitgelaat het oor die problematiek rondom die korrekte kategorisering:

> "Die redelike houding om in te neem skyn te wees dat regte op minerale beperkte saaklike regte *sui generis* is. 'n Nuwe *species* van saaklike reg word geskep, maar 'n saaklike reg met omskrewe inhoud. Die servituut (*sic*) as regsinstelling word dan nie verkrag nie . . ."

Alhoewel daar nie direk verwys is na De Wet se standpunt in *Ex parte Pierce*[63] nie,[64] het die Oranje-Vrystaatse Provinsiale Afdeling, by monde van regter Brink, ook die mening uitgespreek dat dit waarskynlik meer korrek is om te beweer dat 'n mineraalreg tot 'n klas saaklike regte *sui generis* tuishoort.[65] Ondanks die navolging van die konvensionele benadering deur die Transvaalse howe, verwys regter Trengove van die Witwatersrandse Plaaslike Afdeling in *Erasmus v Afrikander Proprietary Mines Ltd*[66] ook na die standpunt dat 'n mineraalreg *sui generis* is.[67]

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62 1943 *THRHR* 191 – 192.

63 *Supra*.

64 Viljoen *Mineral rights* 31 is van mening dat Hall en Kellaway *Servitudes* waarskynlik die hof beïnvloed het omrede daar in die hoofde van betoog na die 1ste uitgawe van hulle werk (148) verwys is. Volgens Viljoen sou gemelde outeurs die enigste wees wat op daardie tydstip die *sui generis*-benadering nagevolg het. Die eienaardige is dat Viljoen as gesag vir lg stelling na die 3de uitgawe van hulle werk verwys. Die enigste par op 148 wat tersaaklik kan wees, lui soos volg: "It might fairly be argued that these contractual rights are not really servitudes at all in that the attributes of a servitude do not apply to them, but whether they are designated *quasi*-servitudes, as in *Van Vuren v Registrar of Deeds* . . . they are so closely allied to servitudes that they fall to be considered amongst them." Dat mineraalregte deur Hall en Kellaway óf as erfdiensbaarhede, óf analoog aan persoonlike serwitute beskou is, blyk ook uit hulle werk (163). Dit wil dus lyk of die *sui generis*-benadering nie aanvanklik aan Hall en Kellaway toegedig kan word nie. Of Brink R eerder deur De Wet se standpunt beïnvloed was, is natuurlik hoogs debatteerbaar. Die belangrike is eerder dat 'n hof hierdie standpunt uitgespreek het.

65 634D. Franklin en Kaplan *Mineral laws* 10 wys daarop dat hierdie stelling bloot *obiter* is aangesien die *ratio decidendi*, nl dat 'n mineraalreg 'n saaklike reg is, reeds in die voorafgaande sinne uitgedruk is (sien vn 31 *supra*). Vgl ook Silberberg en Schoeman *Property* 424.

66 1976 1 SA 950 (W) 956E.

67 Williams *Mineraleregte* 112 wys daarop dat Trengove R se verwysing binne die konteks van *Ex parte Pierce supra*, na *sui juris* in plaas van *sui generis*, welke begrippe verskillende betekenisse het, waarskynlik as 'n tikfout afgemaak kan word. In *Apex Mines Ltd v Administrator, Transvaal* 1986 4 SA 581 (T) 590H – I is Van Zyl R ook van mening dat die verwysing na "real rights *sui juris*" in plaas van "real rights *sui generis*" duidelik foutief is. Die kategorisering in *Ex parte Pierce supra* word maw nagevolg. Daar word aan die hand gedoen dat Trengove R se verwysing (956E – F) na *Van Vuren v Registrar of Deeds supra, Lazarus and Jackson v Wessels, Olivier and the Coronation Freehold Estates, Town and Mines Ltd supra, Gluckman v Solomon* 1921 TPD 335 asook *Ex parte Pierce supra* bloot gesien moet word as gesag vir sy standpunt dat 'n mineraalreg 'n saaklike reg is. Met uitsondering van *Ex parte Pierce* is genoemde beslissings juis nie gesag vir die standpunt van eiesoortige saaklike regte nie (sien voorts *Apex Mines Ltd v Administrator, Transvaal supra* 590I). Aangesien dit net nodig was om uit te maak of 'n duidelike reg vir doeleindes van die verlening van 'n interdik voorhande was (956C – D), is die hof se bevinding dat 'n mineraalreg 'n saaklike reg is, alreeds genoegsaam. Die daaropvolgende kategorisering sou dus ook bloot *obiter* wees.

Gedurende 1982 word die volgende samevatting van die positiefregtelike kategorisering van 'n mineraalreg deur regter Van der Walt in die uitspraak van die Transvaalse Provinsiale Afdeling in *Du Preez v Beyers*[68] verskaf:

> "In die Transvaal word minerale regte as persoonlike *quasi*-serwitute beskou (*Van Vuren and Others v Registrar of Deeds* . . .), en in die Vrystaat as eiesoortige saaklike regte (*Ex parte Pierce and Others* . . .). Dit wil egter voorkom of die Appèlhof in *Nolte v Johannesburg Consolidated Investment Co Ltd* . . . die omskrywing van minerale regte as *quasi*-serwitute aanvaar het."

Regter Van der Walt wys egter daarop dat dit nie vir doeleindes van sy uitspraak nodig is om in besonderhede met die verskil in kategorisering te handel nie.[69] Die kategoriseringsprobleem kom dan ook glad nie ter sprake in die daaropvolgende volbankbeslissing in *Beyers v Du Preez*[70] nie.

In *Apex Mines Ltd v Administrator, Transvaal*[71] gooi regter Van Zyl ook sy gewig agter die benadering van 'n eiesoortige kategorie saaklike regte in:

> "Hence it would appear more correct to regard mineral rights as real rights of a particular kind – *iura in re aliena sui generis*, as was suggested in *Ex parte Pierce* . . ."

Die korrektheid al dan nie van regter Van Zyl se voorkeur was nie ter sake vir doeleindes van die appèlhof se uitspraak in *Apex Mines Ltd v Administrator, Transvaal*[72] nie. Welke kategorisering uiteindelik deur die appèlhof aanvaar sal word, bly dus steeds 'n ope vraag.

In *Government of the Republic of South Africa v Oceana Development Investment Trust plc*[73] was dit, ondanks regter Goldstone se bewustheid van die kategoriseringsprobleem, ook nie vir hom nodig om daarop in te gaan nie.

Die nuwe benadering tot die kategorisering van 'n mineraalreg word egter al vir 'n geruime tyd deur huidige akademici onderskryf, hoofsaaklik omdat die konsep *quasi*-serwituut terminologies verwarrend sou wees,[74] of omdat 'n mineraalreg nie in die gietvorm van hetsy 'n persoonlike serwituut hetsy 'n erfdiensbaarheid ingeforseer kan word nie.[75]

Ter voortbouing van die benadering waarin die eiesoortige geaardheid van 'n mineraalreg erken word, is daar begin om eerder op die eiesoortige kenmerke van 'n mineraalreg self te probeer fokus.[76] Dié uitligting geskied egter steeds deur middel van kontrastering met die kenmerke van 'n persoonlike serwituut en 'n erfdiensbaarheid en is derhalwe die teenkant van die konvensionele benadering. Dit is egter belangrik dat meer klem gelê moet word op die eiesoortige kenmerke van 'n mineraalreg eerder as die afwykings daarvan van die

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68 *Supra* 324G – H.

69 324H – I. Van der Walt R se opmerking onmiddellik daarna, nl dat dit wel belangrik is om te let op die oorerflikheid en oordraagbaarheid van 'n mineraalreg (324I), kan gesien word as 'n oorleuning na die konvensionele benadering.

70 *Supra*.

71 *Supra* 590F.

72 1988 3 SA 1 (A).

73 *Supra* 36H – I.

74 Van Warmelo "Real rights" 1959 *Acta Juridica* 91 waarsku in dié verband: "The reference to a quasi-servitude is, with due respect, an unhappy one. For the concept of a quasi-servitude was known in Roman Law already in the case of the so-called quasi-usufruct of consumable things."

75 Hall *Servitudes* 179; Viljoen *Mineral rights* 33 – 34; Viljoen en Bosman *Mining rights* 20 – 21; Silberberg en Schoeman *Property* 424; Van der Merwe *Sakereg* 560 – 561; Delport en Olivier *Sakereg* 682; Olivier, Pienaar en Van der Walt *Sakereg* 366; Hutchison (ed) *Wille's principles of South African law* (1991) 257.

76 Sien Badenhorst 1989 *De Jure* 389, 1990 *TSAR* 475 – 476; Van der Merwe *Sakereg* 561.

serwituut-*species* saaklike regte. Die kenmerke van 'n mineraalreg sal bespreek word na afhandeling van al die benaderings tot die kategoriseringsprobleem van 'n mineraalreg.[77]

3 3 Onstoflike onroerende saak

Alhoewel regter Goldstone in *Government of the Republic of South Africa v Oceana Development Investment Trust plc*[78] enersyds aanvaar dat 'n mineraalreg 'n saaklike reg, oftewel 'n *ius in re aliena*, uitmaak,[79] huldig hy andersyds 'n heeltemal nuwe standpunt:[80]

> "Again, whatever the precise juristic nature of mineral rights may be, there is also no doubt that they are incorporeal rights relating to immovable property and hence must be regarded themselves as immovable incorporeals."

Alhoewel regter Goldstone in 'n mate gelyk gegee kan word dat steun vir hierdie standpunt te vinde is in vorige akteswetgewing[81] en in 'n gemeenregtelik gerigte benadering,[82] is dit suiwer regsteoreties onjuis indien die leerstuk van subjektiewe regte as korrekte vertrekpunt aanvaar sou word: eerstens, indien gekyk word na die definisie van 'n saak,[83] behoort die begrip "saak" tot iets stofliks beperk te word. Dit is onjuis om 'n saak as die objek van 'n reg te definieer en om in dieselfde asem te beweer dat 'n reg ook 'n saak kan wees of, anders gestel, dat 'n reg ook die objek van 'n reg sou kon wees.[84] Tweedens, selfs al word die begrip onliggaamlike saak aanvaar, is die klassifikasie van roerende en onroerende onstoflike sake onlogies omdat die kriterium van beweegbaarheid van een plek na 'n ander sonder beskadiging en met behoud van die identiteit van die saak, nie van toepassing is op onstoflike sake wat nie beweeg kan

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77 Sien par 4 hieronder.

78 *Supra*; sien voorts Badenhorst 1989 *De Jure* 387 – 388, "The nature, transfer and loss of mineral rights" 1989-90 *Obiter* 202 – 204.

79 36H – I.

80 36I.

81 A 30 van Wet 25 van 1909, waarna Goldstone R (36I – J) verwys, bepaal bloot in breë trekke dat by die voorbehoud van 'n mineraalreg by die oordrag van blote eiendomsreg en die uitreiking van 'n sertifikaat van mineraalregte, sodanige sertifikaat 'n geldige titel uitmaak. Dit sou eerder sy aanvanklike standpunt, nl dat 'n mineraalreg 'n beperkte saaklike reg is, steun. Dit is egter so dat "vastgoed" in a 61 van Wet 13 van 1918 gedefinieer is as insluitende "een mijnpacht of recht op mineralen of edelgesteenten of een huur daarvan" (36 – 37A). Goldstone R beweer dat soortgelyke erkenning te vinde is in a 70 – 74*bis* van die Akteswet (37A – B). Bedoelde artikels verleen egter nie erkenning aan die gedagtegang dat 'n mineraalreg as 'n onstoflike onroerende saak beskou moet word nie. 'n Mineraalreg word voorts, anders as bv 'n geregistreerde mineralehuurkontrak, nie omvat deur die definisie van "onroerende goed" in a 102 van die Akteswet nie.

82 Van der Merwe *Sakereg* 36 wys daarop dat abstrakte vermoëns, wat nie 'n fisieke bestaan gevoer het nie maar tog 'n geldwaarde gehad het (soos regte), in die gemenereg as "onstoflike" sake erken is. Sodanige onstoflike sake is weer ingedeel in onstoflike roerende en onstoflike onroerende sake deur te let op die aard van die voorwerp van die onstoflike saak ('n reg). Alle regte tav onroerende sake is as onstoflike onroerende sake beskou terwyl alle regte tav roerende sake as onstoflike roerende sake beskou is (vgl *idem* 40 – 43). Alhoewel die ontwikkelingstadium waarskynlik nie in die gemenereg bereik is dat 'n mineraalreg afsonderlik van die eiendomsreg van die grond bestaan het nie, sou 'n mens by die hedendaagse toepassing van so 'n gemeenregtelik gerigte benadering op 'n mineraalreg moontlik die slotsom kon bereik dat 'n mineraalreg as 'n onstoflike onroerende saak beskou kan word.

83 Sien *idem* 23 – 27.

84 Silberberg en Schoeman *Property* 11.

word nie.[85] Uit 'n regshistoriese oogpunt dien ook daarop gelet te word dat dit in die gemenereg prakties noodsaaklik was om onstoflike sake in roerende en onroerende sake in te deel omdat verskillende regsgevolge aan die roerende en onroerende aard van sake geknoop is. Hierdie gemeenregtelike regsgevolge het vandag grootliks verval.[86]

Daar word egter toegegee dat die begrip onliggaamlike saak, as synde die objek van 'n saaklike reg, vandag juridies aanvaar word.[87] Dit is tog so dat 'n vruggebruik ten opsigte van 'n mineraalreg,[88] 'n verband ten opsigte van 'n mineraalreg[89] en 'n mineraalhuurkontrak ten aansien van 'n mineraalreg[90] in die praktyk erken word. Die vraag ontstaan hoe hierdie werklikhede van die praktyk hanteer behoort te word. Een benadering sou wees om hulle bloot as uitsonderings op die teorie van 'n mineraalreg te beskou.[91] Ter aansluiting hierby sou selfs beweeg kon word in die rigting wat deur Van der Vyver[92] ingeslaan is, naamlik dat die gedagte van 'n reg op 'n subjektiewe reg nie in stryd sou wees met die leerstuk van subjektiewe regte nie mits die reg as objek al die *essentialia* van 'n subjektiewe reg behou. In Van der Vyver se nuwe benadering is egter 'n negering opgesluit van die leerstuk van subjektiewe regte, met sy duidelike onderskeid tussen regte, bevoegdhede en regsobjekte, welke negering gevaarlik sou kon wees. So 'n benadering behoort konserwatief toegepas te word bloot ter verklaring van die praktyksgevalle. 'n Ander benadering sou wees om mineraalregte deur die bank as onroerende onstoflike sake te beskou. Hierdie benadering bied in 'n sekere mate 'n oplossing vir die praktyksgevalle. By die verkryging van 'n prospekteerreg of 'n mynreg sou 'n mens moontlik kon argumenteer dat die mineraalreg van die verlener die regsobjek uitmaak. Dit sou natuurlik lynreg bots met 'n jarelange implisiete beskouing van die howe dat die grondstuk (of selfs foutiewelik die minerale) die regsobjek uitmaak. Hierdie radikale benadering sou veral tot onaanneemlike resultate aanleiding gee by die ontleding van 'n mineraalreg op sigself. Indien aangevoer word dat 'n mineraalreg 'n regsobjek is, moet daar steeds 'n breë saaklike reg op daardie objek bestaan. Dit sou toutologies en akademies absurd wees om te praat van 'n saaklike reg ten aansien van 'n mineraalreg.

3 4 Mineraalreg ingevolge subjektiefregtelike konstruksie

Daar word aan die hand gedoen dat wanneer die begrip "mineraalreg" in wetgewing, regspraak, die praktyk en algemene spraakgebruik voorkom, in gedagte gehou moet word dat dit in die eng sin van die woord enige van die volgende

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85 Van der Merwe *Sakereg* 40.

86 *Idem* 41. Hiermee word die belang van hedendaagse relevante regsgevolge voortspruitend uit die onderskeid tussen roerende en onroerende sake (soos aangedui deur Van der Merwe *idem* 45 – 47 en Olivier, Pienaar en Van der Walt *Sakereg* 23 – 24) natuurlik glad nie ontken nie.

87 Vgl Van der Merwe *Sakereg* 37; Olivier, Pienaar en Van der Walt *Sakereg* 16 – 17.

88 *Ex parte Eloff supra* 620D – E; sien verder Badenhorst *Bevoegdheid om minerale te ontgin* 454 – 456.

89 A 3(1)(e) en 50(1) van die Akteswet; sien verder Badenhorst *Bevoegdheid om minerale te ontgin* 475 – 482.

90 Badenhorst *idem* 425.

91 Sien Badenhorst "The revesting of state-held entitlements to exploit minerals in South Africa: privatisation or deregulation" 1991 *TSAR* 117 – 118.

92 *Huldigingsbundel vir WA Joubert* 234.

betekenisse kan dra:[93] (a) *'n Bevoegdheid van volledige eiendomsreg.* Soos reeds ter inleiding aangedui is, kan die bevoegdheid om minerale te ontgin van die volledige eiendomsreg van grond geskei word. Alvorens sodanige afskeiding nie plaasgevind het nie, moet eerder na 'n ontginningsbevoegdheid van volledige eiendomsreg verwys word. (b) *'n Saaklike reg in die breë sin van die woord.* Indien die ontginningsbevoegdheid van die volledige eiendomsreg van grond geskei word, kom 'n saaklike reg met 'n bepaalde inhoud tot stand. Hierdie saaklike reg kan egter weer in twee verskillende betekenisse gebruik word, naamlik (i) 'n *ius in re sua*: in die gevalle waar die houer van volledige eiendomsreg uit eie keuse of tydens dorpstigting onderworpe aan 'n voorbehoud die ontginningsbevoegdheid van die volledige eiendomsreg van grond skei, word 'n mineraalreg en blote eiendomsreg van grond deur dieselfde regsubjek behou. Indien die houer van blote eiendomsreg se eiendomsreg as 'n *ius in re sua* beskou word, is daar geen prinsipiële rede waarom die mineraalreg nie ook as sodanig beskou kan word nie; en (ii) 'n *ius in re aliena*: in al die ander gevalle van afskeiding verskil die reghebbende van blote eiendomsreg en die houer van die mineraalreg. Die mineraalreg word derhalwe afsonderlik gehou en bestaan ten aansien van iemand anders se grond. (c) *'n Regsobjek van 'n ander saaklike reg.* Hierdie gevalle is reeds bespreek.[94]

Daar word aan die hand gedoen dat vir doeleindes van 'n subjektiefregtelike benadering nie na (a) hierbo as 'n mineraalreg verwys behoort te word nie. Dit is egter korrek om na (b) en (c) hierbo as 'n mineraalreg te verwys. Alhoewel in die gevalle waarna in (c) hierbo verwys word, 'n mineraalreg 'n fiktiewe en dubbele rol van 'n regsobjek kan speel, bly dit steeds in wese 'n subjektiewe reg. Hierdie mineraalreg in die ware sin van die woord (in (b) en (c) vermeld), kan vervolgens geïsoleer word ten einde die ware kenmerke van 'n mineraalreg te identifiseer.

Om saam te vat: 'n mineraalreg is 'n saaklike reg. 'n Mineraalreg is slegs 'n *ius in re aliena* indien die houer van 'n mineraalreg ten opsigte van die grond nie die houer van die blote eiendomsreg van die grond is nie. Indien die houer van 'n mineraalreg ten opsigte van die grond ook die houer van die blote eiendomsreg daarvan is, is 'n mineraalreg egter 'n *ius in re sua*.[95]

4 KENMERKE VAN 'N MINERAALREG

Die eiesoortige kenmerke van 'n mineraalreg kan vervolgens soos volg vermeld word:[96]

(a) 'n Mineraalreg verleen 'n beperkte heerskappy oor 'n saak deurdat slegs ontginningsbevoegdhede[97] ten aansien daarvan uitgeoefen kan word.

(b) Die uitoefening van die ontginningsbevoegdhede deur die houer kan egter deur die verlening van 'n saaklike reg opgeskort word.

(c) Vanweë die elastisiteit van 'n mineraalreg word die mineraalreg weer volkome by die beëindiging van die beperkte saaklike reg.

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93 Sien Badenhorst 1991 *TSAR* 118.
94 Sien par 3 3 hierbo.
95 Hiermee word dus weggebreek van die tradisionele beskouing van die sakereg dat slegs eiendomsreg as 'n *ius in re sua* aangemerk kan word.
96 Sien Badenhorst 1989 *De Jure* 389, 1990 *TSAR* 475; Van der Merwe *Sakereg* 561 – 562.
97 Of, in sommige omstandighede, besondere aanvullende eiendomsbevoegdhede tav grond.

(d) 'n Mineraalreg word ten gunste van 'n regsubjek in 'n persoonlike hoedanigheid gevestig.

(e) 'n Mineraalreg is vryelik oordraagbaar en oorerflik.

(f) 'n Mineraalreg kan afsonderlik van die grondstuk ten aansien waarvan dit bestaan, vervreem word.

(g) Onderworpe aan die voorskrifte van wetgewing wat die vermeerdering van houers van mineraalregte verbied, is 'n mineraalreg deelbaar vir sover die houer 'n onverdeelde aandeel in 'n mineraalreg kan verkry of vervreem.

(h) Die uitoefening van 'n mineraalreg geskied noodwendig met aantasting van die wese van die grond.

(i) In uitsonderlike gevalle kan 'n mineraalreg die objek van 'n ander saaklike reg wees.

(j) 'n Mineraalreg kan nie met die blote eiendomsreg van grond saamsmelt tot volledige eiendomsreg indien beide regte in een houer sou vestig nie.

(k) 'n Mineraalreg is in beginsel absoluut.

(l) 'n Mineraalreg is in beginsel van onbepaalde duur deurdat dit bly voortbestaan by afsterwe, insolvensie of likwidasie van die houer daarvan.

5 SLOTSOM

Dat 'n mineraalreg 'n saaklike reg is, word sonder uitsondering aanvaar. Alhoewel daar 'n verskil van mening bestaan oor die kategorie waartoe 'n mineraalreg behoort, is 'n versoening tussen die verskillende benaderings moontlik. Deurgetrek tot sy volle konsekwensie, beteken die konvensionele standpunt dat 'n mineraalreg analoog is aan 'n serwituut in die breë sin van die woord, dog aansienlik verskil van beide persoonlike serwitute en erfdiensbaarhede. Anders gestel, iewers in die grys gebied tussen erfdiensbaarhede en persoonlike serwitute, dog binne die kader van die serwituut, skuil 'n verskynsel genaamd 'n mineraalreg wat drastiese afwykings van die normale verskyningsvorme van serwitute openbaar.

Die teenkant van hierdie spreekwoordelike muntstuk is eenvoudig die erkenning van 'n unieke saaklike reg met eiesoortige kenmerke. Dit sou die logiese eindontwikkeling wees tot die konvensionele benadering wat in die begin van hierdie eeu deur hoofregter Innes van stapel gestuur is. Indien die uniekheid van mineraalregte eenmaal erken word, kan die eiesoortige geaardheid en kenmerke daarvan ontleed en verder ontwikkel word. Selfs die erkenning van 'n mineraalreg as onroerende onliggaamlike saak kan onder die uitsonderlike kenmerke daarvan tuisgebring word. Die knoop kan finaal deurgehak word deur die onderhawige subjektiewe reg eenvoudig 'n mineraalreg te noem. Die belangrikheid van die konvensionele benadering sal egter altyd daarin geleë wees dat 'n bekende voertuig, naamlik die serwituut, deur middel van kontrastering meesterlik deur ons regters in die afwesigheid van gemeenregtelike aanknopingspunte gebruik is om 'n uiters belangrike onderafdeling van die privaatreg te ontwikkel.[98]

98 Interessantheidshalwe dien daarop gelet te word dat soortgelyke regsontwikkeling in die Amerikaanse staat Louisiana plaasgevind het (sien Badenhorst *Bevoegdheid om minerale te ontgin* 882 ev).

Limitation provisions of the Bophuthatswanan Bill of Rights

JD van der Vyver
BCom LLB HonnsBA LLD LLD hc
Professor of Law, University of the Witwatersrand; IT Cohen Professor of International Law and Human Rights, Emory University, Atlanta, Georgia

OPSOMMING

Inperkingsklousules van die Verklaring van Fundamentele Regte in die Grondwet van Bophuthatswana

Die Verklaring van Fundamentele Regte in die Grondwet van Bophuthatswana is nou reeds 15 jaar van krag en in daardie tyd is daar bykans 20 grondwetlike uitsprake gelewer wat op die verklaring betrekking het. In hierdie artikel word een faset van die menseregtebepalings – die inperkingsklousules – krities onder die loep geneem.

Die inperkingsklousules waarom dit gaan, lewer uiters gekompliseerde uitlegprobleme op, hoofsaaklik omdat die verklaring nie aan die eise van behoorlike wetskrywing voldoen nie. Byvoorbeeld, terwyl artikel 8(1) van die grondwet "fundamentele vryhede" as die versamelnaam van die beskermde regte en vryhede aandui, word daardie term nooit weer in die grondwet gebruik nie. In artikel 18 word wel van "fundamentele regte en vryhede" gewag gemaak (met in die Engelse teks "freedom" in die enkelvoud), wat 'n mens laat wonder of hierdie "vryhede" iets anders as "fundamentele regte" beteken.

Die verklaring put sy inhoud uit hoofsaaklik twee bronne: die Europese Konvensie van Menseregte en die Duitse Basiese Wet. Geen poging is deur die wetsopstellers aangewend om die gegewens uit hierdie twee verskillende bronne te sinkroniseer nie en daarom vertoon die verklaring die tipiese (verwarrende) eienskappe van eklektisisme. Die bepalings van artikel 18 wat, ooreenkomstig die Duitse model, algemeen vir alle inperkingsklousules geld, is gevolglik nie met die aanwending van geykte reëls van wetsuitleg te versoen met die, aan die Europese Konvensie ontleende, besondere (kasuïstiese) inperkingsklousules van artikels 13(2), 14(2), 15(2) en 16(2) nie.

Ten einde dergelike anomalieë te vermy en aan die verklaring sin te verleen, word aan die hand gedoen dat die inperkingsbepalings in vier kategorieë ingedeel word: (a) Interne (inhoudelike) *grense* van 'n fundamentele reg, wat die begin en die einde, asook die bevoegdhede wat by 'n reg inbegryp is, aandui; (b) eksterne *beperkings* van 'n fundamentele reg, waarby die (gedeeltelike) *inkorting* en die (volledige) *opskorting* van 'n fundamentele reg inbegryp is; (c) *uitsonderings* op die reël van regsbeskerming wat in buitengewone (en tydelike) omstandighede geoorloof is; en (d) die *feitelike ontneming* van 'n fundamentele reg in 'n gegewe konkrete geval by wyse van 'n *ad hoc* administratiewe bevel en/of handeling.

Daar moet veral op gelet word dat sekere fundamentele regte hoegenaamd nie ingeperk mag word nie, terwyl ander aan inkorting, en 'n derde groep fundamentele regte aan opskorting, blootgestel is. Die algemene bepalings van artikel 18 kan alleen op die inkorting van fundamentele regte van toepassing gemaak word.

Die onkritiese aanwending van geleende leerstellinge in Bophuthatswana word hierby aan die kaak gestel. Dit geld byvoorbeeld vir die Duitse leerstuk van proporsionaliteit. Daar is in Bophuthatswana wel plek vir dié leerstuk in gevalle van (slegs) inkorting en daarom kan die beginsel van proporsionaliteit nie in dieselfde algemene sin as in Duitsland aangewend

word nie (in die Duitse reg kan 'n basiese reg nooit volkome opgehef word nie). Die Europese leerstuk wat aan ledestate van die Europese Konvensie 'n mate van selfbeskikking ("a margin of appreciation") by die toepassing van die norme van die konvensie in hulle onderskeie jurisdiksiegebiede veroorloof, kan in 'n enkelstaat soos Bophuthatswana hoegenaamd geen toepassing vind nie. 'n Onlangse uitspraak van regter Comrie waarin hierdie leerstuk aangewend is ten einde geldigheid aan die plakkerswet in Bophuthatswana te verleen, kan daarom nie onderskryf word nie.

The Declaration of Fundamental Rights in the Republic of Bophuthatswana Constitution Act 18 of 1977 has been in operation now for almost 15 years and the Supreme Court has handed down approximately 20 judgments in which constitutional matters were in issue. This is a good time, therefore, to take stock of these judgments with a critical eye.

One cannot, of course, do justice to all the issues that arose in the Supreme Court's constitutional jurisprudence within the confines of a law review article. This article therefore focuses on only one aspect: the limitation of fundamental rights.[1]

The analysis of those limitation provisions is conditioned by the following statements of understanding:

(a) Bills of rights may be classified into two distinct categories. First there are those that circumscribe the protected rights and freedoms in general and often sweeping terms, leaving it to the courts to determine the exact meaning and limitations of those rights and freedoms. The second category comprises those bills of rights that define the protected rights and freedoms with a greater measure of precision and, more importantly, meticulously stipulate the circumstances in which, the degree to which and the procedure by which the rights and freedoms may be subjected to limitation.

The American Bill of Rights is a prime example of freedom charters of the first kind. The bills of rights that mushroomed after World War II mostly belong to the second category; and that certainly holds true for the Declaration of Fundamental Rights of Bophuthatswana. Bills of rights of this kind essentially demand judicial constraint when it comes to the courts' law-creating function through constitutional interpretation. Clear directives of the legislature as to the meaning and limitations of the rights and freedoms to be protected must be meticulously observed by courts of law called upon to give effect to the bill of rights. While judicial activism may be feasible in constitutional systems of the first kind, that is decidedly not the case in countries, such as Bophuthatswana, where the drafters have expressed the legislative intention with a degree of circumscription and precision that leaves little scope for speculation as to the true or literal meaning of the provisions to be interpreted.

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1 The Supreme Court has repeatedly acknowledged that fundamental freedoms are not absolute: see *S v Chabalala* 1986 3 SA 623 (BAD) 631F – 632B; *Segale v Government of Bophuthatswana* 1987 3 SA 237 (BGD) 240I – 241B; *Government of the Republic of Bophuthatswana v Segale* 1990 1 SA 434 (BAD) 448A – D; *Bopalamo v The Government and Other Cases* 5 BSC 140 (1988) 156F – 157B; *Molotlegi v The Minister of Law and Order* case no M5/89 (BGD) 1989-08-04 (unreported) 23; *Lewis v Minister of Internal Affairs* 1991 3 SA 628 (BGD) 637G – 638G; *Nyamakazi v The President of Bophuthatswana* 1992 4 SA 540 (BGD) 563 – 564.

(b) The Bophuthatswanan Constitution was enacted at a time when human rights protection was generally looked upon with suspicion by the powers that be. For that reason, the drafters followed a conservative approach, confining the protected rights and freedoms to the classical civil and political rights that have come to be known as the first generation of human rights.

(c) Although the principle of constitutionalism inherent in a system of human rights protection[2] radically deviates from the Anglo-South African notion of parliamentary sovereignty, it is worth noting that the constitutional dispensation of Bophuthatswana was cultivated in a legal tradition of legislative supremacy. That being the case, limitations of the power of legislation dictated by the Declaration of Fundamental Rights should remain confined to those stipulated by the constitution itself.

(d) The ultimate source of the Declaration of Fundamental Rights was, by and large, the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950. Certain provisions, notably section 18 of the Bophuthatswanan Constitution, were borrowed from the Basic Law of the Federal Republic of Germany (as it then was) of 1949. Useful guidance as to the meaning of the corresponding provisions in the Declaration of Fundamental Rights may therefore be derived from Strasbourg and German jurisprudence.

1 FUNDAMENTAL RIGHTS NOT SUBJECT TO LIMITATION

It is important to note at the outset that not all fundamental rights proclaimed in the declaration are subject to limitation. This applies to:

- the non-discrimination provision;[3]
- the proscription of torture and of inhuman and degrading treatment or punishment;[4]
- the right of a person arrested to be informed, in a language he understands, of the reasons for his arrest and of any charge against him;[5]
- the right to a fair trial by an independent and impartial tribunal;[6]
- the presumption of innocence;[7]

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2 The principle of constitutionalism as perceived in Bophuthatswana was articulated as follows by Waddington J in *Bopalamo v The Government of Bophuthatswana supra* n 1 156B–E: "One of the features of the Constitution is that the absolute supremacy of the law – that is, the rule of law – is enshrined in the Constitution itself. Every subject, high and low, is amenable to the law, but the liberty of none can be prejudiced save by properly constituted legal tribunals or save in accordance with procedures prescribed by laws which pass the test of constitutionality prescribed by the Constitution. If any person's rights or personal liberty or property is threatened whether by the executive or by private individuals, the courts are open for their protection. The Constitution ranges behind the courts the full power of the State to ensure the enforcement of their protective orders. The Constitution is in fact the only practical confirmation possible of human rights and freedoms to which reference has been made above. If the Constitution were to be put at risk the very freedoms which were so closely cherished by the framers of the Constitution would be jeopardised."

3 S 9.

4 S 11.

5 S 12(4).

6 S 12(6).

7 S 12(7)pr.

- some of the "minimum rights" of a person charged with a criminal offence specified in section 12(7), namely: the right to be informed promptly, in a language which the suspect understands, of the nature and cause of the accusation against him;[8] the right to adequate time and facilities to prepare his defence;[9] and the right of *audi alteram partem*;[10]
- the rule against the retroactive creation of an offence and of more severe penalties;[11]
- freedom of thought and of conscience;[12] and
- freedom to hold opinions and to receive information and ideas.[13]

2 SECTION 18

Turning next to fundamental rights that may indeed be subjected to limitations, it is perhaps most expedient to commence a more detailed exposition of the limitation provisions in the Declaration of Fundamental Rights with an analysis of the general dictates of section 18 pertaining to "restrictions" of fundamental rights.

Section 18 of the Bophuthatswana Constitution provides:

> "(1) The rights and freedom referred to in sections 9 to 17 may be restricted only by a law of Parliament and such a law shall have a general application.
>
> (2) Except for the circumstances provided for in this Declaration, a fundamental right and freedom shall not be totally abolished or in its essence be encroached upon."

It is difficult to conceive of constitutional provisions that are as fraught with interpretational difficulties as is section 18:

- Why, for instance, did the legislature in section 18(1) speak of "rights" (in the plural) and "freedom" (in the singular) as though only one of the fundamental rights dealt with in sections 9 to 17 qualifies as a "freedom" within the meaning of section 18(1)?[14]
- Was the requirement that "rights and freedom . . . may be restricted only by a law of Parliament" intended to apply to all derogations; and if so, why then do sections 13(1), 14(1), 15(1) and 16(1) stipulate that the derogations provided for in those subsections are to be "in accordance with the law" or "prescribed by law"?
- Should the verb "restricted" be interpreted in its literal sense as including all limitations, or should section 18(1) be taken to leave space for the administrative decision, act or decree prohibiting a certain publication or gathering, or effecting the detention of a person or the expropriation of property, in any given case?

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8 S 12(7)(a).
9 S 12(7)(b).
10 S 12(7)(c). Note that the right to legal representation stipulated in the same par is subject to limitations and may be derogated from or suspended.
11 S 12(8).
12 S 14(1) – but not freedom of religion, which, as will be pointed out later on, is subject to limitation.
13 S 15(1).
14 It is no answer to apply the rule of statutory construction that the singular is presumed to include the plural, because using the singular alongside and after the plural "rights" refutes that presumption.

- What meaning should be attached to the requirement that the law sanctioning the restriction of a fundamental right must have "a general application": would, for instance, a law restricting the right of foreigners to participate in political activity in Bophuthatswana, since it applies to foreigners only, be one with "general application"?
- The phrase, "[e]xcept for the circumstances provided for in this Declaration . . ." in section 18(2) implies that provision is made in the declaration for the total abolition in certain specified circumstances of a fundamental right or for encroachment in the essence of such a right, and the question arises whether this applies to all the fundamental rights that are subject to limitation or only to some of them.
- Does the wording of section 18(2) leave scope for the doctrine of proportionality?[15]

In seeking to find an answer to these questions, it may be helpful to keep in mind the German provision from which section 18 was taken. Article 19 of the German Basic Law provides in part:

> "(1) In so far as a basic right may under this Basic Law be restricted by or pursuant to a law, such law must apply generally and not for an individual case. Furthermore, such law must name the basic right while indicating the Article concerned.
>
> (2) In no instance must the essential substance of a basic right be encroached upon."[16]

Section 18 is often referred to in judgments of the Supreme Court, but so far those judgments have not produced any in-depth analysis of its true meaning and impact.[17] In *Smith v Attorney-General, Bophuthatswana*[18] Hiemstra CJ said of section 18:

> "Subsection (1) seems to empower Parliament to encroach upon a fundamental right at will, by legislation which has general application, that is to say it shall not be confined to individuals or a class of individuals. The apparent power, which would render the whole Bill of Rights nugatory, is however qualified by ss (2), which says the fundamental right shall not be totally abolished or in its essence be encroached upon. The expression 'in its essence be encroached upon' opens the field of learning which the Germans have evolved around their related expression 'Wesensgehalt'. The Wesensgehalt or essence will assume its own characteristics in relation to each fundamental right or "Grundrecht", according to its particular weight and meaning within the totality of the system. Before the Court will strike a law down because it seems to encroach

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15 The doctrine of proportionality is explained in par 4.

16 "(1) Soweit nach diesem Grundgesetz ein Grundrecht durch Gesetz oder auf Grund eines Gesetzes eingeschränkt werden kann, muß das Gesetz allgemein und nicht für den Einselfall gelten. Außerdem muß das Gesetz das Grundrecht unter Angabe des Artikels nennen.
(2) In keinem Fall darf ein Grundrecht in seinem Wesensgehalt angetastet werden."

17 See *S v Marwane* 1982 3 SA 717 (A) 741E (per Rumpff CJ) and 747D – E (per Miller JA); *Smith v Attorney-General, Bophuthatswana* 1984 1 SA 196 (BSC) 198E – F 202C – G; *Segale v Government of Bophuthatswana supra* fn 1 240H – I 242I – 243A; *Government of the Republic of Bophuthatswana v Segale supra* fn 1 443E – F 449B – D 450D; *Bopalamo v The Government and Other Cases supra* fn 1 144B – D 146D – F 148F – 149F 154D – E; *Molotlegi v The Minister of Law and Order supra* fn 1 22 – 23 27 – 28; *Monnakale v Republic of Bophuthatswana* 1991 1 SA 598 (BGD) 613H – I 628B; *Mfolo v Minister of Education, Bophuthatswana* 1992 3 SA 181 (BGD) 184E – F; *Nyamakazi v The President of Bophuthatswana supra* fn 1 58 64 88; *Bokaba v The Minister of Law and Order* case no M277/92 (BGD) 1992-10-29 (unreported) 9 (per Comrie J); *Kekana Royal Executive Council v Minister of Law and Order* case no M20/93 (BGD) 1993-06-17 (unreported) 44 – 45.

18 *Supra* fn 17 202; and see also *Segale v Government of Bophuthatswana supra* fn 1 242 – 243.

> upon the essence of a fundamental right, it will apply the process of an interplay of forces, or 'Wechselwirkung' as the Germans call it – nicely rendered by 'wisselwerking' in Afrikaans. When an infringing law admittedly, taken on the wording as such, encroaches upon a fundamental right, the Court will in turn interpret such a law restrictively, 'in the light of the meaning of the Bill of Rights'. If the Court can achieve such a synthesis of the two opposing forces, it would prefer to uphold the infringing law under a truncated meaning rather than declare it unconstitutional."

One should at all times attempt as best one can to make sense of the wording chosen by a legislature to express its will, giving due consideration to the rules of statutory interpretation and applying the presumptions that have a bearing on the language preferred in the legislation to be interpreted; for instance, the presumption that a variation in words and phrases in the same instrument is indicative of a change of meaning. One must always assume that the legislature has carefully considered every word and phrase so as to express its intention in the clearest possible terms. This is especially true of the country's basic law; and the principle applies even more vigorously when the legislature has derived a particular provision from another enactment and has elected to change the words and phrases preferred by the other legislature. That, surely, must be as strong an indication as one may wish to find that the legislature has carefully considered its choice of words and pondered over the crossing of t's and the dotting of i's.

Having carefully considered section 18 in view of these directives, one cannot escape the conclusion that many of the questions raised above simply derived from ill-considered and sloppy drafting. This will appear clearly from the following analysis of the different phrases that constitute the essence of section 18.

(a) "*The rights and freedom referred to in sections 9 to 17 . . .*"

This passage refers to the fundamental rights guaranteed by the Declaration of Fundamental Rights. The legislature initially chose to use "fundamental rights" as the composite phrase to denote those protected rights and freedoms,[19] but thereupon decided to ignore that directive. In section 18 it speaks of "rights" in the plural and "freedom" in the singular.

Whereas, therefore, the German drafters denoted the rights and freedoms to which article 19(1) of the Basic Law applies with the accepted (and consistently used) term "basic rights", the Bophuthatswanan legislature preferred "rights and freedom" for what should have been "fundamental rights". To assume – as the rules of statutory interpretation would dictate – that section 18(1) was intended to convey that the "fundamental rights" protected by the declaration must be subdivided into "rights" and (one) "freedom", would result in an exercise in futility and with no conceivable practical consequences. It is therefore submitted that no consequences should, or possibly could, be attached to this change of wording.

(b) ". . . *may be restricted . . .*"

Fundamental rights may be subjected to various kinds of limitations. Those limitations may be subdivided into "confines", "suspensions", "derogations", "exceptions" and "*de facto* deprivations". These concepts will be explained below;[20] and it will be pointed out that the provisions of section 18(1) apply

19 See s 8(1).
20 See par 3.

to "derogations" only. "Derogations" denote general limitations, short of the total "suspension" (abolition) of the right, applying to a particular fundamental right, such as limitations which are

> "necessary in a democratic society in the interests of national security, public safety or the economic well-being of Bophuthatswana, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".[21]

(c) ". . . *in terms of an Act of Parliament* . . ."

In terms of section 18, derogations from fundamental rights may clearly not be imposed by means of subordinate legislation or through rules of law posited by a voluntary association or any other non-state institution. The only problem that exists in this regard concerns the conflict between the present requirement pertaining to derogations from fundamental rights and the provisions of sections 13(2), 14(2), 15(2) and 16(2) authorising derogations from the fundamental rights to which those provisions relate if such derogations are "in accordance with the law" or "prescribed by law". Applying the presumption against tautology to duplication of the requirement that derogations must be "in accordance with the law" or "prescribed by law",[22] on the one hand, and sanctioned "only by a law of Parliament",[23] on the other hand, would again bring one nowhere. The reason for this duplication is at least explainable: sections 13 to 16 were taken from the European Convention which fragmented the general requirements applying to limitations and does not contain any general provision comparable to section 18; and section 18 was taken from the German Basic Law which, without duplication, regulated all the general requirements applying to limitations in one section.[24] One should therefore not attempt to make anything of the dual requirement of legality specified in sections 13 – 16 and section 18 respectively: that duality is indeed simply a duplication.

However, there is this further problem: "law" as contemplated in sections 13(2), 14(2), 15(2) and 16(2) was interpreted by the European Court of Human Rights to denote any juridical norm, including legal provisions posited by way of subordinate legislation and in the (juridical) rules of conduct of non-state institutions.[25] Section 18(1), on the other hand, refers clearly to "a law of Parliament". The applicable rule of statutory construction requires one in cases of such conflicting provisions in the same instrument to seek reconciliation by restricting the wider concept to a meaning common to both. In this instance, "a law of Parliament" is the narrower concept. The phrase "in accordance with the law" and "prescribed by law" as contemplated by sections 13(1), 14(1), 15(1) and 16(1) must accordingly be interpreted to refer to an act of parliament within the meaning of section 18(1).

The Bophuthatswanan legislature reduced the German "restricted by or pursuant to a law" to "restricted only by a law of Parliament". It is difficult to conveive any reasonable explanation or jurisprudential wisdom that might have prompted the Bophuthatswanan legislature to follow this course. On the contrary, the Bophuthatswanan phrase has led to uncertainty and could culminate

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21 See s 13(2).
22 S 13(1) 14(1) 15(1) and 16(1).
23 S 18(1).
24 A 19.
25 See par 6(a) below.

in absurdity. The German provision makes a clear distinction between a law defining the limits of a basic right, on the one hand, and, on the other, an executive decision, act or decree in any individual case by which, for instance, an arrest is made or dissemination of a publication is restricted. The German phrase "or pursuant to any law" makes it clear that such executive intervention or administrative control must indeed be sanctioned by a law with general application but need not itself be transcribed in a law; and the executive intervention or administrative control measure applies only, for example, to the individual person being arrested or the particular publication being restrained.

The Bophuthatswanan Declaration, on the other hand, provides nothing of the kind. Section 18(1), on the contrary, stipulates that *all* restrictions must be effected by a law of parliament with general application. Section 13(2) does make provision for "interference [with the exercise of the right to privacy] by a public authority . . . in accordance with law"; and section 16(2) sanctions

> "the imposition of lawful restrictions [pertaining to the exercise of the freedom of peaceful assembly and of association with others] . . . by members of the armed forces, of the police or of the administration of Bophuthatswana".

These provisions are, on face value, in conflict with section 18(1), but reconciliation is possible if one takes the execution provisions of sections 13(2) and 16(2) to be exceptions to the general rule enunciated in section 18(1). But what then of all the other derogation provisions that require execution in concrete cases and which have been subjected to the requirement of having to be effected "only by a law of Parliament" having "general application" (noting, once again, that the Bophuthatswanan legislature deliberately omitted the phrase "pursuant to a law" in its imitation of the German provision)?

The point was marginally and superficially raised by counsel for the respondent in *Government of the Republic of Bophuthatswana v Segale*.[26] That case dealt with restrictions imposed by section 31 of the Internal Security Act 32 of 1979 (B) in respect of gatherings of more than 20 persons. Convenors of all such gatherings, except those mentioned in section 31(5), were required to obtain ministerial permission for the holding of the gathering, and the minister was instructed not to refuse such permission except in certain specified circumstances. The crux of the argument for the respondent was that parliament had evaded its responsibility under section 18(1)

> "by delegating its legislative function to a Minister who is given a discretion to make a decision specifically in regard to any proposed meeting . . ."

The historical context of section 18 and its appropriate meaning were not considered by counsel for the respondent or by the court; nor was any special significance attached to the administrative powers conferred on the executive in the closing clause of section 16 of the constitution. Galgut AJA disposed of the matter in the following terms:[27]

> "As stated earlier, counsel for respondent also submitted that by vesting a discretion in an individual, and more particularly a Minister of State, to prevent a meeting of more than 20 persons or to impose conditions under which such a meeting could be held was a negation of the rights granted in ss 15 and 16.
>
> We have seen that these two sections require a decision as to public safety to be made. I find no merit in the submission that such a decision should not be made by an individual provided that the individual is a competent person. Competent in the sense that

26 *Supra* fn 1 440C – 441C.
27 450D – G.

> he will be in a position to have available, and thus to know, all the relevant facts which could have a bearing on the question of public safety. It is known that political meetings, which the organisers believed would be peaceful, have been broken up by opponents, have resulted in fighting, in injuries and in damage to property. This is in fact borne out, as will be seen later, by the affidavit of the Commissioner of Police. The Minister, because of the sources available to him, is best placed to ascertain whether there is a real possibility of this happening."

The wording of section 18(1) may, in the writers' opinion, be relied upon in support of the proposition that, except for the provisions of sections 13(1) and 16(1), the *de facto* deprivation of fundamental rights cannot be effected by way of executive decree or administrative act, even if such decree or act is sanctioned by a law with general application. Nor can *Segale* be cited as authority to the contrary, because in the first place, the arguments advanced in it, founded on the *de iure* interpretation of the constitutional provisions concerned, were not considered in that case; and in the second place, the decision dealt essentially with section 16 of the constitution which, after all, does make provision for executive implementation of the derogation provisions of that section. Section 15, which does not sanction administrative implementation and is therefore subject to the general dictates of section 18(1), was indeed mentioned but not specially considered in argument or in the judgment.

The absurdities that will undoubtedly result from this conclusion dictate, however, that the ordinary rules of construction must again be thrown overboard. It will be argued, therefore, that section 18 does not apply at all to *de facto* deprivations of fundamental rights through executive implementation of a general power, sanctioned by law, to deprive a person of his fundamental right in any individual and concrete case.[28] The alternative would be to require the Supreme Court to read the phrase "or pursuant to any law" back into section 18, in spite of the fact that the legislature deliberately elected to omit that phrase from its enactment.

(d) ". . . *and such a law shall have a general application*"

In *Smith v Attorney-General, Bophuthatswana*[29] Hiemstra CJ interpreted this phrase to mean that the law of parliament derogating from a fundamental right "shall not be confined to individuals or a class of individuals". Matters, we fear, are not as simple as that.

The corresponding clause in the German Basic Law requires derogation provisions to apply "generally and not for an individual case".[30] The Bophuthatswanan legislature preferred to omit the phrase "and not for an individual case". This omission is probably of no consequence. German jurisprudence seems to indicate that the two notions, "generally" and "not for an individual case", mean the same thing in any event.

Lepa[31] summarises the meaning to be attached to the legality requirement of article 19(1) of the German Basic Law as follows:

- Although the phrase "must apply generally and not solely for an individual case" seems to deal with two matters, it actually deals with one matter only, namely that the limitation may not apply to an individual case.

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28 See par 3(d) below.
29 *Supra* fn 17 202D–E.
30 ". . . allgemein und nicht für den Einzelfall . . .".
31 *Der Inhalt der Grundrechte* (1985) 294–295 (par 7–9).

● The prohibition of legislation dealing with individual cases only, is exclusively applicable to enactments that curtail constitutional rights and freedoms.

● Legislation regulating an individual case will be at hand when the enactment seeks exclusively to regulate a concrete instance or an isolated group of concrete instances, or when it speaks to a particular addressee only. If it should appear that the legislation could be applied in many circumstances ("viele Sachverhalte"), the norm embodied in article 19(1) would not be violated. In this regard one should also keep an eye on the future: a law that may now only affect a single instance would nevertheless be permissible if its field of application would cover a wider spectrum in future. Lepa mentions the example of legislation which would presently affect the only existing station pharmacy, but where more such pharmacies may be established in future. It is not so much a matter of the number of cases that would be affected; the question is whether or not the law is drafted in such general terms that the individual instances falling within its range cannot be calculated.

● The generality of formulation of the law is, however, not the only criterion. The legislature may use general language to conceal an intention to regulate an individual case or a group of individual cases.

● Legislation regulating a single or individual case as contemplated by article 19(1) must be distinguished from precautionary measures ("Maβnahmegesetzen"). The latter type of legislation is not prohibited by article 19(1).

It is difficult to define accurately the exact meaning of the requirement that derogation legislation shall apply generally. Lepa's analysis demonstrates that a law applying generally to pharmacies, and in fact only to pharmacies on railway stations, would satisfy the legality requirement of the parallel German provision. If a law derogating from a fundamental right would, on the other hand, apply only to the pharmacy on the railway station of Makwassie, or to the one(s) belonging to Mr Druggist, the provision would clearly fall foul of section 18(1).

A useful guide to establishing whether the classification of persons for the purpose of derogating from a fundamental freedom is permissible, would be to consider the legality requirement of section 18(1) in the light of the Equal Protection Clause:[32] all classifications founded on sex, descent, race, language, origin or religious belief are prohibited by that clause.

One should also consider the reasonable foundation of the classification. In the United States, the principle that obtains in this regard was summarised as follows in the judgment of Brennan J (delivering the opinion of the court) in *Plyer v Doe*:[33]

> "The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike'. F.S. *Royster Guano Co. v Virginia*, 253 U.S. 412, 415 (1920). But so too, '[t]he Court does not require things which are different in fact or opinion to be treated in law as though they were the same'. *Tigner v Texas*, 310 U.S. 141, 147 (1940). The initial discretion to determine what is 'different' and what is 'the same' resides in the legislature of the States. A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy that very ill. In applying

32 S 9.
33 457 US 202 216 (1981).

the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to the legitimate public purpose."

(e) "*Except for the circumstances provided for in this Declaration . . .*"

Except for a passage in *Molotlegi v The Minister of Law and Order*,[34] the Supreme Court seems to have ignored the opening lines of section 18(2): "Except for the circumstances provided for in this Declaration . . .", thereby creating the impression that a fundamental right may never be totally abolished or in its essence be encroached upon. It was rightly pointed out in *Molotlegi* that this is not the case. There are indeed instances where a fundamental right may be totally abolished or be encroached upon in its essence. However, the example mentioned in *Molotlegi*[35] is not one of those instances. The phrase under consideration refers only to limitation provisions of the declaration that qualify as "suspensions" of fundamental rights and not to the declaration's "derogation" provisions.[36]

In a passing remark, Comrie J in *Kekana Royal Executive Council v Minister of Law of Order*,[37] again stated that *all* the limitation clauses in the Declaration of Fundamental Rights are included in the present phrase, thereby suggesting that in every instance the fundamental rights subjected to limitations may be totally abolished or in their essence be encroached upon. This is clearly not the case: the phrase under consideration refers only to provisions in the declaration that expressly make allowance for the total abolition of a fundamental right; that is, those provisions that sanction the suspension of a fundamental right (as will be explained hereafter).[38]

(f) ". . . *a fundamental right and freedom shall not be totally abolished . . .*"

The wording of section 18(2) again raises problems of interpretation: if in terms of section 18(1) the composite phrase denoting the constitutionally protected rights and freedoms is to be "fundamental right(s)", does the phrase "and freedom" refer to rights and/or freedoms other than the constitutionally protected ones? Should a distinction, furthermore, be made between "rights and freedom" as contemplated by section 18(1) and "fundamental right and freedom" within the meaning of section 18(2)? For reasons mentioned earlier, the choice of words in section 18 must be attributed to bad drafting. The phrases under consideration all have the constitutionally protected rights and freedoms (that is, the "fundamental rights") in mind.

The phrase under consideration does not apply, however, to all the fundamental rights. There are indeed certain fundamental rights that may be suspended in the sense of being totally abolished. The opening lines of section 18(2) apply to those, and only to those, fundamental rights.[39] All other fundamental

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34 *Supra* fn 1 28.

35 With a view to the derogation provisions of s 13(2), 15(2) and 16(2), he referred to "exceptional cases . . . such as where it is necessary in the interests of national security or public safety or the prevention of disorder or crime or the like . . ."

36 These concepts and their pertinence will be explained more fully in par 3(b) below.

37 *Supra* fn 17 45.

38 See par 3(b) below.

39 The fundamental rights that may be totally abolished in circumstances provided for in the declaration are enumerated in par 3(b) below.

rights, except those mentioned earlier that are not at all subject to limitation,[40] come within the protection of section 18(2); that is, they may in the appropriate circumstances be subjected to derogation but may never be suspended.

(g) "*. . . or in their essence be encroached upon*"

The only judicial opinion thus far attempting to shed light on the present phrase, is the general statement of Hiemstra CJ in *Smith v Attorney-General, Bophuthatswana* cited earlier.[41]

The court in that case found section 61A of the Criminal Procedure Act 51 of 1977[42] to be unconstitutional. That section authorised the Attorney-General to instruct a court to refuse a bail application in certain cases; which, according to Hiemstra CJ, constituted an encroachment upon the essence of an accused's right to the due process of law. Section 61A was for that reason declared unconstitutional.

The due process provision that constituted the crux of the dispute in *Smith* centred upon the passage in section 12(3)(b) authorising the arrest of a person on reasonable suspicion of having committed an offence,

> "provided that such a person shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within reasonable time or to release pending trial . . ."[43]

At the time of the judgment in *Smith*, this provision was one that was not at all subject to limitation; and we might add that the limitations on this provision that were subsequently introduced by section 12(7A) – to the extent of depriving certain political detainees of the *interdictum de libero homine exhibendo* – would in any event not have been applicable in the matter. It was therefore not necessary for the court to base its finding of unconstitutionality on section 18. The provision of section 18 which renders the essence of a fundamental right unassailable, applies to instances where the fundamental right may lawfully be subjected to limitations, whereas section 61A of the Criminal Procedure Act was in any event unconstitutional because it violated a fundamental right that could not be restricted at all.

3 THE CONCEPT OF LIMITATIONS DEFINED

In order to evaluate the meaning and impact of section 18 more closely, it is necessary to distinguish between the different kinds of limitation that may apply to basic human rights.

The words chosen for purposes of the present analysis to denote the different kinds of limitation are to some extent arbitrary. The Declaration of Fundamental Rights does not make clear the distinctions that obtain in this regard and, in fact, is not at all consistent in its own selection of terminology. It is nevertheless important to make those distinctions, because different kinds of limitation are essentially subject to different rules of procedure.

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40 See par 1 above.
41 See the text accompanying fn 18 *supra*.
42 Inserted into the Bophuthatswanan version of the act by Act 33 of 1980 (B).
43 See 198G – H.

Limitations of human rights and fundamental freedoms – the term perhaps best suited to collectively include all the others – may take the form of confines, restrictions,[44] exceptions and *de facto* deprivation. Restrictions, in turn, may take on the form of derogation from or suspension of a fundamental right.

(a) The *confines* of a fundamental right denote its boundaries, the limits within which a legal subject may exercise the entitlements embodied in his right. Two aspects of the confines of a fundamental right may thus be distinguished: (i) where or when does one's right begin and end; and (ii) which entitlements are included in one's right?

The confines of a fundamental right are seldom defined in a bill of rights. As to the first component of a fundamental right's confines, take for instance the right to life. Section 10(1) of the Bophuthatswanan Constitution proclaims: "Everyone's right to life shall be protected by law . . ." But the constitution is silent as to when life begins and when it ends, even though this question is of vital importance with regard to state regulation of abortions and of tissue transplants (respectively). Nor is it incumbent on the legislature to define, by means of statute, the moment when life begins and ends and within which timespan life is to be protected.[45]

An instance where the definitional confines of a fundamental right are clearly stipulated, is to be found in section 12(2) of the Bophuthatswanan Constitution. Section 12 deals with the prohibition of slavery and servitude; and section 12(2) stipulates forms of involuntary service not included in the constitutional definition of "compulsory labour": any work required to be done in the ordinary course of detention or during conditional release from detention;[46] services associated with military training;[47] services exacted in an emergency or calamity threatening the existence or well-being of Bophuthatswana;[48] and services that constitute part of one's normal civic obligations imposed by law.[49]

The entitlements – and, more importantly, the confines of the entitlements – included in a fundamental right are also mostly left unspecified in the bill of rights. For instance, section 17 of the Bophuthatswanan Constitution protects "[t]he right to own and possess private and communal property" but nowhere stipulates what the owner or possessor may or may not do with the property that constitutes the object of his right.

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44 This term derives from s 18(1).

45 Certain human rights instruments do define the moment when the right to the protection of one's life commences. Art 4(1) of the American Convention on Human Rights, 1969 thus provides: "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." Even here, there is scope for speculation as to the extent of the right to life. The phrase, "in general", was presumably inserted to permit states parties to the convention to enact exceptions to the rule prohibiting abortions (see the *"Baby Boy" Opinion* case no 2141, Inter-American Commission of Human Rights 25, OAS Series L/V/II 54, Doc 9 rev 1 (1981)). Many member states of the Organization of American States (established in 1948) exclude criminal liability for abortions performed (for instance) to save the mother's life, to interrupt pregnancy of the victim of a rape, to protect the honour of an honest woman, to prevent the transmission to the fetus of a hereditary or contagious disease, or for economic reasons. (These examples are cited in the *"Baby Boy" Opinion supra*.)

46 S 12(2)(a).

47 S 12(2)(b).

48 S 12(2)(c).

49 S 12(2)(d).

It is submitted that all rights, the exercise of which will bring the beneficiary into inter-individual relationships in the private-law sense, are limited by, and must be exercised within the confines of, the common-law principle of commutative justice expressed in the maxim: *sic utere tuo ut alienum non laedas*. The principle is mentioned in the limitation provisions of section 13(2): the right to privacy; 14(2): freedom to manifest one's religion or belief; 15(2): exercise of the right of expression; and 16(2): freedom of peaceful assembly and of association with others.

Omission of the principle of commutative justice in the property clause (section 17), following its express mention in sections 13(2), 14(2), 15(2) and 16(2), could possibly be taken to indicate that the entitlements included in property rights are *not* conditioned by the norm of having to be exercised subject to the rights and freedoms of others: *inclusio unius est exclusio alterius*. Two arguments may be advanced to counter this conclusion: first, it would lead to gross absurdity and chaos; and secondly, there is a feasible explanation for the omission in section 17: sections 13 to 16 were taken from, and closely followed the wording of, the European Convention, while section 17 was taken from, and mimicked the wording of, the German Basic Law. This is but one instance where the (uncritical) eclectic composition of the Declaration of Fundamental Rights produced problems of interpretation. Other instances will be alluded to later on in their appropriate place.

The confines of fundamental freedoms are not subject to the general provisions of section 18 – again a section borrowed from the German Basic Law and without an equivalent in the European Convention. It is submitted that section 18 – which, amongst other things, requires "restrictions" of fundamental rights to be embodied in "a law of Parliament" – applies only to "derogations" as defined hereafter in paragraph (b). The following compelling reasons substantiate this submission:

- There may not be "a law passed by Parliament" that defines the alpha and the omega of constitutionally protected fundamental rights or which circumscribes the exact nature and limits of the entitlements included in such rights; and if one were to impose section 18 on the question of confines, the absence of such legislation would render the constitutional rights inoperative. It would be absurd, or at least highly impolitic, to conclude that the legislature could be permitted to sabotage the Declaration of Fundamental Rights through failure to enact laws that define the confines of a fundamental right in either of the two senses specified above.

- Although the confines of a fundamental right denote the boundaries of the right and the scope or frontiers of the entitlements it entails, such boundaries and frontiers are fundamentally different from the "restrictions" contemplated by section 18: one is here concerned with limitations that constitute part of the very substance of the fundamental right; it is part of its definition: *this* is where the right to life begins and ends; or, *that* is what property rights, as a matter of definition, comprise. Section 18 is concerned with external, as opposed to internal, limitations of a fundamental right; limitations that are superimposed by the legislature or the executive branch of government in respect of a fundamental right (with its definitional boundaries and substantive content of "a bundle of entitlements").

There is no law of parliament in Bophuthatswana which defines when life begins or ends, and the principle of *sic utere tuo ut alienum non laedas* is also not part of statute law (except for isolated mention of the principle in the above constitutional provisions). This fact, in spite of section 18, is in our opinion of no constitutional consequence.

(b) *Restrictions* of a fundamental right denote limitations that may be sanctioned by the repositories of state authority for certain specified purposes, within certain defined limits, and through the medium of a certain prescribed procedure. Restrictions in this sense do not constitute part of the definition of the fundamental right, though they may apply generally and need to be sanctioned by law.

Restrictions may take on the form of either derogation from or suspension of the fundamental right:

- *Derogations* from a fundamental right denote the partial limitation of the right in accordance with pertinent demands of the situation that prompted state intervention.
- *Suspension* of a fundamental right, on the other hand, signifies the total abolition of the fundamental right.

Here, the Declaration of Fundamental Rights leaves the interpreter on the horns of a dilemma. Section 18(1) seems to apply to restrictions in the sense of derogation as well as suspension.[50] Section 18(1) requires all restrictions to be sanctioned by (a) a law of parliament (b) with general application. Now, the problem is this: restrictions in the sense of derogations from fundamental rights as contemplated by section 18 have a certain continuity; they are written into the general law of the land and, relatively speaking, enjoy long-term validity – it makes sense, in a word, to provide in the constitution that such limitations of a fundamental right must be enacted in a law of parliament with general application,[51] and that the derogation provisions should not totally abolish the fundamental right or encroach upon its essence.[52] That, however, is not the case as far as suspensions of a fundamental right are concerned. It cannot possibly make sense to provide that the total abolition of a fundamental right must be embodied in a law of parliament (which assumes a relatively long duration of the suspension) with general application, as mandated by section 18(1). This would leave the legislature with a competence, in the cases where suspension of a fundamental right is authorised by the constitution, practically to abolish the right concerned on a more or less permanent basis. Suspensions would at best be legitimate in very special and exceptional circumstances and often for a limited time only, for instance while a certain emergency exists. Suspension of a fundamental right in such circumstances would come within the range of exceptions as defined in the next paragraph and which, in our opinion, are not subject to section 18.

The source of this problem is again a matter of history: section 18 was taken from the German Basic Law, which makes no allowance whatsoever for suspensions of a basic right (only for derogations).[53]

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50 The phrase "[e]xcept for the circumstances provided for in this Declaration . . ." in s 18(2) refers to suspensions.

51 S 18(1).

52 S 18(2).

53 The phrase, "[e]xcept for the circumstances provided for in this Declaration . . ." therefore does not appear in the corresponding art 19 of the German Basic Law.

The problem pertaining to suspension provisions may be restated as follows: if section 18 were to apply to the suspension of fundamental rights, it would mean that, for instance, a judgment of the Supreme Court sentencing a particular criminal to death,[54] or a decision of the government to reject an application for the establishment of a private educational institution,[55] or a decree for the expropriation of a particular farm,[56] or an instruction of the State President to suspend a political trial or of the Minister of Law and Order to deny a political detainee access to his legal representative,[57] would have to be converted into and decreed by "a law of Parliament". Furthermore, that law would have to have "general application" – which is simply not possible.

The absurdities that would ensue if that were to be the state of the law, dictate the conclusion that section 18(1) cannot possibly be applied to the suspension of fundamental rights; and the opening phrase of section 18(2), "[e]xcept for the circumstances provided for in this Declaration . . .", in any event makes the substantive provision of that subsection inapplicable to suspensions.

It is fair to conclude, therefore, that section 18 applies to derogation provisions only.

(c) The term *exceptions* to the rule of fundamental rights protection is used here to denote the abridgement of such rights when very special, extraordinary and legitimising contingencies require such abridgements. Whereas the circumstances that warrant derogations from a fundamental right are generally present and may be said to apply across the board, those that may found the imposition of an exception are of a passing nature; they obtain, for instance, while (and only for as long as) an emergency caused by a natural disaster or a political uprising prevails. Exceptions therefore designate essentially *temporary* intervention by the authorities as a legalised means of dealing with the situation.

Exceptions are not written into the general law of the land; the law only authorises their (occasional) imposition, while their actual implementation requires further state action.

In a state of political insurrection, for instance, the authorities may impose a ban on open air meetings (limitation of the freedom of assembly provision) or it may find it necessary to prohibit all gatherings (suspension of the freedom of assembly provision).

The Bophuthatswanan Constitution does not deal directly with exceptions but does so indirectly. That is to say, the imposition of exceptional limitations derives its legality from intermediary legislation, the legality of which is in turn dependent on a constitutional provision sanctioning that intermediary legislation by means of a derogation provision. Take the following example:

The derogation provisions contained in sections 13(2), 14(2), 15(2) and 16(2) make provision for curtailment of, respectively, the exercise of the right to privacy, the freedom to manifest one's religious belief, the right to exercise one's freedom of expression, and the exercise of freedom of peaceful assembly and of association with others, in the interest of national security and/or public safety. These derogation provisions may be relied upon as a constitutional basis

54 See s 10(1).
55 See s 13(3).
56 See s 17(2).
57 See s 12(7A).

for legalising the proclamation of a state of emergency in terms of section 27 of the Internal Security Act 32 of 1979 (B). In terms of section 28 of the latter act, the State President has authority to proclaim emergency regulations that may remain in force "for as long as the proclamation declaring the existence of such emergency remains in force"; and those regulations may substantively authorise such actions

> "as appear to him [the State President] to be necessary or expedient for providing for the safety of the public, or the maintenance of public order . . ."

The substance of the emergency regulations, in so far as it limits any of the above constitutional rights, would qualify as exceptional abridgements of those rights.

In the writers' opinion, the Internal Security Act is, but the emergency regulations as such are not, subject to the general dictates of section 18. The act embraces the derogation provisions sanctioned by the Declaration of Fundamental Rights, and each such provision must be meticulously scrutinised in the light of the enabling provisions of the constitution relied upon to sanction its validity. The requirements of section 18 must also be satisfied in each of those provisions. The emergency regulations, in turn, in so far as they constitute abridgements of any of the rights and freedoms guaranteed by the Declaration of Fundamental Rights, must also with precision comply with the relevant limitation provisions of the declaration; but, since the emergency regulations comprise exceptional limitations of fundamental rights, they need not satisfy the demands of section 18. The fact that emergency regulations are decreed by means of a presidential proclamation and not by an act of parliament, and that such regulations might not always apply generally – they ought indeed to confine their operation to the particular persons, objects or events that mandate emergency action – will not render those regulations unconstitutional.

The power of the State President to proclaim a state of emergency and to issue emergency regulations is not *per se* unconstitutional. However, if the security regulations were to abridge any of the fundamental rights guaranteed by the Declaration of Fundamental Rights, the regulations will, to the extent of such abridgements, in our opinion be null and void. Assume, for instance, that the security regulations make provision for detention without trial. This provision will, for its validity, be dependent on the derogation provision of section 12(3)(g), which authorises the "lawful detention" of a person "in the interests of national security or public safety". Section 27(1) of the Internal Security Act 32 of 1979 sanctions the proclamation of a state of emergency if "in the opinion of the President" the action or threatened action of any person or body of persons, or the prevailing circumstances, constitute a serious threat to "the safety of the public, or the maintenance of the public order" and the ordinary law of the land is inadequate to deal with that threat.

Two problems need to be addressed in this regard:

First, the enabling provision (s 12(3)(g)) speaks of "the interests of national security or public safety" and the derogation provision (s 27(1)) refers to "the safety of the public, or the maintenance of public order". While "public safety" and "the safety of the public" clearly means the same thing, that is not necessarily true of "national security" and "the maintenance of public order". If the state of emergency was proclaimed for the maintenance of public order, the court will have to establish whether restoring of the order was a matter of

"national security". If not, the detention provision in the emergency regulations will be null and void. The problem stems from the fact that "national security" has a more restricted meaning than "maintenance of public order".

The second problem emerges from the clear difference between "the interests of national security or public safety" *as a matter of fact* – as required by the enabling provision – and *the opinion of the President* that "the safety of the public or the maintenance of public order" requires emergency intervention – as provided by the derogation provision; and to add constitutional insult to injury, the substance of emergency regulations may, in terms of section 28(1) of the Internal Security Act, be founded on what "appear[s] to him" to be necessary or expedient for providing for the safety of the public or the maintenance of public order. The problem here is that the language preferred by the legislature ("in the opinion of the President" and "as appear to him") renders the question of the *de facto* existence of the emergency or the necessity or expediency of the measures decreed non-justiciable. Derogation from the right to liberty and security of one's person is only authorised if, *as a matter of fact*, national security or public safety requires one's "lawful" detention; and while the derogation provision excludes the jurisdiction of the court to inquire into the existence of that fact, any extraordinary detention provision in the emergency regulations will be unconstitutional.

Since emergency regulations by their very nature belong to the category of "exceptions" and are as such dependent for their legality on the *de facto* existence of the emergency at any particular time, section 28(1) of the Internal Security Act, proclaiming that emergency regulations shall retain their validity "for as long as the proclamation declaring the existence of such emergency remains in force", is constitutionally suspect.

The above reasoning will apply to all emergency regulations that make allowance for exceptional abridgements of any of the fundamental rights. Additional grounds for contesting the legality of abridgements of particular fundamental rights may be dictated by the wording of the constitution. For instance, derogation from freedom to manifest one's religion or belief may be justified "in the interest[s] of public safety" or "for the protection of public order",[58] but the right to privacy,[59] freedom of expression[60] and freedom of peaceful assembly and of association with others[61] may only be restricted in the interest of public safety. If, therefore, the state of emergency was proclaimed for the maintenance of public order, abridgements of this latter category of rights in the emergency regulations will be unconstitutional in any event.

It should be noted, though, that sections 13(2), 15(2) and 16(2) do make provision for derogation from the fundamental rights concerned "for the prevention of disorder". Since section 14(2) speaks of "the protection of public order", it must be assumed that the two phrases have a different meaning; and the wording of the emergency provisions in the Internal Security Act more closely resembles that of section 14(2).

(d) At the end of the line, whenever derogation or suspension provisions or exceptional intervention require implementation, a decision has to be taken by

58 S 14(2).
59 S 13(2).
60 S 15(2).
61 S 16(2).

a member of the bureaucracy, and in many cases that decision needs to be acted upon by the competent public servants. The *de facto deprivation* of a fundamental right in any given case thus occurs through the medium of an *ad hoc* administrative decision, followed – whenever applicable – by an executive act.

The language of the saving provisions in, for instance, section 13(2) – authorising intervention

> "by a public authority . . . in accordance with the law and [in so far as it] is necessary in a democratic society in the interests of national security, public safety or the economic well-being of Bophuthatswana, for the prevention of disorder or crime, or the protection of health or morals, or for the protection of the rights and freedoms of others"[62]

– have by and large the makings of a *de facto* deprivation activity. Similar clauses are to be found in sections 14(2), 15(2) and 16(2).

De facto deprivations are not always executed by means of an executive act or decision *per se* but may be required to be translated into a decree or proclamation in the *Government Gazette*. The latter form of execution, though it might resemble a law or enactment, nevertheless retains the essential characteristic and nature of an administrative act.[63]

4 THE DOCTRINE OF PROPORTIONALITY

In *Smith v Attorney-General, Bophuthatswana*,[64] Hiemstra CJ implanted into the *corpus iuris civitatis* of Bophuthatswana a constitutional norm taken from German law, known as the doctrine of proportionality:

> "There is another principle in the interpretation of a Bill of Rights which is applicable here. That is the 'principle of proportionality', called 'Verhältnismaβigkeit' by the Germans. It refers to the constitutional limitation of the State's power, in legislation as well as administrative action. Interference with the rights guaranteed in the Constitution is legal only when it is
> (a) allowed in the Constitution;
> (b) capable of achieving its purported objective;
> (c) necessary to achieve such purported objective in the sense that no lesser form of interference is available;

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62 In *Kekana Royal Executive Council v Minister of Law and Order supra* fn 17 37–38 it was decided that, since execution of the limitation provision contained in s 13(2) was confined to "a public authority", the demolition of a squatter dwelling pursuant to the Prevention of Illegal Squatting Act 52 of 1951 (which the court in that case found to have been legalised by s 13(2)) by a *private person* was not covered by the limitation clause under consideration and was therefore unconstitutional.

63 This proposition is borne out by the judgment of Lawrence AJ in *Molotlegi v The Minister of Law and Order supra* fn 17 31: "I however agree with the submission . . . that it is wrong to assume that a legal act which by its very nature constitutes administrative conduct is converted into law . . . simply because it is exercised through the medium of a proclamation as in this matter [referring to Proc 14 of 1988 in *Bophuthatswana Government Gazette* vol 17, no 244 of 1988-12-02, declaring the Bafokeng Women's Club to be an unlawful organization in terms of s 2 of the Internal Security Act 32 of 1979]." Counsel for the applicant had argued that the proclamation, being a law, must in terms of s 18 be of general application and not totally abolish the applicant's constitutional right to freedom of association with others or encroach upon the essence of that freedom. The court rejected that submission; which further goes to show that the provisions of s 18 are not applicable to administrative decisions taken, or executive acts performed, in the course of implementing the limitations to which the fundamental rights have been lawfully subjected.

64 *Supra* fn 17 201.

(d) reasonable or proportional in the sense that the purported objectives of such interference are as such lawful, adequate, necessary and of equal or superior weight, when balanced against the affected right."

The doctrine of proportionality was subsequently referred to in several judgments of the Supreme Court.[65] In *Segale v Government of Bophuthatswana*,[66] Waddington and Khumalo JJ (in a joint judgment) restated the crux of the doctrine, namely that

> "interference with rights guaranteed in the Constitution . . . must be proportional in the sense that it is necessary to achieve the purported objective, ie no lesser form of interference must be available".

In *Bopalamo v The Government and Other Cases*,[67] Waddington J highlighted the truism that

> "[t]he principle of proportionality is not of application . . . in the enactment of legislation which is not subject to the restrictions contained in s 18 of the Declaration";

and he went on to find that the power granted to the legislature by section 79(1) of the Bophuthatswanan Constitution to amend the Declaration of Fundamental Rights was not subject to section 18.

The judgment of Lawrence AJ in *Molotlegi v The Minister of Law and Order*[68] also made an important addendum to Hiemstra CJ's exposition of the principle of proportionality:

> "I do not think that the Learned Chief Justice in his remarks intended to exclude the provisions of Section 18(2) of the Constitution which specifically provides that in exceptional circumstances . . . a fundamental right and freedom may be '*totally abolished* or in its essence be enroached upon'."

The essence of this *dictum* is that the doctrine of proportionality does not apply in those cases where a fundamental right may be totally abolished or in its essence be encroached upon. However, as mentioned earlier, the example given by Lawrence AJ of such an instance was, unfortunately, ill chosen.[69] The fact is, though, that the doctrine applies to (all) derogations from the constitutionally protected rights and not to any of the suspension provisions.

The German doctrine of proportionality applies generally because the Basic Law makes no provision for the suspension of any basic right: not one of the basic rights may consequently be totally abolished or in their essence be encroached upon. The historical origin of the doctrine and its German source, as far as Bophuthatswana is concerned, dictate its application to derogation provisions only, and not to suspension provisions.

When, therefore, the State President orders the suspension of court proceedings for purposes of avoiding prejudice to a general criminal or public investigation into incidents of treason or sedition,[70] or the Minister of Law and Order refuses a request of the suspected perpetrator of treason or sedition to see his lawyer while he is in detention,[71] or the government refuses an application for

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65 See *Segale v Government of Bophuthatswana supra* fn 1 242F–H; *Bopalamo v The Government and Other Cases supra* fn 1 148D–G 155C–E; *Molotlegi v The Minister of Law and Order supra* fn 1 27–28.
66 *Supra* fn 1 242.
67 *Supra* fn 1 148.
68 *Supra* fn 1 28.
69 See fn 35 and the text accompanying fn 36.
70 S 8(4).
71 S 12(7A).

the establishment of a private school,[72] or the state exercises its power of expropriation,[73] the infringements of fundamental rights that attend the executive interventions need not be weighed up against any particular assessment of those fundamental rights.

It should be noted, though, that the notion of proportionality may apply to suspensions for reasons unrelated to section 18(2). For instance, the prohibition against "inhuman and degrading . . . punishment"[74] requires that a punishment must be proportional to the offence to which it relates.[75] When, therefore, the right to life is suspended by the death penalty,[76] disproportionality between the crime and the sentence would render the punishment unconstitutional.[77]

5 THE DOCTRINE OF A MARGIN OF APPRECIATION

Sections 13, 14, 15 and 16 of the Bophuthatswanan Constitution are almost identical to, respectively, articles 8, 9, 10 and 11 of the European Convention. Guidance as to the meaning of these sections of the Bophuthatswanan Constitution may, and should, therefore be sought in opinions of the European Commission of Human Rights and judgments of the European Court of Human Rights. However, in evaluating the degree of persuasive force to be accorded in Bophuthatswana to interpretations of the European Convention, one should bear in mind that the Strasbourg tribunals are not entirely on a par with the local Supreme Court. The European Commission and court are international institutions called upon to judge the municipal laws and executive acts of a diversity of national member states, while the Bophuthatswanan Supreme Court reviews the laws and executive acts of one political community only, of which the court itself constitutes a part. A second important element to consider is the introduction in Bophuthatswana of section 18, which – as we already know – was taken over from the German Basic Law. That section has no direct equivalent in the European Convention but, nevertheless, seemingly applies generally to all derogations, including those enunciated in sections 13 – 16.

The first of these two considerations should be borne in mind when the applicability in Bophuthatswana of the European doctrine of a margin of appreciation is considered. The commission and court, in terms of this doctrine, allow states parties to the convention a measure of discretion to decide what, in their special circumstances, would be necessary in the interest of, for instance, public safety, or for the protection of public order, health or morals, within the

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72 S 13(3).
73 S 17(2).
74 S 11.
75 In the Report of the European Commission of Human Rights in *The Greek Case* (1969) 12 *Yearbook of the European Convention on Human Rights* 186, "inhuman treatment" is defined as "at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable". Applying this directive to the concept of "inhuman punishment", Fawcett *Application of the European Convention on Human Rights* (1987) 42 adds to this standard definition: "and when forming part of criminal punishment, out of proportion to the offence".
76 S 10(1).
77 In *S v Chabalala supra* fn 1 627 – 628, Theal Stewart CJ rejected arguments of counsel for the appellant showing that the death penalty for "murder without extenuating circumstances" as sanctioned by s 277 of the Criminal Procedure Act 51 of 1977 was disproportionate to the crime and therefore an inhuman punishment.

meaning of the derogation clauses under consideration. The idea derived from, and may be likened to, the typical approach of a court of appeal when evaluating the finding of facts by the judicial officer who conducted the trial and "has seen the witnesses". In the case of the European Commission and Court of Human Rights, of course, not only questions of fact but also questions of law are considered to be primarily within the purview of the state party whose acts or law is under investigation.[78]

In the *"Lawless" Case*[79] – dealing with emergency regulations imposed by the United Kingdom in Northern Ireland – Sir Humphrey Waldock, President of the Commission of Human Rights, while explaining to the court the position taken by the commission in the matter, outlined the doctrine of margin of appreciation in the context of state security considerations:

> "The concept behind the doctrine is that Article 15 [dealing with derogations in times of war or other public emergency] has to be read in the context of the rather special subject-matter with which it deals; namely the responsibilities of a government for maintaining law and order in times of war or public emergency threatening the life of the nation. The concept of margin of appreciation is that a government's discharge of these responsibilities is essentially a delicate problem of appreciating complex factors and of balancing conflicting considerations of the public interest; and that, once the Commission or the Court is satisfied that the Government's appreciation is at least on the margin of the powers conferred by Article 15, then the interest which the public itself has in effective government and in the maintenance of order justifies and requires a decision in favour of the legality of the Government's appreciation."

In die *Handyside Case*,[80] which concerned the legality under the European Convention of conviction of the applicant under Britain's Obscene Publications Act 1959/1964, the doctrine was explained as follows:

> "48. . . . The Convention leaves to each Contracting State, in the first place, the task of securing the rights and freedoms it enshrines . . .
>
> [I]t is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them . . .
>
> Consequently, Article 10 §2 [dealing with derogation from freedom of expression] leaves the Contracting States a margin of appreciation. This margin is given both to the domestic legislature ('prescribed by law') and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force . . .
>
> 49. Nevertheless, Article 10 §2 does not give the Contracting States an unlimited power of appreciation. The Court, which, with the Commission, is responsible for ensuring the observance of those States' engagements (Article 19), is empowered to give the final ruling on whether a 'restriction' or 'penalty' is reconcilable with freedom of expression as protected by Article 10. The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its 'necessity'; it covers not only the basic legislation but also the decision applying it, even one given by an independent court . . ."

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78 See Morrison "Margin of appreciation in European human rights law" 1973 *Revue des Droits de l'Homme/Human Rights Journal* 265: "The function of these courts [appellate tribunals] is to correct errors of law; trial courts decide the facts. In the case of the European Human Rights Commission, this idea is carried one step farther – not even errors of law are within the Commission's purview, *per se*."

79 *Publications of the European Court of Human Rights* Series B (1960 – 61) 408.

80 *Publications of the European Court of Human Rights* Series A, vol 24 (1976) par 48 – 49.

It should be emphasised that the principle of a margin of appreciation was in general applied to all the components of derogation provisions in the European equivalents of sections 13 – 16 in the Bophuthatswanan Constitution. Janis and Kay[81] explain the basis of the doctrine as follows:

> "Underlying the doctrine of the margin of appreciation are two assumptions: First, what is necessary to serve interests may vary from state to state even in 'democratic societies'; and, second, a government's estimate of that necessity is entitled to some deference by an international court, presumably less familiar with the relevant circumstances."

It should be noted that Strasbourg jurisprudence does not reflect consistency in applying the doctrine of a margin of appreciation, and each opinion and judgment should therefore be carefully scrutinised in order to establish the extent to which pluralistic considerations may have influenced the outcome.

The *Sunday Times Case*[82] is often quoted as one in which the court was less indulgent in permitting a margin of appreciation. Following the thalidomide catastrophy of 1959 to 1962, and while civil actions relating to the tragedy were still in progress and being contemplated, the London *Sunday Times* published an article under the title: "Our Thalidomide children: a cause for national shame". A follow-up article was forestalled by a court judgment founded on contempt of court (the *sub judice* rule). The matter eventually came before the Strasbourg tribunals. The European Court of Human Rights, upholding the opinion of the European Commission of Human Rights, gave judgment for the *Sunday Times*. The court,[83] referring to its earlier judgment in the *Handyside Case*,[84] reiterated that the initial responsibility for securing the rights and freedoms enshrined in the European Convention lies with the High Contracting Parties. The court further recognised that while certain articles in the convention leave the High Contracting Parties a margin of appreciation in limiting particular rights and freedoms in order to accommodate their own needs with respect to, for instance, national security, territorial integrity, public safety, or impartiality of the judiciary, the said margin of appreciation was not unlimited. In the final analysis such derogations are subject to the supervision of, and a final ruling by, the court as to whether they are warranted within the meaning of the convention.

Commenting on this judgment, Van Dijk and Van Hoof remark:[85]

> "Unlike in previous cases with respect of Article 10(2), the Commission and Court in fact did not confine themselves here to a marginal review based on the 'margin of appreciation' doctrine. On the contrary, they instituted a comprehensive independent inquiry into the question of whether the requirement of necessity in a democratic society had been satisfied, without apparently being guided very much by the views of the national authorities."

Elsewhere the same authors observe:[86]

> "Even with regard to the establishment of the facts therefore the application of the 'margin of appreciation' doctrine is justified only *in so far as* the national authorities

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81 *European human rights law* (1990) 244. For a general overview of the application of this doctrine in Europe, see Van Dijk and Van Hoof *Theory and practice of the European Convention on Human Rights* (1984) 427 – 449.
82 *Publications of the European Court of Human Rights* Series A, vol 30 (1979).
83 §59.
84 *Supra* fn 80.
85 *Supra* fn 81 438.
86 *Idem* 447 – 448.

> are in so much better a position to judge on these facts that such an establishment cannot be made autonomously by the Strasbourg organs."

The principle underlying the doctrine of a margin of appreciation – the plurality of states and diversity of local circumstances – does not obtain in Bophuthatswana. In *Kekana Royal Executive Council v Minister of Law and Order*,[87] Comrie J therefore erred in applying the European notion of a margin of appreciation in support of his finding that the Prevention of Illegal Squatting Act 52 of 1951 did not constitute an unconstitutional infringement of the right, afforded in terms of section 13 of the constitution to "everyone", to respect of her private and family life. The requirements of the Declaration of Fundamental Rights must on the contrary be upheld more stringently than has been done in Europe in respect of corresponding provisions of the European Convention. European jurisprudence pertaining to derogations from fundamental rights must always be treated with the following question in mind: does the European opinion or judgment reflect a permissive approach dictated by the commission or court's indulgence when catering for a margin of appreciation? In Bophuthatswana, strict and uniform observance of the norms enunciated in the Declaration of Fundamental Rights is called for!

6 GENERAL DEROGATION CONDITIONS IN THE PRIVACY AND FREEDOM PROVISIONS OF THE DECLARATION OF FUNDAMENTAL RIGHTS

The derogation provisions of sections 13, 14, 15 and 16 introduced into the constitutional law of Bophuthatswana certain general concepts that require further clarification. Restrictions of the right to privacy,[88] freedom to manifest one's religious belief,[89] freedom of expression[90] and freedom of peaceful assembly and association with others,[91] must be sanctioned "in accordance with law" or "prescribed by law", and must furthermore be "necessary in a democratic society" for the purpose of obtaining certain objectives, specified in the concerned subsections, such as national security and public safety. These general derogation conditions of sections 13 – 16 will be considered next.

(a) "*Prescribed by law*"

The derogation provisions of sections 13(2), 14(2), 15(2) and 16(2) require the restrictions to be "in accordance with law"[92] or to be "prescribed by law".[93] These two phrases may be taken to have the same meaning.

Janus and Kay[94] note, with reference to the phrase "prescribed by law" in the corresponding provisions of the European Convention, that "[t]he value protected by this requirement is often summarized as the value of the 'rule of law' ".

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87 *Supra* fn 17 35 43.
88 S 13(2).
89 S 14(2).
90 S 15(2).
91 S 16(2).
92 S 13(2).
93 S 14(2), 15(2) and 16(2).
94 *Supra* fn 81 297.

"Law" in that sense includes any rule of conduct that would qualify as a juridical norm, irrespective of the law-creating agency responsible for sanctioning the norm.[95] There is the added requirement, though, that the rule of conduct must comply with the demands of legal certainty and, consequently, parliamentary legislation defining the limits of a fundamental right within the confines of sections 13(2), 14(2), 15(2) or 16(2) can be struck down by the Supreme Court on the ground of vagueness.[96]

As to the meaning of "law", matters are complicated in Bophuthatswana by section 18(1), which requires all derogation provisions, including those contained in sections 13(2), 14(2), 15(2) and 16(2), to be sanctioned by "a law of Parliament". It has been submitted earlier[97] that the phrase "in accordance with law" or "prescribed by law", on the one hand, and "restricted only by a law of Parliament", on the other, must be taken to mean the same thing. In order to reconcile the two phrases, applying the appropriate standards of statutory interpretation, effect must be given to the (narrower) meaning common to both. In this instance, the wider concept of "law" in sections 13(2), 14(2), 15(2) and 16(2) must give way to the more limited concept of "a law of Parliament" as required by section 18(2). The interpretations of "prescribed by law" in judgments of the European Court of Human Rights as including all juridical norms irrespective of their source,[98] therefore cannot be applied in Bophuthatswana.[99] However, the European precedents relating to the demands of legal certainty[100] do retain their persuasive force in Bophuthatswana.

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95 See the *Sunday Times Case supra* fn 82 par 47 (holding that "law" includes the common law); the *Barthold Case, Publications of the European Court of Human Rights* Series A, vol 90 (1985) par 46 (holding that the rules of professional conduct of a veterinary council constitutes "law").

96 The *Sunday Times Case supra* fn 82 par 49, where the European Court of Human Rights remarked: "In the Court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. First, the law must be adequately accessible: the citizen must be able to have an indication what is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice." See also the *Barthold Case supra* fn 95 par 45.

97 See *supra* par 2(c).

98 See *supra* fn 95.

99 In *Kekana Royal Executive Council v Minister of Law and Order supra* fn 17 34, Comrie J therefore erred in deciding that "the word 'law' (where it appears in phrases such as 'in accordance with the law' or 'prescribed by law') is not confined to statutes and regulations but includes rules of the common law". See also Dlamini and Manda "The Bophuthatswana (Constitution) Bill of Rights and security legislation: a rule of law appraisal" 1993 *Stell LR* 106, who erroneously maintain that the "law" sanctioning the limitation of a fundamental right could in terms of the constitution be promulgated in the form of subordinate legislation.

100 See *supra* fn 96.

(b) "*Necessary*"

The word "necessary" was considered, in the context of the European Convention, in the *Handyside Case*,[101] where the court observed:

> "The Court notes at this juncture that, whilst the adjective 'necessary', within the meaning of Article 10 §2, is not synonymous with 'indispensible' (cf., in Article 2 §2 and 6 §1, the words 'absolutely necessary' and 'strictly necessary' and, in Article 15 §1, the phrase 'to the extent strictly required by the exigencies of the situation'), neither has it the flexibility of such expressions as 'admissible', 'ordinary' (cf. Article 4 §3), 'useful' (cf. the French text of the first paragraph of Article 1 of Protocol No. 1), 'reasonable' (cf. Article 5 §3 and 6 §1) or 'desirable'. Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context."

In the *Case of Young, James and Webster*,[102] the court stated that an inquiry into the "necessity" of a derogation is to be founded on three principles:

- "Necessity" does not have the flexibility of concepts such as "useful" and "desirable";
- pluralism, tolerance and broadmindedness must be recognised as hallmarks of a democratic society; and
- any restriction imposed on a fundamental right must be proportionate to the legitimate aim pursued.

The contribution of the European Commission of Human Rights in this regard may be gleaned from its opinion in *Application No 7805/77 (X and the Church of Scientology v Sweden)*,[103] where it was said:

> "It emerges from the case law of the Convention organs that the 'necessity' test cannot be applied in absolute terms, but require the assessment of various factors. Such factors include the nature of the right involved, the degree of interference, ie whether it was proportionate to the legitimate aim pursued, the nature of the public interest and the degree to which it requires protection in the circumstances of the case."

(c) "*In a democratic society*"

There is no comprehensive definition in any of the opinions of the European Commission of Human Rights or in judgments of the European Court of Human Rights of the essential features of a "democratic society". Certain elements of the concept of democracy may, however, be gleaned from European jurisprudence in general.[104] Resolution 78(8) of the Council of Ministers refers to "the right of access to justice" as an "essential feature of any democratic society"; in the *Handyside Case*,[105] the court proclaimed freedom of expression to be "one of the essential foundations" of a democratic society and referred to "the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society' "; in the *Case of Klass*[106] the court proclaimed the rule of law to be a foundational principle of a democratic society, and went on to say:

> "The rule of law implies, *inter alia*, that an interference by the executive authorities with individual's right should be subject to an effective control which should normally be assured by the judiciary, at least as a last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure."

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101 *Supra* fn 80 48.
102 *Publications of the European Court of Human Rights* Series A, vol 44 (1981) par 63.
103 European Commission of Human Rights (1979) 16 *Decisions and Records* 68 par 5.
104 See Van Dijk and Van Hoof *supra* fn 81 449.
105 *Supra* fn 80 par 49.
106 *Publications of the European Court of Human Rights* Series A, vol 28 (1979) par 55.

In the *Case of Young, James and Webster*,[107] the court added the following observation in respect of the concept of a democratic society:

> "Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position."

As to the substantive pertinence of the requirement of a derogation having to be "necessary in a democratic society", Van Dijk and Van Hoof[108] summarise the state of affairs in Europe as follows:

> "The notion of 'democratic society' hardly functions . . . in the Strasbourg case-law as a separate criterion in the assessment of the admissibility of restrictions. If the national authorities hold that a restriction in itself was necessary and this necessity is recognized by the Strasbourg organs, the latter are inclined to conclude that the assessment that this necessity existed in a democratic society is implied in the fact that the contracting States are democracies. Thus the issue that has to be tested becomes itself the criterion."

The only case in Bophuthatswana thus far in which the court tried to make something of the requirement that derogations from the concerned fundamental rights should be compatible with the general attributes of a democratic society was *Segale v Government of Bophuthatswana*.[109] The case concerned a provision in section 31 of the Internal Security Act 32 of 1979, which required prior ministerial permission for the holding of any gathering of more than 20 persons, which permission the minister could not refuse save in certain specified circumstances.[110] Judges Waddington and Khumalo, in a joint opinion, found this provision to be unconstitutional, because, *inter alia*, the constraint was found not to be "necessary in a democratic society".

The problem with the requirement in section 31, according to Waddington and Khumalo JJ, was that it placed a *permanent* ban on public meetings of more than 20 people, irrespective of whether the interests of national security, territorial integrity or public safety, or the prevention of disorder or (exercise of) any of the other "police powers" mentioned in the sections concerned demand such a ban. Applying the norms of a democratic society[111] to this derogation, the court emphasised *free elections* as a particular attribute of a "democratic society"; and free elections require *election campaigns* (which include the holding of public gatherings of (preferably) more than 20 people). Another incident of a "democratic society" that was emphasised in this case was the *free exchange of ideas*, particularly at election times and with a view to enlightening public opinion.

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107 *Supra* fn 102 par 63.

108 *Supra* fn 81 449.

109 *Supra* fn 1, overruled on appeal by *Government of the Republic of Bophuthatswana v Segale supra* fn 1.

110 S 31 was subsequently amended by the Internal Security Amendment Act 5 of 1991. The provision was made applicable to all gatherings, regardless of the number of people attending, and gatherings of registered political organisations were added to the list that does not require ministerial permission. As to the constitutionality of the amended provision, see *Mokwele v Government of the Republic of Bophuthatswana* case no M86/92 (BGD) 1993-08-12 (unreported).

111 Waddington and Khumalo JJ stated (243 – 244) that "democratic society" in the present context does not signify "some hypothetical democratic society" but the type of democratic society to which Bophuthatswana itself belongs, as established by its constitution.

In *Government of the Republic of Bophuthatswana v Segale*[112] – a judgment of the Appellate Division that overruled the Supreme Court judgment in the matter – the court made mention of freedom of speech and freedom of assembly as "the democratic right . . . of every citizen".[113] Mr Justice Galgut went on to explain that these democratic freedoms may be subjected to restrictions in terms of the constitution, but he failed to explain that such restrictions would be lawful only if they were indeed found to be necessary in a democratic society for any of the purposes stipulated in sections 15(2) and 16(2). Seeing that freedom of speech and freedom of assembly are here (rightly) identified as essential components of the concept of "democracy", an accurate conclusion to be derived from this statement would be that those freedoms could be restricted only if it were considered necessary for the eventual safeguarding of those very same freedoms. Restrictions under the present heading would in other words be justified only if those restrictions were aimed at persons or institutions out to destroy freedom of speech and of assembly.

There was also a brief reference to democracy in a few other cases. In *Nyamakazi v The Minister of Law and Order*[114] mention was made of "divergent political views" being "normal and acceptable" in a democratic country, and of "freedom of assembly" being a "fundamental and basic right" in such countries. Furthermore, in "a stable democratic country", everyone was said to have "the right to form associations and hold meetings for any reason whatsoever provided they are not contrary to the law". In *Bokaba v The Minister of Law and Order and Other Cases*[115] Comrie J, while speaking out against detention without trial, expressed the view that in a democratic society one would not expect encroachments "more than was necessary" on "the fundamental right to personal liberty". In *Kekana Royal Executive Council v Minister of Law and Order*,[116] Comrie J added to the list of democratic norms (without further definition), "the rule of law" and the "due process of law".

(*to be continued*)

112 *Supra* fn 1.
113 449, with reference to *S v Turrel* 1973 1 SA 248 (C) 256 and to s 15 and 16 of the Bophuthatswanan Constitution.
114 Case no CA 185/90 (BGD) 1990-12-13 (unreported) 7 – 8 8 – 9.
115 *Supra* fn 17 9.
116 *Supra* fn 17 42.

BUTTERWORTHS-PRYS

Dit doen die redaksie genoeë om aan te kondig dat die Butterworths-prys vir die beste eersteling-bydrae van 1993 toegeken is aan:

Mnr APH Cockrell
Universiteit van Kaapstad

The LOA life register – a snap survey of possible legal pitfalls*

WG Schulze
BLC LLB
Senior lecturer in Mercantile Law, University of South Africa

OPSOMMING

Die LOA-lewensregister – 'n blitsopname van moontlike regslaggate

Die Vereniging van Lewensversekeraars van Suid-Afrika (Engels: LOA), hou 'n lewensregister waarin daar mediese inligting betreffende alle aansoekers om lewensversekeringsdekking aangeteken word. Een van die metodes wat deur die vereniging aangewend word om mediese inligting te versamel, is om die aansoeker om lewensversekering skriftelik te laat toestem dat enige geneesheer of ander persoon mediese inligting oor die aansoeker aan die vereniging mag verskaf. Hierdie (en ander) inligting word in 'n sentrale gerekenariseerde register aangeteken en aangewend om aansoeke om lewensversekering te beoordeel. Hierdie artikel ondersoek die regsgeldigheid van die toestemmingsklousule asook die vraag na die moontlike inbreukmaking op die aansoeker se reg op privaatheid deur die bewaring en verspreiding aan ander versekeraars van mediese inligting via die lewensregister.

1 INTRODUCTION

The majority of domestic life insurance companies are members of the Life Office Association of South Africa (hereafter referred to as the LOA). All members of the LOA are compelled to participate in the Life Registry system run by the LOA. The Life Registry system is designed to forewarn offices of an impairment which may not have been disclosed when an assurance was applied for.[1] A number of issues are raised by the Life Register, some of which will be touched upon in this analysis. I shall discuss the reasons, as seen from an insurance-law point of view, for the bringing about of the Life Register. I shall also refer to the vexed waiver clause which purports to be a consent by the proposer for life-cover to the particular life insurance company, to collect information concerning the proposer's health. I shall argue that this waiver clause fails to constitute a valid consent for an intrusion of the proposer's privacy. I shall also argue that the clause, and for that matter any other similar type

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* This article is an expanded version of a lecture delivered at the Life Office Association's "Underwriting Forum" at the BIFSA Conference Centre, Midrand on 1993-03-26.

1 To use the wording of the rules of the registry. For an exposition of the origin of the (outdated) distinction between the concepts insurance and assurance, see Visser "Two insurance bills and insurance-contract law: a furtive reconnaissance" 1991 *SA Merc LJ* 20. As to the different basic forms of life insurance and the life insurance contract in general, see Havenga *The origins and nature of the life insurance contract in South African law with specific reference to the requirement of an insurable interest* (LLD thesis Unisa 1993) 1 – 2.

of clause, does not and will not in a court of law qualify as a valid consent to store and to distribute to third parties information concerning the proposer's health. Finally, I shall refer briefly to the position in the United States of America regarding the legislative protection of privacy as well as the possibility of introducing these and other data-protection regulations in South Africa.

2 THE DUTY TO DISCLOSE AND THE LIFE REGISTER

As a rule, there is in our law no general duty upon contracting parties to disclose to one another any facts or circumstances known to them which may influence the other party in deciding whether to conclude the contract. One exception to this rule is where a relationship of trust or confidence exists between the parties.

In the insurance context it is generally accepted that such a relationship exists between the proposer for insurance and the insurer. Consequently, apart from positive misrepresentation, failure to disclose or silence as to material facts or information by one of the contracting parties (normally the proposer for insurance), may entitle the other party to avoid the contract. An insurer is therefore entitled to avoid an insurance contract where the proposer conceals a material fact or neglects to disclose it in the proposal form or otherwise. The fact that the proposer is in a better position to know of facts which may affect the risk is seen as a justification for imposing a duty of disclosure on him. This duty to disclose has been the subject of intense criticism.[2] Without scrutinising the different points of criticism it suffices to say that such a duty does exist and is alive and well.[3]

This duty of disclosure relates not only to material facts which lie within a party's actual knowledge but also to material facts of which the particular party had constructive knowledge.[4] Constructive knowledge entails those facts of which the applicant ought to have known, or would have known, were it not for his own negligence. The test to establish whether information should be disclosed, is whether the reasonable man (not the reasonable insurer or insured) would consider that it should be conveyed to the prospective insurer so that it could reach a decision whether it would accept the risk or charge a higher premium than normal.[5]

In spite of this rather burdensome duty to disclose material facts which rests upon the proposer, insurers still experienced difficulties over the years to extract all the relevant information in order to establish the compass of the proposed

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2 See in general Hasson "The doctrine of uberrima fides in insurance law – a critical evaluation" 1969 *Mod LR* 632–634.

3 See *Gordon and Getz on the South African law of insurance* by Davies (1993) 111–119; Reinecke and Van der Merwe *General principles of insurance* (1989) par 120. See also the recent case law on this topic cited in fn 5 hereunder.

4 See *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A) 436E.

5 See Van Niekerk "Enkele opmerkings oor die openbaringsplig by versekeringskontrakte" 1989 *SA Merc LJ* 93–99; *President Versekeringsmaatskappy Bpk v Trust Bank van Afrika Bpk* 1989 1 SA 208 (A) 216E–F; *Videtsky v Liberty Life Insurance Association of Africa Ltd* 1990 1 SA 386 (W) 388B–389D; *Pillay v SA National Life Assurance Co* 1991 1 SA 363 (D) 368H–370A; *Qilingele v South African Mutual Life Assurance Society* 1993 1 SA 69 (A) 73B–F.

risk.[6] This was (and still is, for various reasons) particularly true in the case of applications for life insurance cover.

In order to overcome this problem of a lack of information, especially information on the medical history and general medical condition of the proposed insured life, the LOA decided to establish a Life Registry. Information which appears in the Life Register is gathered in different ways,[7] one of which is the signing of a waiver clause by every proposer for life insurance. More about this clause later.[8]

Information obtained from or through the medium of the Life Registry is made available only to other members of the LOA. Strict control over the storage and distribution of collected information is an attempt to protect the interest of insurer and insured.

3 THE LIFE REGISTER AND THE CONCEPT OF PRIVACY

Privacy as a legal term first arose in 1890 in the United States of America[9] and has retained its status as a vogue word ever since.[10] It has been described as perhaps the most personal of all legal principles,[11] and may be defined as a

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6 On the history and early (fraudulent) practices of insurers (and insureds), see in general Van Niekerk *An introduction to and some perspectives on the sources and development of Roman-Dutch insurance law with appendices containing the more important Roman-Dutch insurance legislation* (1987) 27–30 and in particular the authority referred to at 28 fn 65.

7 Not all the methods employed by insurance companies are always above board. Consumer investigative companies (also known as the underground gumshoes of the insurance trade) are frequently mandated to gather information on insureds by talking to their neighbours or fellow employees. These investigators will even dress as priests or physicians to roam the corridors of hospitals in search of medical information about individuals who have filed insurance claims (see Smith *Privacy – how to protect what's left of it* (1979) 106–107).

8 Apart from the pre-contractual need for information concerning the insured, an insurance company also requires certain information once the insured has filed a claim. In investigating insurance claims, insurance companies sometimes use surveillance techniques. In regard to the rights of the insured and the duties of the investigator, see Broghammer "Invasion of privacy by defence surveillance" *FICC Quarterly*/Summer 1990 432.

9 See the much referred to article by Warren and Brandeis "The right to privacy" 1890 *Harv LR* 193.

10 The spate of literature published on this topic serves as proof of this statement. A small fraction of the more readily available Anglo-American materials on this topic (and which was also consulted in the writing of this article) includes: Ernst and Schwartz *Privacy – the right to be let alone* (1968); Miller *The assault on privacy – computers, data banks, and dossiers* (1971); Mayer *Rights of privacy* (1972); Jones (ed) *Privacy* (1974); Sobel (ed) *War on privacy* (1976); Young (ed) *Privacy* (1978); Smith *Privacy – how to protect what's left of it* (1979); Flaherty *Privacy and government data banks – an international perspective* (1979); Wacks *The protection of privacy* (1980) (Wacks *Protection*); Hoobler and Hoobler *Your right to privacy* (1986); Sloan (ed) *Law of privacy – rights in a technological society* (1986); Hixson *Privacy in a public society – human rights in conflict* (1987); Wacks *Personal information – privacy and the law* (1989) (Wacks *Information*); Brill *Nobody's business – paradoxes of privacy* (1990); Hendricks, Hayden and Novik *Your right to privacy* (1990); Kupferman (ed) *Privacy and publicity* (1990); Elder *The law of privacy* (1991); Samar *The right to privacy – gays, lesbians, and the Constitution* (1991); Bennett *Regulating privacy – data protection and public policy in Europe and the United States* (1992).

11 See Ernest and Schwartz 1.

person's right to be left alone and his right to seclusion in his private life.[12] The concept of privacy also includes the individual's right to prevent or control intrusions on his private life as well as the collection and dissemination of information about himself.[13]

The right to privacy is undoubtedly recognised as an independent right of personality in South African law.[14] Privacy may be infringed in two ways only, namely through intrusions (acquaintance) on and disclosure (revelation) of private facts in a manner which is contrary to the aims and wishes of the person whose right is being infringed. The acquaintance with personal facts should not only be contrary to the subjective will of the prejudiced party, but should at the same time, viewed objectively, be contrary to the views of the community or unreasonable. South African case law places particular emphasis on the concept of the *boni mores* or unreasonableness as the criterion for wrongfulness.[15] If a violation of privacy is not unlawful, no delict is committed.[16]

When will a violation of privacy through an act of intrusion then be unlawful? Two different acts of intrusion may be distinguished, namely the acquaintance with private facts where such acquaintance is (a) totally prohibited, or limited to specific persons; and (b) permissible for an indeterminate but limited number of persons. Every acquaintance with facts in situation (a) contrary to the aims and wishes of the holder of the right, is *prima facie* contrary to the opinion of the community and thus in principle wrongful.[17] Instances of such acts of intrusion which have already served before our courts and which are relevant for current purposes are the following: the reading of private documents[18] and the taking of an unauthorised blood test.[19] By contrast, acquaintance with facts in situation (b) will only be wrongful in principle if it is contrary to human nature, for example shadowing a person in public places or collecting information on him.[20] Each set of facts must, however, be judged

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12 See McQuoid-Mason *The law of privacy in South Africa* (1978) 100 (McQuoid-Mason *Privacy*); McQuoid-Mason "Consumer protection and the right to privacy" 1982 *CILSA* 136 (McQuoid-Mason *Consumer*); Neethling, Potgieter and Visser *Law of delict* (1994) 333 – 335; Neethling *Persoonlikheidsreg* (1991) 31 – 37 (Neethling *Persoonlikheidsreg*). Privacy in the sense of "limited accessibility" is also described as a cluster of three related but independent components, to wit, secrecy (information about an individual), anonymity (attention paid to an individual) and solitude (physical access to an individual) (see Wacks *Information* 15 – 16).

13 See McQuoid-Mason *Privacy* 91 – 100; Neethling *Persoonlikheidsreg* 226 – 246 275 – 290.

14 See *O'Keeffe v Argus Printing and Publishing Co Ltd* 1954 3 SA 244 (C) 249C – D; Neethling "Grondslag vir die erkenning van 'n selfstandige persoonlikheidsreg op privaatheid in die Suid-Afrikaanse reg" 1976 *THRHR* 128; Neethling *Persoonlikheidsreg* 31 – 37 223 – 226; *Boka Enterprises (Pvt) Ltd v Manatse* 1990 3 SA 626 (ZH) 632E – I; *Nell v Nell* 1990 3 SA 889 (T) 895H – I; *Culverwell v Beira* 1992 4 SA 490 (W); *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 2 SA 451 (A) 462B – E; *Jansen van Vuuren v Kruger* 1993 4 SA 842 (A) 849E – G. A further important aspect of the *Sage Holdings* case relates to the protection afforded to a juristic person in regard to personality rights otherwise than via the law governing defamation. *Sage Holdings* is the first South African decision in which a juristic person's right to privacy was expressly acknowledged (462C – E).

15 See Neethling *Persoonlikheidsreg* 226; the *Sage Holdings* case *supra* 462F – 463B.

16 See Neethling, Potgieter and Visser 29.

17 See Neethling *Persoonlikheidsreg* 232; see also the *Sage Holdings* case *supra* 464F – G.

18 See *Reid-Daly v Hickman* 1981 2 SA 315 (ZAD) 323C – D.

19 See *Seetal v Pravitha* 1983 3 SA 827 (D) 861C.

20 See Neethling *Persoonlikheidsreg* 232 – 233 279 – 280; *Epstein v Epstein* 1906 TH 87; *S v Bailey* 1981 4 SA 187 (N) 189 – 190.

in the light of its own circumstances and in the view of that particular community.[21]

Apart from intrusion on (acquaintance with) private facts, privacy may also be infringed through an act of disclosure or revelation. Such an infringement will arise where, against the wishes and intention of the injured party, an outsider reveals to third persons personal facts regarding such injured party, which although known to the outsider, none the less remain private.[22] Three acts of disclosure may be distinguished, namely disclosure of private facts (a) acquired by a wrongful act of intrusion; (b) meant only for specific persons; and (c) meant only for an indeterminate but limited number of persons. It is important to note that an infringement of privacy will have taken place only if the injured party is indeed identified with the facts disclosed. If the identity of the injured party cannot be linked with the disclosed facts, no infringement of privacy has taken place.[23]

The first act of disclosure normally does not pose any problem. There can be no doubt that if a person acquires knowledge of private facts through a wrongful act of intrusion, any disclosure of those facts by such person, or by any other person, also constitutes an infringement of the right to privacy in principle.[24]

The second act of disclosure raises problems with regard to the question of wrongfulness. There is a distinction between disclosure to an individual (or a small group of persons) and publicity (disclosure to an unlimited number of persons). A disclosure to an individual or a small group of persons is, as a general rule, harmless and in accordance with human nature. This does not, however, mean that such disclosures are never unreasonable in the opinion of the community. The law will provide protection whenever the opinion of the community demands such protection. Specific confidential relationships such as between doctor and patient[25], banker and client, and insurer and insured[26] call for the protection of the privacy of the injured party. The underlying reason for this protection is that the holder of the right is obliged to disclose certain facts about himself to the other party.[27]

The third act of disclosure relates to the situation where an indeterminate number of persons acquire knowledge of private facts in accordance with the aims and wishes of the holder of the right. This type of disclosure to individuals (or a small group) is not wrongful, since it accords with human nature and general legal sentiment. If, however, the disclosure is made to an unlimited number of people, it will be wrongful.[28]

Finally, it is important to note that the fixation of private facts will also create the possibility of an intrusion of privacy. The concept fixation entails the

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21 See Neethling *Persoonlikheidsreg* 227 – 232.
22 See *idem* 232 fn 96.
23 See Elder 162 – 164; Neethling *Persoonlikheidsreg* 232; Neethling "Foto's en privaatheidsbeskerming" 1992 *THRHR* 273 – 274.
24 See Neethling *Persoonlikheidsreg* 232 – 233; the *Sage Holdings* case *supra* 463F – G.
25 See McQuoid-Mason *Privacy* 175 – 177 for examples of disclosures concerning someone's physical deformities and health; see also the *Jansen van Vuuren* case *supra* concerning the disclosure by a doctor that his patient had AIDS.
26 See Reinecke and Van der Merwe par 120.
27 See Neethling *Persoonlikheidsreg* 233 – 238.
28 See *idem* 238 – 244.

embodiment of private facts by way of photography, photocopying, tape recordings and computer technology. It is argued that the mere fixation of private facts will be wrongful in principle. This will be the case even where the person who has fixed the private information was entitled to be acquainted with the private facts. Such a fixation is not deemed to be in accordance with human nature. Furthermore, disclosure of embodied private facts is of a more serious nature than the mere communication of the facts.[29]

Before applying these legal principles in answering the question whether the Life Register constitutes an intrusion on and/or a disclosure of the applicant for insurance's privacy, it is also important to refer to the various relevant grounds of justification which may apply to the right of privacy. The defences which rebut the wrongfulness of the alleged wrongdoer's conduct and may be used to defeat a claim for intrusion on or disclosure of privacy include the following: (a) justification; (b) privilege; (c) fair comment; (d) consent; (e) necessity; (f) self-defence; and (g) statutory authority.[30]

For present purposes I will concern myself with the defence of consent only. The vexed waiver clause is supposed to constitute a valid consent for an intrusion on and disclosure of the applicant's privacy. Consent will be a valid defence to an action for invasion of privacy, provided the invasion takes the form consented to. The defence of consent will avail only where the injured party had knowledge, appreciation and consent concerning the invasion.[31] Consent given under duress is not valid consent.[32] The consent must also be given voluntarily in a broad sense of the word and must not be *contra bonos mores*, that is, contrary to the opinion of the community. Consent to an unlimited intrusion on one's privacy for an indeterminate period of time does not satisfy the requirement of knowledge, appreciation and consent. It is possible to revoke a consent, even if it is supposedly irrevocable. Although such a revocation will constitute breach of contract, a person cannot be deprived of his right to revoke his consent.[33]

Let us now turn to the legal consequences of the waiver clause which is present in every application for life insurance underwritten by members of the LOA. The current clause reads as follows:

> "I irrevocably authorise and request any doctor or other person who may be in possession of, or hereafter acquires, any information concerning my health up to the present time to disclose such information to the ABC Insurance Company Limited, and I agree that this authority and request shall remain in force after my death as well as prior thereto."

This waiver clause (or "authority and request" as it is also described in Rule 10 of the Life Registry's Rules), merits a number of comments.[34]

First of all, there can be no doubt that the action of collecting and storing confidential information about another person's health in principle amounts

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29 See *idem* 244 – 245.
30 See McQuoid-Mason *Privacy* 217 – 218; Neethling *Persoonlikheidsreg* 247 – 260.
31 See *Waring & Gillow Ltd v Sherborne* 1904 TS 340 344.
32 See Elder 192; McQuoid-Mason *Privacy* 231 – 232; Neethling *Persoonlikheidsreg* 97 – 99 258 – 259.
33 See Neethling, Potgieter and Visser 91 – 92.
34 Apparently the LOA is in the process of reformulating and adapting this waiver clause. The present clause is, however, the one currently in use (and has been in use over the past few years) and I will restrict my discussion to an analysis of this particular clause.

to wrongful invasion of privacy.[35] The subsequent disclosure and circulation of such information to other members of the Life Office Association also in principle amounts to a wrongful invasion of privacy, since it is the disclosure of private facts.[36]

Secondly, the waiver clause purports to act as consent to the intrusion on and disclosure of privacy. It is my submission that this clause fails to act as valid and lawful consent. The first comment to be made concerns the so-called irrevocability of the applicant's consent. As indicated above, consent can be revoked at any time preceding the defendant's conduct even it was given irrevocably. The effect of such a revocation will be that the insured commits breach of contract. It is, however, only possible to commit breach of contract if a contract has come into being between the applicant for insurance and the insurer. Before the acceptance of the applicant's proposal, no contract exists and breach of contract will therefore not be possible. Only after the insurer has accepted the proposal will a contract come into being.[37]

The first reason why this waiver fails to be a valid consent is the fact that the consent given is too wide. The consent contained in the waiver is an authorisation to an unlimited number of persons, to disclose facts concerning an exceptionally comprehensive topic (the applicant's health), for an indeterminate period of time.[38] One of the requirements for a valid consent is that the person giving his consent must have full knowledge and appreciation about the consent given. It can hardly be said that someone has full knowledge and appreciation about consent which relates to actions beyond his wildest dreams and which will be in force even after his death!

A second reason for questioning the validity of this consent is to be found in the instruction given by the applicant that the information should be disclosed to the specific life insurance company. This instruction "authorises" the insurer to collect information, but not to store and to distribute the information through the medium of the Life Registry. Not only is the storage and further distribution of information not authorised, but there does not appear any indication whatsoever in the proposal form concerning the existence and function of the Life Register. There can therefore be no question about any possibility of implied consent. The fact that the information is disclosed to a limited number of persons only, does not rescue the conduct of the particular insurer from being characterised as a wrongdul invasion of privacy. Because of the existence of the special relationship between an insurer and an insured, such a disclosure, even to a limited number of persons and in coded form, will still be unlawful.

Thirdly, the question can be raised whether the consent contained in the waiver is given voluntarily. Nowadays all life insurance proposal forms underwritten by members of the LOA contain such a clause. A life-insurance policy is an indispensable instrument of finance. Financial institutions often require the cession of a life policy in their favour to cover the repayment of a mortgage,

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35 See McQuoid-Mason *Privacy* 175 – 177; Neethling *Persoonlikheidsreg* 231 – 232 279 – 280 282 – 283.

36 See McQuoid-Mason *Privacy* 169 *et seq*; Neethling *Persoonlikheidsreg* 232 *et seq* 283.

37 See Reinecke and Van der Merwe par 44 46.

38 This type of clause in insurance applications has been described as "a blank cheque with no limit of time . . . an unlimited search warrant" (see Ellis 109).

a loan or even an overdraft facility for a significant amount.[39] The concerned financial institution is generally very "helpful" in "recommending" a particular insurance company for this purpose. More often than not, a financial link exists between the financial institution and the insurer.[40] Rather, it is by economic necessity and adhesion that the applicant must consent to such intrusion, with little real choice in the matter.[41] This fact, together with the reality that no policy will be issued if the applicant refuses to sign the waiver, casts serious doubt upon the voluntariness of the "consent" contained in the waiver.

What, then, is the effect of all this? The life insurance industry is, in my opinion, exposed to a large number of delictual claims from thousands of policyholders. All that is required, is a single test case by an aggrieved insured to bring this gulf of litigation about.

4 COMPUTER DATA BANKS AND INSURERS – THE AMERICAN EXPERIENCE

4 1 Introduction

It has been said that the invention of the computer has led to a "cybernetic revolution" in the collection and processing of data concerning private individuals.[42] As every man goes through life, he fills a number of forms for the record, each containing a number of questions, resulting in hundreds of little threads radiating from him. Computer data banks are used to store many of these threads, which can be analysed and processed at speeds thousands of times faster than through earlier conventional methods.[43] Once collected and stored, the information is used as the basis for making decisions affecting all walks of life. Insurance, employment, credit, benefit eligibility and even admission to a university are dealt with almost exclusively on the basis of precollected information, not person-to-person encounters.[44] The use of computers is also singled out as one of the greatest threats to the privacy of the individual in industrial countries today.[45] The threat which computers pose for privacy lies in the fact that they facilitate the maintenance and retention of extensive records; make data easily and quickly accessible from any distant point; make it possible for data to be transferred from different systems; make it possible to combine data in ways not otherwise practicable; and allow data to be stored and transmitted in unintelligible forms so that few people know what the records contain and how they are being used.[46]

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39 See Visser "Aids and insurance law: a preliminary list of issues" 1993 *SAJHR* 130.

40 On the fiduciary duties of a banking and lending institution towards its client see Wacks *Protection* 128 – 129; Elder 369 – 373.

41 See Fensterstock in Kupferman (ed) 1 – 13 3.

42 See Wacks *Protection* 123 – 124; McQuoid-Mason *Privacy* 7.

43 See Samar 181.

44 See Hixson 183.

45 See Neethling *Persoonlikheidsreg* 275 – 290. See also Wacks *Information* 182 – 205 on the problems posed by the use of data banks. On the use of surveillance and other data-seeking intrusions on the individual's privacy see Weston in Jones (ed) 26 – 40 and Sobel (ed) 15 – 44.

46 See McQuoid-Mason *Privacy* 195 – 196; Neethling "Computers and private-law legal remedies for the protection of privacy, trade secrets, patents and copyright" 1992 (1) *Codicillus* 4 – 5 (Neethling *Computers*). Apart from these objections to the use of computers the risks of a breach of security and error on the part of the computer must not be overlooked (see Mayer 74; Weston in Jones (ed) 74 – 75; Wacks *Protection* 130 – 132).

In most Western countries, data banks are used to store a wealth of private and public information about persons.[47] This practice is also employed by the insurance industry.[48] The insurance industry in America was and still is the undisputed leader in the field of insurance data banks and the realisation of the need to protect the interests and privacy of the individual.[49] Any discussion on data banks and the insurance industry therefore calls for a brief reference to the position in America.

4 2 Insurance data banks and privacy in the United States of America

The Medical Information Bureau (MIB) is America and the world's largest electronic network of health data and was created in 1902. About 800 life insurance companies participate in the on-line exchange of medical data with the MIB, to prevent fraud by life and health applicants who fail to give complete or accurate medical histories. Health conditions are reported and stored by using one or more of about 210 codes. Non-medical information, for example such issues as reckless driving, hazardous sports, and aviation activity is covered by five additional codes. Insurers are not allowed to use MIB information as a basis for establishing an applicant's eligibility for insurance. It is only to be used as a caveat to members of a possible need for further investigation. Members are compelled to give notice to the applicant of the fact that information about him will be passed on to the MIB.[50]

Consideration of the privacy interests that individuals have in personal information collected, stored, and distributed about them, began to emerge in the last half of this century.[51] These emerging claims to privacy included:

- the individual's right to be protected against the secret gathering of personal information;
- the individual's right to be protected against the overbroad collection and retention of unnecessary personal information in databanks;
- the individual's right to prevent the improper use of information for purposes other than those consented to by the individual; and
- the individual's right to reasonable access to and a check on the accuracy of existing records.[52]

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47 See McQuoid-Mason *Privacy* 7 – 8 43 – 48 55 – 56 64 80 – 81 84 – 85.

48 See McQuoid-Mason *Consumer*; Neethling "Databeskerming: motivering en riglyne vir wetgewing in Suid-Afrika" in Strauss (ed) *Huldigingsbundel vir WA Joubert* (1988) 109 (Neethling *Databeskerming*).

49 See Miller 239 – 257; see also Neethling "'n Geval van privaatheidskending?" 1972 *THRHR* 372 – 373.

50 See Hendricks, Hayden and Novik 158 – 159; Latrenta *Privacy and fair information practice principles in the life insurance business – a modern historical review* (1990) 48 – 53.

51 Data protection moved from an originally abstract intellectual concern to a contentious political issue. This move was motivated, amongst other things, by the wealth of literature published in many countries in the late 1960s and early 1970s that served to draw public attention to the privacy problem (see Bennett 45 53 – 55). The politics of privacy mainly involves the conflict between the belief in the inherent worth and good of personal freedom on the one hand, and the belief in regulation and control of other's lives for the presumed public good (see Brill 187 and Smuts *Freedom* – Rectorial Address delivered at St Andrews University 1934-10-17 32 where individual freedom is described as the most ineradicable craving of human nature and the essence of all true progress).

52 See Latrenta 10 – 11.

The federal government, as well as many states, has in the past 20 years responded to these claims and enacted laws prescribing standards of conduct and proscribing certain disclosure practices. Although most of the state medical confidentiality laws are general in nature, there are laws which more directly address the activities of insurers.[53]

A few of these laws will be highlighted. First there is the Rhode Island Confidentiality of Health Care Information Act of 1978 (Rhode Island Act). This act requires the written consent of the individual or his authorised representative for the release or transfer of an individual's health care information. The act also prescribes the required content of the consent form.[54] Does this mean that patients can prevent doctors and hospitals from disclosing their records? The answer is no. Applicants for insurance routinely authorise the release of their records in a blanket waiver or general consent. The signing of this waiver is a condition for the eventual issuing of the policy. The condition is pure and simple: no consent to an intrusion of the applicant's privacy means no policy.[55]

Secondly, regulations have been promulgated under the Federal Drug and Alcohol Abuse Records Act. These regulations prescribe, amongst other things, the content and form of authorisations that may be used to obtain patient information. Such authorisation must be in writing and must include the name or title of the individual or organisation to which the disclosure is to be made; the purpose or need of the disclosure; the extent or nature of information to be disclosed; a statement that the consent is subject to revocation at any time except to the extent that action has been taken in reliance upon it; and a specification of the date, event or condition on which it will expire without express revocation. These regulations also limit the type of data that may be released pursuant to a court order.[56]

A third relevant piece of legislation is the Federal Fair Credit Reporting Act of 1971.[57] Its purpose is to ensure that consumer reporting agencies adopt reasonable procedures and act in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevance, and proper utilisation of collected information.[58] This act also imposes specific procedural requirements on consumer reporting agencies to prepare investigative consumer reports for underwriting purposes. Insurers are compelled to include a pre-notification with application forms which advises the applicant of the possibility that an investigative consumer report may be procured. Any insurer which uses a consumer report and bases an adverse action wholly or partly on information contained in such a report, must advise the applicant against whom such adverse action has been made, of that fact. The insurer must also supply the name and address of the agency making the report. The agency is also required to disclose the sources of all the information in its files. Sources of information

53 Certain states, amongst others California, Connecticut and Illinois, have laws granting insurance customers access to their records, limiting data collection practices, regulating use of confidentiality waivers, and specifying what disclosures to outsiders are allowable. Although Congress was seriously considering national legislation on insurance privacy during the 1970s, federal legislation on this topic has not yet become a reality (see Hendricks, Hayden and Novick 173).

54 See Latrenta 12 – 14.

55 See Hendricks, Hayden and Novik 160 – 161.

56 See Latrenta 20 – 25.

57 See also Fensterstock in Kupferman (ed) 1 – 13.

58 See Latrenta 25 – 27.

which are required solely for use in preparing an investigative consumer report and used for no other purpose need not be disclosed. Any violation of these regulations will result in civil as well as criminal penalties.[59]

Fourthly, there is the Privacy Act of 1974 which was a direct consequence of the Watergate scandal. This act generally requires that data subjects have the right to know whether they are included in a particular federal data file, to know what information pertaining to them is included in the file, to know about the uses and disclosures made of such information, to have access to such information, to see and copy such information and to amend, correct or dispute such information.[60]

These few examples are neither intended as a representative picture of the extent of the privacy protection provided for by the American legislator, nor should it be regarded as perfect examples of consumer protection legislation.[61] They should rather be seen as general guidelines of what can be achieved in the regulation of data bank practices and privacy protection.[62]

5 POSSIBLE LEGISLATIVE REFORM IN SOUTH AFRICA

In the light of the foregoing discussion and the general extent and seriousness of the threat to privacy, it is with a sense of utmost surprise that one finds that legislative provisions for the protection of the individual's data privacy are almost non-existent in South Africa. South African legal writers are virtually unanimous on the point that such protection calls for immediate legislative intervention.[63]

The following general data protection principles have been advanced by Neethling[64] as the basis for any future legislative data protection regulation:

"(a) Data may only be processed for one or more specified lawful purpose or purposes.
(b) Data which is processed for a specified purpose (principle (a)) must –
  (i) be reasonably connected with, and necessary for, that purpose;
  (ii) not be used or communicated in a manner incompatible with that purpose; and
  (iii) not be stored or used for longer than is necessary for that purpose.
(c) Processed data must –
  (i) be true;
  (ii) not be misleading; and
  (iii) have been obtained in a lawful manner.
(d) An individual shall be entitled to –
  (i) be aware of the existence of data on himself processed by a data medium;
  (ii) be aware of the purpose or purposes for which such data is processed;
  (iii) gain access to the data stored by the data medium;
  (iv) be informed by a data medium to what third parties the data has been communicated by that medium;

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59 See *idem* 25 – 29.
60 See *idem* 60 – 63; Hendricks, Hayden and Novik 3 – 16.
61 For a more comprehensive list of American state privacy statutes see Sloan 121 – 135.
62 See Flaherty 47 – 55 112 – 123 149 – 163; Bennett 45 – 94 for a discussion of the development of data protection law in Sweden, (West) Germany and the United Kingdom.
63 See Neethling *Databeskerming* 113 – 124; Neethling *Computers* 5 fn 8 and the authority cited there.
64 *Computers* 6 – 7; see also Neethling *Databeskerming* 124 – 125; Neethling *Persoonlikheidsreg* 289.

(v) procure a correction of misleading data (principle (c)(ii)) by the data medium;

(vi) procure an erasure of false data (principle (c)(i)); or obsolete data (principle (b)(iii)); or data obtained in an unlawful manner (principle (c)(iii)); or data not reasonably connected with, or necessary for, the specified purpose (principle (b)(i)), by the data medium."

Principles (a), (b) and (c) are referred to as the traditional principles. They are based on the application of the ordinary common-law delictual principles regulating the protection of the individual's privacy. Principle (d) is the so-called control principle in terms of which the individual is allowed to exercise direct control over the processing of data concerning him.[65]

Draft legislation containing these data protection principles has been drawn up and recommendations have been made to the South African Law Commission in this regard. Until now, however, no legislation has materialised.

6 CONCLUSION

From a purely legal point of view, the Life Register is not unlawful provided that a valid consent is obtained from individuals to record information about their health.

It is clear from the above that the current waiver clause does not constitute a valid consent to intrusion on or disclosure of the applicant's privacy. The only reason why the validity of the clause has not been contested in a court of law can be ascribed to the fact that 99% of all applicants are not aware of the existence of the Life Register, let alone of its legal consequences.

Applicants for insurance should not only be informed about the existence, purpose and consequences of the Life Registry system, but should also consent to the actual distribution and storage of relevant information concerning their health. More importantly, the insured should be allowed to exercise direct control over the processing of data concerning him.

It would be worthwhile for the LOA to amend the waiver clause to bring it within the parameters of a legally recognised consent. The general data protection principles advocated by South African legal commentators and applied in America and elsewhere in the Western world, should be adopted voluntarily by the life insurance industry. Insurers should not wait for the legislator to force these principles upon them. In this way the insurance industry may just manage to rescue some of its lost esteem and credibility.[66]

In the final instance, it should be remembered that no law says that the applicant for insurance has to provide any of the information requested by an insurer. Most (if not all) insurance companies want to sell insurance more than customers want to buy it. It is possible for the applicant for insurance to bargain with the insurance company through his agent. The applicant for insurance should let the insurance companies compete for his business and meet his demands for minimal collection of personal data.[67]

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65 For further principles in this regard see Neethling *Computers* 7 – 10.

66 For a review of some of the unacceptable practices of insurance companies in dealing with AIDS-related issues, see Visser "Foundering in the seas of human unconcern: AIDS, its metaphors and legal axiology" 1991 *SALJ* 632 – 639.

67 See Ellis 116 – 119.

AANTEKENINGE

THE INTERPRETATION OF CONTRACTS: SOME PERSISTENT PROBLEMS

Basic propositions

Within the limits laid down by law, parties are at liberty to express themselves in words of their own choosing, and they are entitled to expect that a court will seek, and if possible discover, what their common intention was when they chose the words they did. This liberty, and this expectation, has been recognised in so many statements by the Appellate Division and other authorities to the effect that courts seek the common intention of the parties that the cases need not be listed here. (See eg those referred to in my *The principles of the law of contract* (1989) 3 – 4 297 – 303 (*Contract*) to which may be added *Atteridge Town Council v Livanos t/a Livanos Brothers Electrical* 1992 1 SA 296 (A) 305J – 306A; *Concord Insurance Co Ltd v Oelofsen* 1992 4 SA 669 (A) 672E – G.)

There is no doubt, so far as I am aware, on the following matters:

(a) Except in very rare instances, words and phrases may bear more than one meaning.

(b) The particular meaning to be attributed to a word or phrase in a contract is arrived at by considering the word or phrase in its context.

(c) When problems arise, a court begins the task of interpretation by reading the contract as a whole and, in doing so, begins with the assumption that the parties intended the words and phrases to bear the meanings they ordinarily bear in contexts of the kind in question.

Preliminary remarks on the admissibility of evidence

A controversial question on which there is no unanimity in reported decisions of the Appellate Division and other courts (*Contract* 306 – 313) is this: in what circumstances is evidence admissible to prove the context in which parties used the words needing interpretation? In *OK Bazaars (1929) Ltd v Grosvenor Buildings (Pty) Ltd* 1993 3 SA 471 (A) the parties had an opportunity in the court *a quo* to lead evidence on, *inter alia*,

> "[w]hether clause 3.3.2 of the agreement of lease failed to reflect the common intention of the parties and thereby falls to be rectified",

but neither party availed itself of the opportunity (478F – 479C). This meant that the only aids to interpretation the court *a quo* and the Appellate Division had to assist them in the identification of the common intention of the parties

was the contract as a whole and, if admissible, the evidence in the affidavits of the landlord and of the tenant (476B – C 479D – F). The admissibility of this evidence was therefore in issue, and the Appellate Division ruled that it was inadmissible. Speaking of the landlord's version in its affidavit EM Grosskopf JA, with whom the other members of the court concurred, said (479F – J):

> "I do not think in any event that this evidence could be used to interpret the contract. The principles concerning the use of extrinsic evidence in the interpretation of written contracts are fairly well settled. In the present case it is not contended that there were any surrounding circumstances or background circumstances (see *Total South Africa (Pty) Ltd v Bekker NO* 1992 (1) SA 617 (A) at 624F – 625A) which may affect the meaning of clause 3.3.2. The evidence which is tendered is evidence of the parties' alleged actual intention, presumably as manifested in their negotiations. It is clear that evidence of what passed between the parties on the subject of the contract is only admissible as a last resort when a sufficient degree of certainty as to the right meaning cannot be reached in any other way. See *Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) at 454F – 455C; *Societe Commerciale de Moteurs v Ackermann* 1981 (3) SA 422 (A) at 428D. In my view the present is a case, in the words of Schreiner JA (*Delmas Milling* case at 454F), where, although there is difficulty, perhaps serious difficulty, in interpretation, it can nevertheless be cleared up by linguistic treatment. There is accordingly no call to have regard to extrinsic evidence. And the fact that the evidence might be admissible for the purposes of rectification of the contract and could in theory shed light on the true intention of the parties cannot in my view make any difference."

"Linguistic treatment" is a quotation from the first *Delmas* step (for the three *Delmas* steps see *Contract* 307 – 308). I have previously drawn attention (*idem* 306 – 307 and 1983 *SALJ* 188 – 191) to the fact that courts have on occasion recognised that the steps cannot always be separated in practice; but as the Appellate Division in the case under discussion seems to have treated them as separate, they will be referred to as separate in this note.

As the court said (see the quotation above) that there were no surrounding or background circumstances to be taken into account which could affect the meaning of clause 3 3 2, the second *Delmas* step was not under consideration. The third *Delmas* step is "recourse . . . to what passed between the parties on the subject of the contract". This is what the court ruled out (see the quotation above). Hence it can be concluded that the court was confident that the difficulty could be cleared up, and that it had cleared it up, "by linguistic treatment" (479I – J quoted above). Either that, or, as the last sentence of the quotation suggests, the court thought that the problem could be solved in a different way. Each of these possibilities will be discussed and then certain supplementary points made.

"Linguistic treatment"

"Linguistic treatment" means "studying the language" (*Contract* 307 fn 74). The language which the court was confident would yield the parties' common intention if studied in the context of the contract was in clause 3 3 2 of the contract of lease which read (474F):

> "If a party refuses to negotiate in the sixth month it shall lose its right to nominate a valuer or fails to nominate its valuer in the following month, the monthly rental in the eighth year shall be 125% of that payable in the last month of the seventh year of the lease."

The full text of clauses 3 2 – 3 3 is given at 474D – G. The interpretation of the phrase "a party" was disputed. The landlord claimed that the phrase meant "either party", whereas the tenant claimed it meant "the tenant", that is, only

the tenant (478F – I). If one studies only "*the language*", that is, if one applies "*linguistic treatment*", my respectful opinion is that one can only conclude that the phrase "a party" meant what the landlord claimed that it meant. The court itself acknowledged that this was the "natural meaning" of the word "party" (477E – F). As the court went on to hold that "a party" meant "the tenant", this, again in my respectful opinion, could only be because the court was applying a criterion or criteria *other than* "linguistic treatment".

Conflicting provisions

The court, per EM Grosskopf JA, felt that the landlord's contention was "wholly at variance with the contract as a whole" (477A); that "[i]n the context the parties must have intended the provision to apply to one party only, namely the tenant" (477E – F); that the landlord's interpretation was "repugnant to clause 3 2 and to the whole scheme of ascertaining a market rental laid down in the contract" (478C). This shows that the court held that effect could not be given to the "natural meaning" of clause 3 3 2 because that meaning conflicted with the dominant provisions of the contract. Dominant provisions take precedence over less important ones (see eg *Elgin Brown & Hamer (Pty) Ltd v Industrial Machinery Suppliers (Pty) Ltd* 1993 3 SA 424 (A) 428F – I; *Contract* 324). They do so because there is need of a rule to resolve conflicts between conflicting provisions, the meaning of both of which may be clear, and not because the fact that there are conflicting provisions means that one is obscure or ambiguous or otherwise in need of "linguistic treatment". It follows that even if the contracting parties had said in clause 3 3 2 "If either the landlord or the tenant refuses . . .", the decision would have been the same. This explains the statement in the last sentence of the passage (479 quoted above) that

> "the fact that the evidence might be admissible for the purpose of rectification of the contract and could in theory shed light on the true intention of the parties cannot in my view make any difference".

A wider meaning of "interpretation"

In the *Elgin Brown & Hamer* case above, the court approached the problem from the point of view of the "construction" of the contract (428H, quoting *Halsbury's Laws of England* (the court quoted vol 10 par 352 of the second edition (1933): see now vol 12 par 1509 of the fourth edition (1975)); 429B) or its "interpretation" (429A – B). This meaning of "interpretation" is different from "studying the language" as that phrase is used in the *Delmas Milling Co* case; it refers to the impression given by the contract as a whole (see the previous section of this note). One may, for example, speak of a violinist's interpretation of a piece of music, or of the "interpretation" seen in a picture an artist has painted. The "interpretation" of two violinists may differ even though there is no doubt that the notes appearing on the page in front of each are those the composer wrote. Similarly, the "interpretation" of two artists may differ although they paint the same landscape from the same position. Hence what was said about "linguistic treatment" in the *OK Bazaars (1929) Ltd* case above was *obiter*: it was about a question other than that on which the decision was reached.

Further remarks on the admissibility of evidence

(a) *General*

Evidence is admissible in cases on rectification. (For authorities see *Contract* 126.) Why is it admissible in such cases? The answer is that, if available, it may provide what the court most needs: the best clue to the common intention of the parties. Similarly, if a court is faced with ambiguous language, evidence to assist in interpretation is admissible. (For authorities see *idem* 311 fn 97, to which add *Prichard Properties (Pty) Ltd v Koulis* 1986 2 SA 1 (A) 10C–D; *Total South Africa (Pty) Ltd v Bekker* 1992 1 SA 617 (A) 624G–H.)

In the *Total South Africa (Pty) Ltd* case (above 624I–J) Smalberger JA, with whom the other members of the court concurred, spoke of "sufficient certainty as to the meaning of a contract" being "gathered from the language alone" in some instances, and in the *OK Bazaars (1929) Ltd* case (479H quoted above) EM Grosskopf JA, adding to the phrase, referred to "a sufficient degree of certainty as to the right meaning". (The addition was, I think, implicit in what Smalberger JA said.) But how can a court that knows that a dispute about the meaning of a contract has arisen, and has been informed that evidence of the parties' common intention is available, ever have "sufficient certainty" about "the right meaning" of the disputed word or phrase or clause if it will not admit and consider that evidence? The only explanation, in my respectful opinion, for such a claim by a court in such a case is that the court is, in effect, claiming that "the right meaning" is something other than the parties' common intention. This in turn means that in effect the court is departing from the principle of the primacy of the common intention of the parties, a principle that goes back to Roman law and has been constantly reiterated since by the courts themselves amongst others (*Contract* 1–2 300–305). It also means that the court is prepared to make contracts for the parties, hypothesising its own context for the words it is interpreting (*idem* 309). A court may well achieve coherence between the context it hypothesises and the words; but that is not what the courts say they endeavour to achieve. A hypothetical context cannot give certainty, sufficient or otherwise, about "the right meaning" unless it happens to coincide with the parties' common intention, a circumstance which may happen sometimes, but about which a court cannot be certain if it excludes evidence of that common intention. If courts do not wish to make contracts for the parties, and I suggest that they do not, evidence of the parties' common intention, if it exists, is admissible whenever one of the parties offers it in an attempt to resolve a dispute on the point.

(b) *Professor Christie's defence of the* Delmas *rules*

Many contracts are clear and do not give rise to problems of interpretation (*Contract* 297); but this does not give grounds for adopting as "[t]he underlying reason" for the approach in the *Delmas Milling Co* case the proposition that

> "where words in a contract, agreed upon by the parties thereto, and therefore common to them, speak with sufficient clarity, they must be taken as expressing their common intention (Christie *The Law of Contract in South Africa* at 177)" (as stated by Smalberger JA in the *Total South Africa (Pty) Ltd* case above 625A–B).

The passage to which the court referred appears in Christie's second edition (1991) (Christie) at 239 and reads:

> "One can sum up these cases [the *Delmas Milling Co* case and others] by saying that the court seeks the common intention of the parties from the wording of the contract because that wording, being agreed by both parties, is common to them, so if it speaks with sufficient clarity it must be taken as expressing their common intention."

One can accept that the wording of an agreed contract is common to both parties; but both the proposition in the *Total South Africa* case and that in Christie 329 assume that, evidence of what passed between the parties having been excluded, the court can determine that at a given point in the process of adjudication the wording is "sufficiently clear". "Sufficiently clear" on what subject? If the answer is not to be something other than that which has been regarded as correct since Roman times the answer must be: "on what the common intention of the parties was". With respect, it cannot be correct to add, as is done in the *Total South Africa* case and in Christie, that at that point the words *as understood by the court* "must be taken as expressing their [the parties'] [actual] common intention" when the court knows that one of the parties is offering evidence which that party believes will prove that the common intention was in fact something other than the proposition the court deduces from the words, and that party has been prevented from putting that evidence before the court because the evidence has been ruled inadmissible (see the hypothetical examples in *Contract* 307 309).

Speaking of the second *Delmas* step Professor Christie says (241):

> "The fact that the contract will not yield to linguistic treatment and reveal the common intention of the parties does not entitle the court to open the floodgates and let in evidence of the parties' subjective motives, intentions and understandings."

With respect, this statement is open to criticism. Motives, intentions and understandings are all in the mind, so to speak of "subjective" ones is to be tautologous. If the learned author meant that in his opinion evidence of the intention of one party only should be inadmissible I disagree. What one party only intended is not part of the contract (*Contract* 60); but a *common* intention can be proved by proving separately the intention of first the one party, then that of the other party, and then showing that the two intentions coincide and that the parties chose the words *a*, *b*, *c* and so on to express their common intention. Hence, if a party wishes to embark on this method of proof, it would not be correct to stop him before he begins stage one by saying that *at that stage* he seeks to prove the intention of one party only. The evidence ought not to be *presumed* to be inadmissible before it is heard. It should be heard, and if it is then found that a party has led it frivolously, an appropriate award of costs can be made (*Contract* 313).

There was a time when in civil cases the parties, and in criminal ones the accused, were not allowed to give evidence (Holdsworth *A history of English law* vol IX (1926) 196). I do not think that anyone would argue that we should return to that situation even though such a move would lessen the amount of evidence a court would hear. It is already open to the court to hear evidence on the ground of ambiguity (*Contract* 311 – 312). If this approach were to be followed more often, some extra evidence would be considered, but the benefit to be obtained far outweighs any handicap there may be in hearing it, just as the benefit of hearing the parties at all outweighs the handicaps of the earlier rule that the parties were not competent to give evidence. Professor Christie's reference to "floodgates" is an exaggeration, and the opportunity is already there. "Gates" do not need to be "opened".

Continuing his defence of the *Delmas* rules Professor Christie says (241):

> "The inquiry must remain an objective one, and must still exclude evidence of the negotiations leading up to the contract and of any agreement allegedly reached but not included in the contract – the object of the inquiry being to interpret the contract, not replace it."

Again there is a problem with the interpretation of this sentence. Is the learned author alleging that evidence *both* of the negotiations leading up to the contract *and* of any agreement not included in the contract would defeat the object of interpreting the contract and/or replace it? If so, I disagree concerning the former (*Contract* 307) and agree, subject to certain qualifications, on the latter (*idem* 264 – 269). The learned author then says:

> "Discounting the misleading impression that evidence of the surrounding circumstances is admissible in all cases, a *dictum* of Innes CJ in *Richter v Bloemfontein Town Council* 1922 AD 57 69 makes clear the object of such evidence:
>
> > 'Every document should, of course, be read in the light of the circumstances existing at the time, and evidence may rightly be given of every material fact which will place the Court as near as may be in the situation of the parties to the instrument.' "

With respect, what the parties understood the words to mean at the time they incorporated them in their contract is "a material fact" (a person's state of mind can be a question of fact: *Contract* 187 – 188); and what passed between the parties may in particular circumstances indicate what they understood the words to mean both during the negotiations and at the time they incorporated them in their contract; it may indeed be the best evidence of "the circumstances existing at the time" (see again the hypothetical example in *Contract* 307).

Background circumstances and surrounding circumstances

In the *Total South Africa* case above Smalberger JA said (624I):

> "Apparently 'background' circumstances are something different from 'surrounding' circumstances (see [*Swart en 'n ander v Cape Fabrix (Pty) Ltd* 1979 1 SA 195 (A)] at 201A), but (as in *Swart's* case) it is not necessary to pursue this matter further for the purposes of the present appeal."

As far as I am aware, no court has explained what the difference is, if any there be. If courts consider that there is a difference, it will be necessary, if the law is not to remain in a state of confusion on the point, for them to explain what it is. I suggest that there is no difference (see "Background circumstances and surrounding circumstances – broad contexts and narrow contexts – the interpretation and rectification of contracts" 1980 *THRHR* 318).

AJ KERR
Rhodes University

REGSPERSONE: FIKSIE OF FEIT?

1 Teoretiese agtergrond

Onlangs is twee uitsprake in verband met die regsaard van regspersone gerapporteer, naamlik *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1993 2 SA 784 (K) en *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 2 SA 451 (A). Die regspersoonlikheidsvraagstuk interesseer juriste alreeds vir eeue lank, maar dit het veral gedurende die afgelope 150 jaar tot verskeie teorieë

aanleiding gegee. Dit is nie slegs van teoretiese belang nie want die regsaard van regspersone is deurslaggewend by die bepaling van die kontraktuele, deliktuele en strafregtelike aanspreeklikheid van regspersone, asook by die vraag of regspersone oor persoonlikheidsregte beskik.

Teoreties word daar veral tussen twee groepe regspersoonteorieë onderskei, naamlik die fiksieteorie en die orgaanteorie. Eersgenoemde teorie hou in dat 'n regspersoon nie werklik bestaan nie en dat die enigste regsubjek wat reëel in die regsverkeer kan optree 'n natuurlike persoon is. Slegs die mens, as etiese wese, is in staat om 'n regserkende wil te vorm en dus draer van regte en verpligtinge te wees, aldus Von Savigny (vir 'n volledige uiteensetting van die fiksieteorie van Von Savigny, sien Pienaar *Die gemeenregtelike regspersoon* (LLD-proefskrif PU vir CHO 1982) 53 – 64). Daarom word mensegroepe wat as regsubjekte aan die regsverkeer deelneem en draer van regte en verpligtinge afsonderlik van dié van die lede is, as fiktiewe regsubjekte getipeer.

Hierteenoor stel Von Gierke in sy orgaanteorie dat 'n regspersoon 'n werklike entiteit is, saamgestel uit organe ('n bestuur en 'n ledevergadering), wat in die regsverkeer as 'n reële regsubjek optree deur draer te wees van regte en verpligtinge in groepsverband (*idem* 64 – 76). Hierdie mening word ook deur Dooyeweerd in sy funksionele verbandsteorie gehuldig; hy beklemtoon naamlik die werklike bestaan van groepsverbande as regsubjekte (*idem* 104 – 117).

2 Regspraak

Regspraak in Suid-Afrika los hierdie teoretiese probleem nie eenduidend op nie. In onlangse regspraak word enersyds erkenning aan die fiksieteorie verleen, maar andersyds word 'n regspersoon as 'n werklike entiteit, wat as regsubjek oor persoonlikheidsregte beskik, erken. So word daar in *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd supra* 816D – E met goedkeuring verwys na die volgende *dictum* in *Lategan v Boyes* 1980 4 SA 191 (T) 201H:

> "I have no doubt that our Courts would brush aside the veil of corporate identity time and again where fraudulent use is made of the fiction of legal personality."

Vir hierdie argument word gesteun op *Webb & Co Ltd v Northern Rifles* 1908 TS 462 464 – 465, waarin beslis word:

> "An *universitas personarum* in Roman-Dutch law is a legal fiction, an aggregation of individuals forming a *persona* or entity, having the capacity of acquiring rights and incurring obligations to a great extent as a human being. An *universitas* is distinguished from a mere association of individuals by the fact that it is an entity distinct from the individuals forming it, that its capacity to acquire rights and incur obligations is distinct from that of its members, which are acquired or incurred for the body as a whole, and not for the individual members."

Alhoewel 'n *universitas* (gemeenregtelike regspersoon) dus as 'n afsonderlike entiteit omskryf word, word dit steeds as 'n fiktiewe (nie-bestaande) gedagtekonstruksie bestempel. Dit impliseer dat sodanige fiktiewe regsubjek nie handelings-, verskynings- of wilsbevoeg is nie.

Hierdie opvatting skep verskeie praktiese probleme:

(a) Dit is in die eerste plek nie duidelik hoe so 'n fiksie regshandelinge kan uitvoer nie. Indien dit deur verteenwoordigers geskied, moet die verteenwoordigers volmag hê om namens die regspersoon op te tree. Maar volmagsverlening is ook maar weer 'n eensydige regshandeling wat deur die regspersoon (as prinsipaal) verleen moet word.

(b) Word die konstitusie as 'n algemene volmag aan bestuurders en lede van 'n regspersoon gesien, beteken dit dat nie die regspersoon nie (wat volgens hierdie argument nie kan handel nie), maar die opstellers van die konstitusie of die individuele lede dan as prinsipale gebonde gehou word aan die verteenwoordigingshandeling. In die praktyk is dit juis nie die geval nie, want die lede van 'n regspersoon kan nie persoonlik aanspreeklik gestel word in die plek van die regspersoon nie.

(c) 'n Verdere probleem is dat 'n prinsipaal (in hierdie geval die regspersoon) nie op grond van die verteenwoordigingsbeginsel vir die onregmatige handelinge van sy verteenwoordiger aanspreeklik gestel kan word nie. Tog is dit 'n algemene beginsel dat regspersone wel vir onregmatige handelinge aanspreeklik gehou kan word (sien bv *Barkett v SA Mutual Trust & Assurance Co Ltd* 1951 2 SA 353 (A) 362; *Kennel Union of Southern Africa v Park* 1981 1 SA 714 (K)).

(d) Daar bestaan 'n opvatting dat 'n regspersoon deur middel van *ex lege* verteenwoordiging kontraktueel aanspreeklik gestel kan word. Dit los egter steeds nie die probleem in verband met aanspreeklikheid vir onregmatige handelinge op nie. Voorts is 'n *ex lege* verteenwoordiger (ouer/voog/kurator) altyd 'n ten volle handelingsbevoegde persoon wat juis 'n handelingsonbevoegde persoon se gebrekkige kompetensies aanvul. In die geval van 'n regspersoon kan 'n beperk handelingsbevoegde persoon wel ingevolge die konstitusie of deur 'n verteenwoordigingshandeling die regspersoon bind (maar in laasgenoemde geval slegs met volmag van die regspersoon), wat die moontlikheid van *ex lege* verteenwoordiging uitsluit.

Dit is dus nie moontlik om 'n regspersoon se kontraktuele, deliktuele en strafregtelike aanspreeklikheid (met uitsluiting van die lede se persoonlike aanspreeklikheid) aan die hand van verteenwoordiging kragtens volmag te verklaar nie (sien hieroor ook Pienaar 57 – 62; Pienaar "Die aanspreeklikheid van verenigingsregspersone" 1985 *TSAR* 77 – 85). So 'n fiktiewe regspersoon is inderdaad 'n willose, handelingsonbevoegde verbeeldingsvlug.

Voorts bestaan daar heelwat kritiek teen die gebruik van fiksies om bepaalde regsfigure te verklaar. So beweer Fuller *Legal fictions* (1967) viii:

> "Even so sober-sided a writer as Austin was moved to ascribe certain legal fictions to 'the active and sportive fancies of the grave and venerable authors'. Bentham's unequalled capacity for excoriation was brought to full flower by the subject: 'Fictions of use to justice? Exactly as swindling is to trade!' "

3 Konsessie-argument

Die problematiek in verband met die regsaard van 'n regspersoon word verder gekompliseer deur reste van die Engelsregtelike konsessiesisteem in die Suid-Afrikaanse reg. Ingevolge Engelse regsbeginsels word regspersoonlikheid slegs deur koninklike oktrooi of wetgewing verleen. Voorbeelde van instansies wat hulle ontstaan aan koninklike oktrooi te danke het, is die universiteite van Oxford en Cambridge (Smith *Law of associations* (1914) 15). Regspersone wat deur wetgewing ontstaan, kan óf regstreeks deur 'n eie magtigende wet in die lewe geroep word (bv die *British South African Company*), óf kan onregstreeks deur algemene wetgewing gemagtig word, in welke geval gewoonlik 'n bykomende registrasiehandeling vir die verlening van regspersoonlikheid vereis word (bv die *Companies Consolidation Act* van 1908). *Voluntary associations*, wat sonder enige owerheidstoestemming tot stand kom, word in die Engelse

reg nie as regspersone erken nie maar as verenigings sonder regspersoonlikheid wat op kontraksluiting berus. Hallis *Corporate personality* (1978) liii verklaar in hierdie verband:

> "Strictly, the Fiction Theory cannot admit any kind of association in between the *universitas* and the *societas*, in between the corporation created by the act of the state and the partnership which remains a purely contractual relationship between distinct individuals."

In die Suid-Afrikaanse reg is reeds herhaaldelik bevestig dat 'n gemeenregtelike regspersoon (*universitas*) sonder uitdruklike owerheidstoestemming tot stand kom deurdat bloot aan 'n aantal gemeenregtelike vereistes voldoen word (*Morrison v Standard Building Society* 1932 AD 229 238; *Ex parte Johannesburg Congregation of the Apostolic Church* 1968 3 SA 377 (W)). Hierdie vereistes sluit in dat daar 'n entiteit moet bestaan wat draer is van regte en verpligtinge onafhanklik van die regte en verpligtinge van die individuele lede, welke entiteit voortbestaan ongeag die wisseling van lede.

Alhoewel daar geen twyfel bestaan dat 'n *universitas* in die Suid-Afrikaanse reg as 'n regspersoon erken word nie, word daar tog dikwels in die regspraak na 'n gemeenregtelike regspersoon as 'n *unincorporated association* verwys, klaarblyklik in navolging van die Engelsregtelike konsessiesisteem wat die verlening van regspersoonlikheid koppel aan owerheidstoestemming in die vorm van 'n magtigende wet en 'n registrasiehandeling (sien bv *Molotlegi v President of Bophuthatswana* 1989 3 SA 119 (BGD) 124B). In *De Meillon v Montclair Society of the Methodist Church* 1979 3 SA 1365 (D) 1368C – D word beslis:

> "Mr Hartcourt, who appeared on behalf of the respondent, is undoubtedly correct in his submission that at common law an unincorporated association must be a *universitas* before it acquires the necessary legal personality enabling it either to sue or be sued in the name of that association."

Hierdie foutiewe stelling berus op die ewe verkeerde standpunt deur Nathan, Barnett en Brink *Eenvormige hofreëls* (1984) 103 in hulle vertolking van reël 14 van die Reëls van die Hooggeregshof:

> "Voordat hierdie Reël in werking getree het, is daar beslis dat 'n vereniging sonder regspersoonlikheid ['an unincorporated association'] slegs as sodanig kon dagvaar of gedagvaar word indien hy 'n *universitas* was met onbepaalde opeenvolging en wat selfstandig van sy lede in staat was om eiendom te besit." (My invoeging na aanleiding van die Engelse teks.)

Dit is natuurlik onsin om te beweer dat 'n *universitas* 'n vereniging sonder regspersoonlikheid (*an unincorporated association*) is net omdat dit sonder owerheidstoestemming (wetgewing of registrasie) tot stand gekom het. Hierdie toepassing van die konsessiesisteem word nêrens in die gesag waarop die gemelde outeurs (verkeerdelik) steun, vermeld nie. 'n *Universitas* (gemeenregtelike regspersoon) is nog altyd sonder enige vorm van registrasie as 'n regspersoon erken. Dit word korrek uiteengesit in *Ahmadiyya Anjuman Ishaati-Islam Lahore (South Africa) v Muslim Judicial Council (Cape)* 1983 4 SA 855 (K) 866H:

> "First plaintiff is a voluntary association. A voluntary association can either be an incorporated voluntary association or an unincorporated voluntary association, ie it can either be a corporate body (*universitas*) or a non-corporate body."

Die appèlafdeling het in *Commissioner for Inland Revenue v Witwatersrand Association of Racing Clubs* 1960 3 SA 291 (A) 302A – B beslis:

> " 'Unincorporate' refers to an association 'which does not have a legal *persona* separate from its constituent members'."

Die onvermoë om duidelik tussen 'n *universitas* as regspersoon (*corporate body*) en 'n vereniging sonder regspersoonlikheid (*unincorporated association*) te onderskei, het grootliks aanleiding gegee tot die standpunt dat 'n regspersoon 'n fiktiewe gedagtekonstruksie is.

4 "Piercing the corporate veil"

Dit is opvallend dat die fiksie-gedagte dikwels na vore kom in sake waar die "piercing of the corporate veil"-beginsel toegepas word. In *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd supra* 815I – 816H verwys regter Nel goedkeurend na *Lategan v Boyes supra* 201H waar 'n regspersoon as 'n fiksie bestempel word (sien ook *Bark v Boesch* 1959 2 SA 377 (T) 382D). Die "piercing the corporate veil"-beginsel hou in dat natuurlike persone as lede van 'n regspersoon persoonlik aanspreeklik gestel kan word as die regspersoon met bedrieglike oogmerke, met die uitsluitlike oogmerk om die reg te omseil of teen die openbare belang gebruik word. Dit word slegs in uitsonderlike omstandighede toegepas (bv *Bark v Boesch supra* 382D; *Gering v Gering* 1974 3 SA 358 (W) 361G – H; *Gien v Gien* 1979 2 SA 1113 (T) 1120A – C).

In *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 het twee Indiërs 'n maatskappy laat registreer waarvan een 149 aandele en die ander slegs een aandeel gehou het. Die maatskappy het daarna 'n grondstuk gekoop in 'n gebied waar Indiërs kragtens Wet 3 van 1885 (T) en Wet 35 van 1908 (T) nie toegelaat was om grond te besit nie. Die regsvraag wat ontstaan het, was of die persoonlike verbod op grondbesit die maatskappy, waarvan die Indiërs aandeelhouers was, geraak het.

Die appèlafdeling bevestig sonder enige verwysing na die fiksieteorie dat 'n regspersoon 'n entiteit afsonderlik van sy samestellende lede is (550 – 551). Persoonlike kenmerke van die lede van 'n regspersoon kan nie aan die regspersoon toegeskryf word nie. (Dit het daarna tot die gewraakte bepalings in die Wet op Groepsgebiede 36 van 1966 (a 1 14(3)) aanleiding gegee dat 'n regspersoon aan die rassegroep behoort van die lede wat die beheersende belang in die regspersoon het.) Indien die oogmerke van die lede of aandeelhouers by die totstandkoming van die regspersoon egter uitsluitlik van so 'n aard was dat hulle die reg daardeur wou omseil (*in fraudem legis*), sal die hof wel die eienskappe van die individuele lede in ag neem (548). In die besondere omstandighede van die saak het die aandeelhouers egter nie *in fraudem legis* opgetree nie aangesien niks 'n regspersoon ingevolge die toepaslike wetgewing op daardie tydstip verbied het om grond te besit nie en die ras van die aandeelhouers nie op die regspersoon (as afsonderlike entiteit) van toepassing was nie.

Die doelstellings van 'n vereniging van persone was egter nog altyd van belang by die verlening van regspersoonlikheid of die voortbestaan van 'n regspersoon. Doelstellings wat onwettig, *contra bonos mores* of in stryd met die gemeenskapsbelang was, het gemeenregtelik daartoe aanleiding gegee dat regspersoonlikheid van sodanige verenigings weerhou is (*Morrison v Standard Building Society* 1932 AD 229 235 – 237). Dat hierdie beginsel steeds in die geval van gemeenregtelike regspersone in Suid-Afrika geld, word nie betwyfel nie (sien hieroor Pienaar 129 – 132; *LAWSA* (*First reissue*) vol 1 "Associations" §§ 454 494). Dit het egter nie tot gevolg dat 'n regspersoon as 'n fiksie bestempel moet word nie. In die geval waar die doelstellings regmatig en in belang van die gemeenskap is, word die bestaan van 'n afsonderlike entiteit as regsubjek erken. Die "piercing

the corporate veil''-beginsel lei dus in bepaalde uitsonderingsgevalle tot die persoonlike aanspreeklikheid van die lede van 'n regspersoon en is nie 'n ontkenning van die reële bestaan van regspersone nie.

5 Reële entiteit

In die lig van bostaande word in *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 550 tereg beslis:

> "This conception of the existence of a company as a separate entity distinct from its shareholders is no merely artificial and technical thing. It is a matter of substance; property vested in the company is not, and cannot be, regarded as vested in all or any of its members."

In *Morrison v Standard Building Society supra* 238 word die opvatting dat 'n regspersoon werklik bestaan (en nie maar net 'n fiktiewe entiteit is nie) bevestig:

> "The society exists as such quite apart from the individuals who compose it, for these may change from day to day. It has perpetual succession and it is capable of owning property apart from its members."

'n Regspersoon word dus saamgestel uit lede maar dit is meer as die somtotaal van die spesifieke lede op 'n bepaalde tydstip, aangesien dit voortbestaan ongeag die wisseling van lede. Dit is interessant dat die appèlafdeling onlangs in *Financial Mail (Pty) Ltd v Sage Holdings Ltd supra* 462A – E erkenning verleen het aandie feit dat 'n regspersoon 'n reg op privaatheid (as persoonlikheidsreg) het. Hierdie uitspraak bevestig ook die feit dat 'n regspersoon oor 'n regsbeskermende reputasie (*fama*) beskik, soos beslis is in *Dhlomo v Natal Newspapers (Pty) Ltd* 1989 1 SA 945 (A) 953I – 954E en *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 3 SA 579 (A) 584G – I:

> "(a) A trading corporation may sue for defamation.
>
> (b) A non-trading corporation could, like a trading corporation, have a *fama* which deserves the protection of the law. It would accordingly be illogical and unfair to deny such a corporation the right to sue for an injury to its reputation, but to grant it to a trading corporation when it suffers injury to its business reputation.
>
> (c) Conceivably, however, certain corporations may be denied the right to sue for defamation on the ground of considerations of public or legal policy."

'n Persoonlikheidsreg word omskryf as die aanspraak van 'n regsubjek op 'n aspek van sy eie persoonlikheid; in die geval van 'n regspersoon word die reg op reputasie (*fama*) en die reg op privaatheid as sy persoonlikheidsregte erken. Dit is ondenkbaar dat die appèlafdeling bereid sou wees om hierdie twee persoonlikheidsregte aan 'n fiksie, dit wil sê 'n nie-bestaande gedagtekonstruksie, te verleen (sien hieroor ook Neethling, Potgieter en Visser *Deliktereg* (1992) 324 – 325). Die persoonlikheidsregte van 'n regspersoon is egter nie identies met dié van 'n natuurlike persoon nie – 'n regspersoon kan byvoorbeeld nie leed ervaar nie. Dat daar egter werklik 'n entiteit (*persona*) as regsubjek met eiesoortige persoonlikheidsregte bestaan, kan nie ontken word nie.

Die erkenning van die bestaan van 'n regspersoon as 'n werklike entiteit hou die volgende in (sien ook Pienaar 1985 *TSAR* 77):

(a) Die regspersoon is 'n reële, eiesoortige persoonsverband wat as subjek aan die regsverkeer deelneem. Dit is saamgestel uit organe (lede en/of bestuurders). Hoewel dit in sekere opsigte ooreenkomste vertoon met die wyse waarop 'n natuurlike persoon aan die regsverkeer deelneem, kom eg menslike hoedanighede nie by 'n regspersoon voor nie en stem hoedanighede wat wel by albei voorkom, nie in alle opsigte ooreen nie. Hierdie entiteit is dus nie 'n superorganisme met menslike eienskappe nie, maar 'n aanwysbare, eiesoortige persoonsverband.

(b) Die regspersoon is nie net 'n juridiese realiteit nie maar dit is 'n werklike entiteit bestaande uit mense. Dit is egter 'n entiteit wat meer is as die somtotaal van die lede/bestuurders op 'n gegewe oomblik, aangesien dit voortbestaan ongeag die wisseling van lede/bestuurders en draer is van regte en verpligtinge afsonderlik van die regte en verpligtinge van die individuele lede/bestuurders waaruit dit saamgestel is.

(c) Daar is niks fiktiefs aan die regsubjektiwiteit (regspersoonlikheid) wat aan persoonsgroepe toegeskryf word nie aangesien hierdie entiteite werklik draers van regte en verpligtinge in groepsverband is. Daar is ook niks fiktiefs aan die persoonsgroep self nie, want wat is nou meer reëel as Eskom, Sanlam of die Jokkieklub van Suid-Afrika?

(d) Regspersone neem aan die regsverkeer deel deur middel van organe. Daar word gewoonlik twee organe onderskei, naamlik 'n bestuur en 'n ledevergadering. Indien die organe aan die hand van die interne verbandsreg van die regspersoon (soos vervat in die statute of konstitusie) of ooreenkomstig geldige besluite in hulle hoedanigheid van organe optree, word dit as 'n handeling of wilsuiting van die regspersoon erken (en nie as 'n verteenwoordigingshandeling kragtens volmag nie). Dit hou in dat die regspersoon 'n wilsbevoegde regsubjek is wat nie alleen regmatige handelinge nie maar ook onregmatige handelinge kan uitvoer (sien bv *Barkett v SA Mutual Trust & Assurance Co Ltd supra* 362D – H; *Kennel Union of Southern Africa v Park supra*).

(e) 'n Regspersoon kan skuld in die vorm van opset of nalatigheid vorm. In *Barkett v National Trust and Assurance Co Ltd supra* 362E – H word beslis:

> "A company acts through its directors and the company, qua company, may be guilty of negligence through an act of omission or commission. If, for instance, a company allows a bus with defective brakes to be used and as a result of the defective brakes the bus cannot be pulled up and injures a third party, that would be negligence on the part of the company. . . . If, on the other hand the company through its directors or managers instructs its servants to drive at a dangerous speed and as a result a third party is injured, the negligence or unlawful act is that of the company."

(f) Regspersone beskik oor persoonlikheidsregte in die vorm van 'n reg op privaatheid en 'n reg op reputasie (*fama*), wat by aantasting daarvan tot 'n genoegdoeningseis aanleiding kan gee.

GERRIT PIENAAR
Potchefstroomse Universiteit vir CHO

GEDAGTES OOR VOORDEELTOEREKENING BY NIE-VERMOËNSKADE

1 Inleiding

'n Skadestigtende gebeurtenis het dikwels nie net skadelike gevolge nie maar kan ook voordele vir 'n benadeelde inhou. 'n Eenvoudige voorbeeld is waar X, wat weens Y se nalatige optrede beseer is, se onkoste deur sy mediese fonds

of werkgewer betaal word. Watter rol, indien enige, speel die ontvangs van hierdie voordeel in die berekening van die bedrag skadevergoeding wat X van Y kan eis? Die kwessie van voordeeltoerekening is een van die moeilikste vraagstukke in die skadevergoedingsreg (sien Visser en Potgieter *Skadevergoedingsreg* (1993) 187 – 221 vir 'n algemene bespreking en verdere verwysings). Die praktyk hanteer die probleme op kasuïstiese wyse terwyl die regswetenskap nog nie werklik in staat was om 'n algemeen aanvaarbare teorie te ontwikkel nie.

Wat nie-vermoënskade betref, is daar nog meer probleme wat saamhang met die besondere aard van hierdie skadevorm. In die algemeen kan nievermoënskade omskryf word as *die afname deur 'n skadestigtende gebeurtenis in die kwaliteit van die hoogs persoonlike (of persoonlikheids-) belange van 'n regsubjek by die bevrediging van sy regserkende behoeftes, welke verandering nie sy ekonomiese posisie raak nie* (sien Visser en Potgieter 88; *Edouard v Administrator, Natal* 1989 2 SA 368 (D) 386). Wat is nou die effek op die skadevergoedingsbedrag wat 'n eiser kan verhaal (vir vermoënskade of nievermoënskade) van nie-vermoënsregtelike *voordele* wat uit die betrokke skadestigtende gebeurtenis volg?

2 Standpunte dat 'n *solatium* nie 'n verrekenbare voordeel is nie

Die standpunt is al gestel (sien Reinecke 1988 *De Jure* 233) dat voordeeltoerekening onvanpas is waar dit gaan om 'n eis weens *solatium* (dws, 'n vergoedingsbedrag vir nie-vermoënskade) of waar die betrokke voordeel die vorm van 'n *solatium* aanneem (dws 'n nie-vermoënsregtelike voordeel is). As gesag vir hierdie beskouing verwys hy na *Mutual and Federal Insurance Co Ltd v Swanepoel* 1988 2 SA 1 (A) 2. In hierdie saak was die eiser 'n lid van die burgermag wat in 'n ongeluk betrokke was en as gevolg daarvan geregtig geword het op 'n militêre pensioen ingevolge die Wet op Militêre Pensioene 84 van 1986. Die vraag wat beantwoord moes word, was of die betrokke pensioen as voordeel verreken moet word ter vermindering van die eiser se (algemene) deliktuele skadevergoeding weens "ongeskiktheid". Die appèlafdeling handhaaf die beslissing van die hof *a quo* (sien 1987 3 SA 399 (W)) dat die pensioen nie in ag geneem mag word nie aangesien dit nie bedoel is as skadevergoeding (kompensasie) vir verlies van inkomste of verdienvermoë nie. Die hof argumenteer soos volg (11):

> "[I]t cannot be said that a plaintiff is over-compensated if, when assessing his general damages, no regard is had to an extraneous benefit conferred upon him for the purpose of ameliorating pain and suffering, loss of amenities, disability, etc. I am accordingly of the view that, insofar as the pension accruing to the respondent serves to compensate him for the intangible consequences of his disability, it should not be deducted from his non-pecuniary loss. And since it is impossible to determine to what extent a pension conferred under the Act is intended to or serves to compensate a member for pecuniary loss, and more specifically loss of earnings, the Court *a quo* correctly held that the respondent's pension should not be set off against the totality of the damages sustained by him . . ."

Na my mening moet die beginsel wat die hof hier stel, beperk word tot die geval wat die hof oorweeg het, naamlik 'n voordeel ingevolge die vermelde Wet op Militêre Pensioene wat 'n besondere tipe *solatium* vir alle geldelike en niegeldelike gevolge van die ongeskiktheid is. *In casu* het die hof ongetwyfeld tot 'n billike en korrekte slotsom gekom maar dit beteken nie dat die hof se *ratio* tot absolute reël vir elke tipe geval verhef kan word nie.

Die hof se algemene verwysings na die aard en beweerde niekompenseerbaarheid van nie-vermoënskade ("it should be borne in mind that

a claim for such loss is not an Aquilian action . . . and . . . an award of money cannot really compensate a plaintiff for pain and suffering" (12)) strook in elk geval ook nie volkome met ander uitsprake van die appèlafdeling nie. Dieselfde appèlregter (Van Heerden AR) verklaar byvoorbeeld in *Administrator, Natal v Edouard* 1990 3 SA 581 (A) 595:

> "As is well known, Roman-Dutch law, unlike Roman law, did, however, by way of exception allow the recovery in delict of intangible loss flowing from the wounding of a free man. It has now been authoritatively established that a claim for such loss, although sounding in delict, is an *actio sui generis* differing from the Aquilian action only insofar as it is from its inception not actively transmissible."

(In *Guardian National Insurance Co Ltd v Van Gool* 1992 4 SA 61 (A) 65 word met goedkeuring na hierdie *dictum* verwys.) Uit die betrokke *dictum* blyk daar nie die diepgaande verskille tussen vergoeding vir vermoënskade en vir nie-vermoënskade – wat dan voordeeltoerekening by nie-vermoënskade ontoepaslik sou maak – waarop die hof in die *Swanepoel*-saak sinspeel nie. Terloops kan ook in hierdie verband verwys word na die volgende opmerking van appèlregter Corbett in die meerderheidsbeslissing in *Evins v Shield Insurance Co Ltd* 1980 2 SA 814 (A) 838:

> "I use the term Aquilian in an extended sense to include the *solatium* awarded for pain and suffering, loss of amenities of life, etc, which is *sui generis* and strictly does not fall under the umbrella of the *actio legis Aquiliae*."

Skade in "Aquiliese verband" kan dus in 'n wye sin ook nie-vermoënskade insluit.

Hoe dit ook al sy, in die *Swanepoel*-saak kon die hof kwalik bedoel het dat die algemene idee van verrekenbare voordele totaal vreemd is aan die bepaling van die vergoedingsbedrag vir nie-vermoënskade. Die opmerking van die hof waarna hierbo verwys word (dat 'n eiser nie oorgekompenseer word as daar nie ag geslaan word op enige voordeel wat hy uit 'n ander bron ontvang het nie), is korrek wat die feite van die betrokke saak betref, maar is nie noodwendig in andersoortige gevalle ook die korrekte oplossing nie. Ook moet onthou word dat oorkompensasie by nie-vermoënskade uiteraard moontlik is en dus vermy of uitgeskakel moet word. Daar is talle voorbeelde waar die appèlafdeling by oorkompensasie die betrokke vergoedingsbedrag tot 'n aanvaarbare vlak verminder het (sien bv *Caxton Ltd v Reeva Forman (Pty) Ltd* 1990 3 SA 547 (A) 575 waar die verhoorhof R250 000 as algemene skadevergoeding toegeken het en dit in appèl na R150 000 verminder is). 'n Mens kan dus nie met 'n beroep op die werklikheidsvreemde argument dat oorkompensasie by nie-vermoënskade onmoontlik is, die moontlike werking van voordeeltoerekening by voorbaat wil uitskakel nie.

3 Voordeeltoerekening wel erken by liggaamlike beserings

'n Voorbeeld van voordeeltoerekening wat reeds in die praktyk aangetref word, is waar 'n eiser se liggaamlike beserings ook bewusteloosheid meebring wat tot gevolg het dat hy minder vergoeding vir pyn en lyding ontvang (sien Corbett, Buchanan en Gauntlett *The quantum of damages in bodily and fatal injury cases* (1985) 53; *Sigournay v Gillbanks* 1960 2 SA 552 (A) 569 – 571; *Botha v Minister of Transport* 1956 4 SA 375 (W) 379 – 380; in die algemeen Visser en Potgieter 97 ev 410). Hier kan 'n mens argumenteer dat die bewusteloosheid 'n "gunstige" effek of voordeel van die betrokke beserings is deurdat dit pyn uitskakel of verminder.

Voorts het die appèlafdeling in *Administrator-General SWA v Kriel* 1988 3 SA 275 (A) beslis dat die toekenning van mediese en para-mediese koste vir hulpmiddele wat iemand se verlies van lewensgenietinge kan verminder, as voordeel in ag geneem moet word by die bepaling van vergoeding vir nie-vermoënskade. So verklaar die hof (786):

> "[I]n addition to the paramedical aids, there are other forms of relief provided for in the award thus far made, which will ameliorate the hardship of the appellant's disability and his loss of amenities . . . The trial Court, it should be noted, was mindful of this danger of duplication when making [an] assessment of compensation for general damages under this head."

(Sien vir verdere voorbeelde van die toepassing van hierdie beginsel *Ngubane v SA Transport Services* 1991 1 SA 756 (A); *Minister of Defence v Jackson* 1991 4 SA 23 (ZSC); *Bennie v Guardian National Insurance Co* Corbett en Honey *The quantum of damages in bodily and fatal injury cases* (1992) A3 – 44; *Dusterwald v Santam Insurance Co Ltd* Corbett en Honey A3 – 89; *Nanile v Minister of Posts and Telecommunications* Corbett en Honey A4 – 33.)

4 Voordeeltoerekening in gevalle van *iniuria*

Ook by die *actio iniuriarum* weens 'n *iniuria* is daar voorbeelde van voordele wat 'n eiser se genoegdoeningsbedrag verminder deurdat dit in verrekening gebring word. Waar 'n eiser wie se vrou met X owerspel gepleeg het, voor die toekenning van genoegdoening eierigting gebruik en X aanrand, word die aanranding in ag geneem ter vermindering van die eiser se genoegdoeningsbedrag (sien bv *Potgieter v Potgieter* 1959 1 SA 194 (W)). 'n Mens kan hier argumenteer dat die eiser reeds buite-geregtelik vir homself 'n genoegdoeningsvoordeel geskep het en dat dit logies is dat dit ter vermindering van sy genoegdoening moet dien.

Dit is ook bekend dat 'n apologie van die verweerder by laster in ag geneem word ter vermindering van die genoegdoening waarop die belasterde geregtig is (sien bv *Norton v Ginsberg* 1953 4 SA 537 (A); *De Flamingh v Pakendorf* 1979 3 SA 676 (T) 686; Burchell *The law of defamation in South Africa* (1985) 299 – 300; Kuper 1966 *SALJ* 480). Die apologie is duidelik 'n voordeel, komende van die verweerder, wat 'n teenwig vir die betrokke persoonlikheidskrenking skep en daarom die genoegdoeningsbedrag sal temper. By ander vorme van *iniuria* kan 'n apologie uiteraard dieselfde rol speel (sien bv *Makhanya v Minister of Justice* 1965 2 SA 488 (N) ivm onregmatige aanhouding).

5 Afwysing van voordeeltoerekening by kontrakbreuk

In *Administrator, Natal v Edouard supra* het dit gegaan oor 'n eis om kontraktuele skadevergoeding weens die ongewenste geboorte van 'n kind. Daar is namens die verweerder, wat die betrokke geboorte deur 'n sterilisasie-operasie moes voorkom, aangevoer dat die geboorte van 'n kind en die gepaardgaande ouerskap 'n vreugdevolle gebeurtenis is wat teen enige geldelike nadele van sodanige geboorte opgeweeg moet word. Die hof verwerp hierdie argument en som die posisie soos volg op (590):

> "In short, in our law a plaintiff claiming patrimonial loss is not called upon to adjust such loss with reference to non-pecuniary benefits arising from *inter alia* a breach of contract."

Hierdie afwysende houding teenoor die verrekening van nie-geldelike voordele by kontrakbreuk kan natuurlik direk teruggevoer word na die beleid van ons

reg om in daardie gevalle vergoeding slegs vir vermoënskade toe te laat. Wanneer ons reg so ontwikkel het dat dit, soos sekere vergelykbare regstelsels, meer geneë is om nie-geldelike nadele te kompenseer, spreek dit vanself dat daar opnuut gekyk sal moet word na die moontlike verrekening van die nie-geldelike voordele van kontrakbreuk.

6 Gevolgtrekking en slotopmerkings

Die afleiding uit bovermelde gesag is dat daar wel gevalle voorkom waar sowel reële of geldelike voordele (soos geld vir hulpmiddele om 'n beseerde se lewe gemakliker te maak) as nie-geldelike voordele (soos 'n apologie in 'n geval van laster) by die bepaling van 'n gepaste vergoedingsbedrag vir nie-vermoënskade verreken moet word. Enige standpunt dat voordeeltoerekening outomaties irrelevant is waar nie-vermoënskade of voordele van nie-vermoënsregtelike aard in deliktuele verband ter sprake kom, moet gevolglik as foutief beskou word.

Die feit dat voordeeltoerekening in beginsel by nie-vermoënskade kan geld of dat nie-vermoënsregtelike voordele in ag geneem mag word, beteken natuurlik nog nie dat voordeeltoerekening outomaties plaasvind sodra so 'n voordeel uit 'n skadestigtende gebeurtenis volg nie. Die hof het steeds 'n diskresie om in die lig van die belange van die eiser, die verweerder, die bron van die voordeel, regsbeleid ensovoorts te besluit of dit billik is dat voordeeltoerekening moet plaasvind.

Ten slotte kan ook na die tragiese dog interessante gevalle verwys word waar die blote bestaan van nie-vermoënskade 'n tipe "voordeel" uitmaak wat die omvang van vermoënskade betref. So word die beserings van 'n eiser wat meebring dat hy 'n verlies van lewensgenietinge ervaar deurdat hy byvoorbeeld nooit sal kan trou en kinders verwek nie, in ag geneem ter vermindering van sy eis vir verlies van verdienvermoë aangesien hy dan ook geen familie sal hê om te onderhou nie (sien bv *Reid v SAR and H* 1965 2 SA 181 (D) 190; *Dusterwald v Santam Insurance Co Ltd* Corbett en Honey A3 – 66). Daar is egter ook kritiek op hierdie beginsel (sien bv *General Accident Insurance Co Ltd v Summers* 1987 3 SA 577 (A) 617; *Bobape v President Insurance Co Ltd* Corbett en Honey A – 54; Visser en Potgieter 201).

PJ VISSER
Universiteit van Pretoria

STATE LIABILITY FOR THE DELICTS OF THE POLICE: THE CLOSING OF THE CIRCLE

Introduction

It is an extremely rare occurrence for the Appellate Division to make a significant break with a long line of decisions and then a mere seven years later revert to the previous position. This is, however, what occurred when the recent case

of *Minister of Law and Order v Ngobo* 1992 4 SA 822 (A) reinstated what has become widely known as the "standard test" for vicarious liability of the state. *Ngobo* ended the flirtation with the creation-of-risk test formulated in *Minister of Police v Rabie* 1986 1 SA 117 (A) in which the Appellate Division abandoned the standard test established in an unbroken line of decisions extending as far back as Union, replacing it under certain circumstances.

In what follows we intend to:

(1) set out the standard test and risk test (as per the *Rabie* decision);

(2) comment briefly on some decisions reported within the *Rabie-Ngobo* interlude dealing with the questions;

(3) analyse the *Ngobo* decision critically;

(4) consider the basis of vicarious liability; and

(5) highlight relevant policy considerations.

1 The standard and creation-of-risk tests

The standard test for the vicarious liability of the state for delicts by police was stated by Corbett JA (as he then was) in *Mhlongo v Minister of Police* 1978 2 SA 551 (A) 567 as follows:

> "[W]hen a wrongful act is committed by a member of the Force in the course or scope of his employment the State is prima facie liable."

The source of state liability is section 1 of the State Liability Act 20 of 1957 which makes the state liable for "any wrong committed by any servant of the state acting in his capacity and within the scope of his authority as such servant". It is trite law that this provision places the state on the same footing as any other master with regard to vicarious liability.

The majority of the court in the *Rabie* case (Van Heerden JA in dissent) held that the most appropriate basis for deciding whether or not the state was vicariously liable in that specific instance was the "creation of risk". This criterion was distilled from the judgment of Watermeyer CJ in *Feldman (Pty) Ltd v Mall* 1945 AD 733 741 where the Chief Justice said:

> "[A] master who does his work by the hand of a servant creates a risk of harm to others if the servant should prove to be negligent or inefficient or untrustworthy; that, because he has created this risk for his own ends he is under a duty to ensure that no one is injured by the servant's improper conduct or negligence in carrying on his work . . ."

The main factual basis for adopting this new test was that in *Rabie* the policeman had (largely according to his own protestations, we submit) resumed duty while in pursuit of private interests (see Martin "State liability for the delicts of the police" 1989 *THRHR* 273). The court held that under such circumstances the standard test was inappropriate, a view which we do not share (see below).

The *Rabie* case therefore introduced a second test for vicarious liability (see below) applicable under limited circumstances (Martin 1989 *THRHR* 280). However, the decision suffered from the major shortcoming that it made no attempt to define the limits for such liability or to provide any assistance in that regard.

2 The interlude between *Rabie* and *Ngobo*

Since it established a precedent in this area of law, *Rabie* was referred to and considered in a number of subsequent decisions. The salient facts are given in order to illuminate the dangers inherent in the *Rabie* approach.

For the purpose of analysis the cases heard during this period may be divided into three groups:

(a) those in which the servant was allegedly on duty when the incident occurred;

(b) those in which the servant was allegedly off on "a frolic of his own", that is, engaged in an act aimed at achieving his own private purposes; and

(c) those in which the servant had allegedly returned to duty while pursuing private interests and analogous situations.

(a) *Servant on duty*

In *Hamman v SWAPO* 1991 1 SA 127 (SWA) Hamman's furniture and appliances were destroyed in a rocket and/or mortar attack on his home by the first defendant's military wing, the Peoples Liberation Army of Namibia (PLAN). The second defendant, who was the vice president of SWAPO, was sued on the basis that by virtue of his membership of the central committee of first defendant, he had authorised and/or assisted, encouraged, instigated or ratified the attack. Second defendant's particulars of claim were held to be excipiable for lack of the essential averment of unlawful conduct on his part which causally contributed to plaintiff's alleged loss.

In the course of his judgment Levy J indicated (albeit *obiter*) that

> "an employer is liable for the delicts of his servants where such delicts . . . are committed in the course and scope of the servant's employment or within the course and scope of the risk created by the employment" (138I – 139A).

The judge cited *Rabie*, *inter alia*, as support for this. While this *dictum* clearly indicates that the court was of the view that there are at least two tests for vicarious liability, no indication is given of when each is applicable or whether they are alternatives for each other under all circumstances. The danger lurking in such uncertainty is that where one test proves unworkable or inappropriate in any situation the other will be applied indiscriminately.

The Zimbabwean case of *Boka Enterprises (Pvt) Ltd v Manatse* 1990 3 SA 626 (ZHC) provides further insights into how *Rabie* has been interpreted. In this instance an incorporated trading company sued the Minister of Finance, Economic Planning and Development for allegedly defamatory statements contained in a letter written by first defendant, a civil servant in the employ of the Department of Customs and Excise. The court decided that the state must take responsibility for the risk that the servant might make improper use of his powers to write letters on its behalf (630A – B). The impact of this decision is reduced somewhat by the fact that liability was also held to exist on the basis of the standard test (629F); it cannot be gainsaid, however, that *Rabie* was being viewed as a general basis for vicarious liability, untrammelled by the limitations implicit in the decision itself.

In both cases *Rabie* was referred to under circumstances for which, we submit, it was not designed: *Boka Enterprises* is a case of a servant performing his duties in an improper manner, while the factual basis of a master-servant relationship was lacking in *Hamman*.

(b) *Servant on "frolic of his own"*

In *Witham v Minister of Home Affairs* 1989 1 SA 116 (ZHC) a constable in the Zimbabwe Republic Police who was on guard duty at the premises of a government minister, shot the plaintiff and his wife (fatally wounding her) at their home some 700 to 800 metres away. The constable had left his post while on duty (121I – J). Ebrahim J held that the constable's digression from duty was

> "so great in respect of space and time that it cannot reasonably be said that he still exercised the functions to which he was appointed" (126A).

After quoting extensively from *Rabie* (134), Ebrahim J (126I) expressed the view that, had the constable fired accidentally at the minister's premises or even in error (albeit deliberately), such actions would have fallen within the purview of the risk created by his appointment. With respect, this interpretation equates the creation of risk criterion with the standard test, particularly if one has regard to the extremely restrictive effect of the words "at the premises". In all fairness, it must be conceded that reference to *Rabie* was not strictly necessary, since the constable had made a deviation from duty, whereas *Rabie* was (in our view) designed for situations in which duty had been resumed during the pursuit of private interests. This concession does not reduce the significance of *Rabie* being yet again interpreted as a test for vicarious liability on an equal footing with the standard test, since the court felt constrained to point out that liability would have ensued on either basis.

(c) *Servant returned to duty*

Tshabalala v Lekoa City Council 1992 3 SA 21 (A) was a case on all fours with *Rabie*. An off-duty municipal policeman (Kgabane) witnessed a fight at a shebeen which he was patronising. He fired at the appellant whom he saw emerging from the scene of the fight. EM Grosskopf JA held that Kgabane had purported to act as a policeman, thus "in the course and scope of his duties as a servant of the respondent" (31H – I). We therefore have an off-duty policeman placing himself back on duty by acting as a policeman. (It is of interest to note the emphasis which the court places on the policeman's intentions (31H), which can only be deduced from his actions: see Martin 1989 *THRHR* 275.) This was precisely the type of situation for which the majority of the court in *Rabie* (134F) had found the standard test inappropriate.

Counsel for the appellant not only argued that the court *a quo* had erred in basing its decision on the minority judgment in the *Rabie* case (*Tshabalala* 23D – E), but also relied on the majority judgment in significant respects (23G – H). These factors notwithstanding, EM Grosskopf JA (31I – 32A) decided the matter on the standard test, devoting a paltry three sentences to the *Rabie* case, none of which offers any explanation of why the *Rabie* case was not followed, even though it had been cited earlier (28C).

We submit that the court's finding that the policeman had resumed duty did not obviate the necessity for applying the *Rabie* test, but rather demanded that this be done. The finding that the policeman had resumed duty made application of the risk test obligatory – this was precisely the type of situation the test was designed for. The fact that the court opted for the standard test completely undermines the disavowal of doubts by the court regarding the correctness of the *Rabie* decision. The characterisation of the policeman's behaviour in *Rabie* as "a mere charade designed to conceal ulterior motives" (*Tshabalala* 31H) also speaks volumes about the court's actual view of the *Rabie* decision:

in *Rabie*, the finding that the policeman's behaviour evidenced an intention to act as such, was the court's justification for a different approach.

The *Rabie* approach was applied in another interesting set of circumstances in *Minister van Wet en Orde v Wilson* 1992 3 SA 920 (A). An off-duty policeman, Minnie, went to first respondent's flat ostensibly to enquire about a telephone call which his ex-wife (then first respondent's girlfriend) was alleged to have made to his (Minnie's) girlfriend, which had caused her much distress. Minnie forced his way into the flat, assaulted Wilson (first respondent), dragged him by the hair down a number of stairs and eventually had him taken away by a police van. The court rejected Minnie's allegation that Wilson had struck him first and that he had dragged Wilson downstairs in order to ascertain his identity for purposes of laying a charge of assault against him. The court held (per Van Heerden JA) that Minnie's conduct was so far removed from the risk created by his appointment as a police officer that the state could not be held liable (928B).

It is interesting to note that in this instance the court rejected Minnie's protestations that he had placed himself on duty after Wilson had assaulted him, since this conflicted with the evidence. This stands in stark contrast to the situation in *Rabie* (134A) where, even though the majority of the court had accepted that Van der Westhuizen's actions had been "totally self serving and mala fide", this did not persuade them to reconsider their earlier view that it "seems a fair inference that he intended throughtout to act as a policeman" (*idem* 133H).

In our view the *Wilson* decision accords with justice, but unfortunately does not explain why the policeman's actions fell outside the risk created by his appointment. The only conclusion we feel confident in drawing from the decision is that the acts of an off-duty policeman cannot fall within the risk created by his appointment.

We find ourselves constrained to express disagreement with one aspect of the interpretation which the court placed on the *Rabie* test in *Wilson*. Van Heerden JA's reference (927F) to *Rabie* (134D – E) does not support his contention that even in terms of the creation-of-risk (*Rabie*) approach, for liability to ensue there must still be

> "a sufficiently close link between the servant's acts for his own interests and the purposes and business of his master".

In the passage quoted from *Rabie*, Jansen JA was still engaged in an examination of the standard test, prior to his rejection of the test. We submit that the proximity of the acts to the servant's functions is part of the standard test and not a requirement for liability on the creation-of-risk test. Furthermore, it is our view that this aspect of *Wilson* represents an effort to temper the far-reaching impact of the *Rabie* test by importing limiting factors from the standard test. This attempt to amalgamate the two approaches has not improved the situation but has, rather, compounded the confusion.

Wilson is arguably the only case in which the court purported to apply the *Rabie* criterion. Van Heerden JA stated the test as follows:

> "[W]aar 'n persoon as polisiebeampte aangestel word [skep] die staat 'n risiko van onregmatige benadeling van derdes . . . d.w.s. 'n risiko dat die beampte sy bevoegdhede vir sy eie doeleindes kan misbruik deur bv. aanranding en onregmatige arrestasie."

In *Macala v Maokeng Town Council* 1993 1 SA 434 (A) an off-duty municipal policeman, Mthembu, had, during the course of an altercation with a third

person, shot and injured the appellant who was passing by. Appellant conceded that at the relevant time, even though Mthembu was in uniform and armed with a firearm supplied by the respondent, he was not in any way engaged in his work as a municipal policeman. This concession notwithstanding, appellant argued that Mthembu's actions fell within the risk created by his appointment as a municipal policeman (440D). Goldstone JA examined *Rabie* (esp 134I – 135B) and came to the conclusion 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" (441D – E).

We submit that the judgments in *Rabie* itself bear testimony to the incompatibility of the standard test and creation-of-risk test. Once more a court adopted a Procrustean bed approach with regard to the majority judgment in *Rabie* in order to ensure that it conformed to the requirements of the standard test.

The majority decision in *Rabie*, based as it was on contradictory and unsatisfactory findings of fact (see above), lends itself to the wide variety of interpretations and confusion to which the aforegoing review attests. Furthermore, the strenuous efforts made by the courts to reconcile the creation-of-risk and standard tests, has already begun to distort both tests. The cumulative effect of the aforementioned factors has resulted in our law of vicarious liability being in a most unsatisfactory state – in need of both thorough revision and restatement.

3 The *Ngobo* decision

The facts very briefly were that two off-duty policemen, Charlie and Ngili, stationed at Guguletu, fired a number of shots at one Ngobo, one of which fatally wounded him. The incident occurred when a companion of the deceased bumped into one of the policemen, who were walking along a street in Langa. An apology tendered by this gentleman resulted in one of the policemen swearing at him. An argument ensued, culminating in the shooting. Ngobo's mother sued successfully in the Cape Provincial Division for loss of support whereupon the Minister appealed. Kumleben JA delivered the unanimous decision of the court.

After reviewing the evidence, the judge set out what would clearly have been adequate grounds for distinguishing *Rabie*: the officers were off duty at the time; the incident occurred in an area in which they would not normally have carried out their duties; they neither announced nor revealed that they were policemen; and neither purported to act in an official capacity (826B – E). The reference to the failure to disclose or announce that they were policemen is of singular import: in *Rabie* a tremendous degree of reliance (far too much, we submit) was placed on the policeman's stated intentions (133G; see Martin 1989 *THRHR* 275) even in the face of the apparently unavoidable inferences to which the facts led. Somewhat unexpectedly, the judge was not content with merely distinguishing *Rabie*, but proceeded to overturn that decision (832C).

In what, we submit, is the typical strategy of a court about to make a significant change in or clarification of the law, the court reviewed the law as it stood prior to *Rabie*, the latter having been the basis of the decision *a quo* (826G – 828A). This necessarily highly selective review, traces developments and presents the standard test as understood at the point at which the *Rabie* decision was handed down. *En passant*, Kumleben JA made the important point that even the so-called deviation cases were in fact decided on the basis of the standard

test (827C – H). The difficulty of applying the standard test had never (and we submit in *Rabie* should not have) been considered as grounds for abandoning the standard test. All that was done in the deviation cases, for example, was that the objective proximity of the servant's acts (performed for purposes extraneous to the purposes for which he had been employed) was emphasised at the expense of the subjective factor of the servant's intentions. The court concluded (and counsel for the respondent conceded) that on the law as it stood prior to *Rabie*, the respondent's action would have failed. This still, however, left the *Rabie* approach to be considered.

We submit, for the reasons which follow, that *Rabie* indisputably established another test for the vicarious liability of the state: (i) Jansen JA impliedly recognised this when he declined to "define the limits of liability based on the creation of risk" (135B); (ii) Kumleben JA concluded that in *Rabie* the sole and not merely the dominant question was whether the policeman's acts fell within the risk created by the state in appointing the policeman (*Ngobo* 831C – D; cf Martin 1989 *THRHR* 279); (iii) Kumleben JA decided that to the extent that the *Rabie* case may be said to have replaced the standard test it was wrongly decided (832C). The creation-of-risk test was therefore not a variant or aspect of the standard test.

Some of the major points made by Kumleben JA when he subjected *Rabie* to thorough critical scrutiny are the following:

(i) The standard test is the most appropriate one where a servant had not been about his master's work immediately prior to the commission of the deleterious act (830H – I). We find ourselves in support of this argument, since the first matter to be decided in such circumstances is whether or not the servant in fact commenced doing his master's work, just as in the deviation cases the question is whether he continued to do the master's work to some extent. The court *a quo* in *Ngobo* appears to have overlooked the fact that a policeman must actually first place himself on duty.

(ii) *Feldman (Pty) Ltd v Mall* (741) does not lend support to the approach adopted in Rabie. The judge referred to the fact that the servant must be carrying out the master's work, according to *Feldman*, whereas in *Rabie* the policeman "did not act in furtherance of his employer's business" (*Ngobo* 831A). It is our view that the *Feldman* case was itself decided completely on the basis of the traditional approach (Martin 1989 *THRHR* 277), and that liability ensued in that instance because

> "[the servant] was driving the van, not solely for his own purposes but also for his master in his capacity as a servant . . ." (*Feldman* 743).

(iii) In *Rabie*, one of the underlying reasons for imposing vicarious liability, namely that employment of a servant creates a risk that the servant will cause harm to others, was converted into the test for such liability (831E; Martin 1989 *THRHR* 277). The majority in *Rabie* appear to have overlooked Schreiner JA's distinction in *Carter and Co (Pty) Ltd v McDonald* 1955 1 SA 202 (A) 211H to the effect that "the reason [for imposing vicarious liability], even if certainly established, is not the same as the rule" (*Ngobo* 831G; cf also Neethling and Potgieter "Risikoskepping by middellike aanspreeklikheid" 1993 *THRHR* 502 – 503).

Kumleben JA indicated that he could have distinguished *Rabie* on the "narrow ground" that the policemen had neither acted as such nor exercised any official

function (832B – C) but the judge was of the view that a broader issue was at stake. We submit that he was justified in adopting this view (and consequently that what he said is not *obiter*) because: (i) the *Rabie* case had resulted in a not insignificant measure of confusion regarding whether or not the liability of the state for police delicts had been extended beyond the course and scope of their duties; and (ii) it was unclear whether or not the risk approach had replaced the standard test completely or only under the circumstances laid down in *Rabie*.

On this broader question of the appropriate test, the court held (830C – 831G) that in *Rabie* it had been wrongly decided to replace the standard test, even in the light of what the court in that instance saw as special circumstances. The court based this aspect of its decision to a large extent on its earlier criticisms of the *ratio* in *Rabie*. We submit, for reasons already mentioned, that this decision is correct and is to be welcomed (cf also Neethling and Potgieter 1993 *THRHR* 502 – 503).

The court's reasoning led it to the conclusion that the creation-of-risk principle was not an aspect of the inquiry into the course and scope of duty (832D). Kumleben JA underscored the effect of the decision *vis-à-vis Rabie* by pointing out that while creation of risk might be a proper consideration when deciding the direct liability of an employer, it has no place in an inquiry into his vicarious liability (832C – D).

In our view, vicarious liability and risk liability coincide only to the extent that the person who is held liable, has not acted negligently; the requirement of negligence continues to apply to the conduct of the servant or agent in cases of vicarious liability. In risk liability proper, however, negligence is not a requirement for the action of either the master or the servant. If seen in this light the excerpt from the judgment in *Feldman* (741) cannot be authority for risk liability, since the requirement is that the servant must have acted negligently or improperly; the same applies to the decision in *Estate Van der Byl v Swanepoel* 1926 AD 141 and other decisions relied on as establishing the risk theory.

Finally, as regards the case based on Charlie's shooting of the deceased (since the matter had also been argued on the basis that Ngili was under a duty to prevent the shooting), the court declined the invitation to adopt creation of risk as the basis and determinant of vicarious liability, even when coupled with foreseeability as the limiting factor. The court held that there was

> "no sound reason for replacing a generally accepted principle with another which is controversial and untried" (833H).

The controversial nature of the risk principle is touched on below. However, far from being untried, we submit that the cases from *Rabie* through to *Ngobo* bear ample testimony to experiments with the principle, ultimately failing to bring clarity to our law.

4 The basis of vicarious liability

This is a matter of perennial controversy. The underlying reasons for the controversy are the need to justify this pervasive departure from the fault principle, as well as the desire to provide a mechanism for determining the proper limits of such liability (*Feldman* 741). Since the establishment of this type of liability, numerous theories have been propounded in attempting to provide a basis for it. Many have not survived the rigours of critical scrutiny, while altered social circumstances have rendered others inappropriate.

Two of the earliest attempts at explaining the basis are the maxims "respondeat superior" and "qui facit per alium facit per se". In *Stavely Iron and Chemical Co Ltd v Jones* 1956 AC 627 Lord Reid finally despatched these with the statement: "The former merely states the rule boldly in two words, and the latter merely gives a fictional explanation of it" (643; see Rogers *Winfield and Jolowicz on tort II* (1984) 602).

Selection and control were once the accepted basis (Barlow *The South African law of vicarious liability in delict* (1939) 180). Selection is an unsatisfactory criterion, since it would permit the master the defence that he had taken the utmost care in choosing his servants. Similarly, the exclusion of due and proper supervision as a defence attests to the inadequacy of the control basis. In addition, the vicarious liability sometimes imposed for the acts of professionals reduces the notion of control to nothing more than a hollow fiction.

At one stage the notion that liability was the consequence of the master having set the whole "thing" in motion (causation basis) enjoyed prominence. Glanville Williams ("Vicarious liability and the master's indemnity" 1957 *MLR* 229) admonishes that liability based on causation alone is a primitive idea, hence the supplementary requirement of fault in delict. The acceptance of causation *simpliciter* as the rationale for vicarious liability would be a retrograde step, given the fact that vicarious liability already excludes fault on the master's part.

The idea that "the master has the deeper pocket" (Rogers 602) seems to have provided the impetus for many of the current theories. It looks at the situation where the loss has already occurred and attempts to settle the loss on the party best able to pay. It is difficult to conceive of a situation where police abuse of authority would occur and neither the individual policeman nor the state would be liable; this suggests that the risk theory has been tailored for situations where the state, but not the individual policeman, could escape liability and that this has been done to protect the public by not forcing them to look for recompense from a possible man of straw (see Dendy "When the force frolics: a South African history of state liability" 1989 *Acta Juridica* 86). However, standing on its own, this test is far too arbitrary and crude to constitute an acceptable basis. Glanville Williams and Hepple (*Foundations of the law of tort* (1984) 133) mention as an ofshoot of this deeper pocket concept the view that the employer should shoulder the losses because he derives the benefit of the service. Their trenchant criticism of this argument is that according to this approach the passenger ought to be liable for the taxi driver's acts.

Another theory Williams and Hepple (134) have distilled from various views, is the one they call the "social insurance" theory. Its basic tenor is that vicarious liability is a mechanism for distributing the risk of losses among the members of society at large. This is achieved by passing on the direct costs of liability to the customer (consumer) and by insurance (the cost of the premiums also being borne by the consumer). The notion of risk is central to this theory. The view that a risk of harm to others is inherent in a master-servant relationship has been and perhaps still is accepted as an independent justification for vicarious liability (see Barlow 184 – 190; Scott "The theory of risk and its application to vicarious liability 1970 *CILSA* 49; South African Law Commission "Report on risk as a ground for liability in delict" Project 23 (1986)). We concede the difficulty of rejecting outright the idea that risk-taking in a broad sense is one of the bases of and justifications for the imposition of vicarious liability. This

notwithstanding, the conclusion arrived at by Williams and Hepple (135) that vicarious liability is an "extraordinarily inefficient" method for providing social insurance casts serious doubt on the adequacy of this explanation.

The fact that liability is focused on the master rather than spread more widely, tends to lend credence to the deterrence theory (Williams and Hepple 134). Further factors underlying the development of vicarious liability are the inculcation of correct policy and discipline by ensuring that the deterrent effects of an adverse judgment permeates an entire state department (Goode "The imposition of vicarious liability to the torts of police officers: considerations of policy" 1975 *Melbourne Univ LR* 47). It is furthermore perceived to be incongruous that the master should escape responsibility on the basis that "the greater the fault of the servant, the less the liability of the master" (Swanton "The master's liability for the wilful tortious conduct of his servant" 1985 *West Aust LR* 3).

According to Dendy (*supra*) to adapt the rule in *Rylands v Fletcher* 1868 LR 1 Ex 265 which relates to the control of something inherently dangerous or of hazardous substances to the vicarious liability of the police, seems to reflect subliminal social perceptions rather than legal principle. Whatever the image of the police, the situations do not seem to be analogous. The fear that in the absence of the creation of risk principle the police will be allowed to run amuck and yet escape condign justice, which is, we submit, implicit in the *Rabie* decision, seems, even in the present recurring shock induced by revelations of depredations by state functionaries, to be somewhat overblown.

Notwithstanding our earlier concession regarding the difficulty of rejecting outright the idea of risk-taking as a reason for imposing vicarous liability, we align ourselves with the Appellate Division in its rejection of risk liability in the technical sense in which it is used by Scott and Van der Walt, *inter alia*, as the basis of vicarious liability (see the synopsis made by Kumleben JA in *Ngobo* 832F – 833E). The main reason for our view is that risk liability in the technical sense is direct or primary in nature, whereas vicarious liability is of an indirect or secondary nature, being dependant on the servant's fault (see *Ngobo* 832C – D). We find further support for our view in the fact that risk liability has been accepted as a form of liability in a number of instances (Law Commission Report 23 – 38; *Pietermaritzburg City Council v PMB Armature Winders* 1983 3 SA 19 (A)) but to date not within the context of vicarious liability (except for the *Rabie* case which was wrongly decided).

We submit that it is both unnecessary and undesirable for a single theoretical justification to receive the judicial imprimatur. It is unnecessary, since the courts have not in any way been hamstrung by its absence, and undesirable in that it will restrict the court's flexibility (as pointed out in the criticisms levelled at some of them). In this context it may be well to accept the pragmatic view expressed by Lord Pearce in *Imperial Chemical Industries Ltd v Shatwell* 1965 AC 656 to the effect that

> "the doctrine of vicarious liability has not grown from any clear logical or legal principle but from social convenience and rough justice" (685).

5 Policy considerations for holding the servant liable

It has already been suggested that the need to protect the public by holding the state liable on the basis of the risk theory is not sound in principle. If one looks at the issue solely to determine whether the state rather than the erring

policeman should be held liable, there seems to be a great deal of consensus among academic writers that the public is best protected by holding the state liable. This we accept in cases where the standard test is satisfied, since the requirement of negligence within the course and scope of duty provides a justifiable basis for liability. Where the criteria for the standard test are not present there is surely a strong public interest in ensuring that the individual policeman is made to suffer the consequences of his actions and not allowed to escape by advancing a spurious claim that he acted within the scope of his employment.

We suggest that this can be done, as in the *Ngobo* decision, by returning to a deterrent approach and forsaking the purely compensatory approach; if it is considered to be a problem that the victim would have to act against a "judgment-proof" defendant, consideration should be given to legislation compelling particular categories of state employees to insure against these contingencies. An individual who enters the service of the state cannot be regarded as having been granted a licence to create state liability for whatever mayhem he wishes to wreak, as long as he remembers to declare that he is acting as a servant of the state. The deterrent effect of this approach should concentrate the mind even of possible manics in the police force.

In addition, there is the salutary consequence that the defendant is individualised and placed on the same level as the plaintiff. The converse of the "man of straw" argument is that the state resources are called to the aid of the state functionary, placing the plaintiff at a serious disadvantage. It is suggested that where the standard test does not apply, these considerations outweigh the benefit of the assurance that the state will be able to pay one's claim.

Holding the individual state functionary liable would simply mean that the criteria for the standard test have not been satisfied; the mere statement of the standard test means that if the wrongs are not committed within the course and scope of his employment the individual functionary and not the state is liable. Where the act complained of does not satisfy the criteria for the standard test the basis for vicarious liability is absent. If the criteria are not satisfied one must not be astute to find policy reasons for the liability of the state notwithstanding the failure of the test; the criteria are the indicators that there are policy reasons for the liability of the state and the failure to meet them means that there are no policy reasons for such liability. The fact that the criteria may be difficult to apply in particular circumstances, and that there may be differences of opinion about when an act falls within the scope of employment, should make no difference to this general approach.

The liability of the servant for acts beyond the scope of his employment routinely occurs in private sector employment and there is nothing to suggest that it should be otherwise in the public sector. For example, in *Fawcett Security Operations v Omar Enterprises* 1992 4 SA 425 (ZSC), a claim that the employer of a security guard was vicariously liable for theft committed by the employee was rejected on the ground that the employee had not abused his authority since the goods had not been entrusted to him as part of his duty. Since he had not made use of ostensible authority, the act of the employee did not fall within the course and scope of his employment (unfortunately the words in the judgment were "the risk created", illustrating the pervasive effect of the *Rabie* test) and therefore vicarious liability did not ensue.

The final question that arises is whether there are possible policy differences justifying different tests in determining state liability as opposed to the liability of masters generally.

A possible basis of distinction is the danger that the police have been provided with the means of deceiving the public and, consequently, may abuse their authority by displaying their appointment cards even when they intend to pursue purely private interests; the ostensible authority approach. This factor seems to have been regarded as of particular importance in the *Rabie* decision. Moreover, there is a stronger interest on the part of society that its members show deference when police authority is exercised. It could then be argued that liability arises not because of the nature of the action of the policeman, but because of the abuse of authority with which he had been clothed coupled with acceptance of that authority by members of the public. This, however, seems to be a false dichotomy because any employee may misuse an identity card: there is nothing which suggests that the police are inherently more disposed to abuse of authority than other employees.

The increased danger that may arise from abuse of authority in the case of policemen, as opposed to other employees, emanates from the difference in the nature of their respective courses of employment and this will be reflected in the measure of damages. Thus there seems to be no reason to discard the standard test since, whatever claims of action within the scope of duty are made by scab policemen, the liability of the state, in circumstances where control of hazards is not germane, should be determined by the traditional criteria.

Conclusions

The foregoing analysis clearly illustrates that the Appellate Division has abandoned the risk theory in favour of the standard test as the criterion for determining the vicarious liability of the state. This development is commended for the following reasons:

(i) The Appellate Division has applied the risk theory solely to determine state liability and has never applied it unambiguously to other master and servant relationships. This is surprising because the State Liability Act 20 of 1957 makes the state subject to the law in the same way as private individuals.

(ii) The basis of the *Rabie* approach represented an attempt to regard the state employee as distinctly different from all other employees; an approach which lacked a realistic foundation and which could rightfully be resented by present and future state functionaries. For this reason, and because the risk theory treats the errant policeman as if he were incapable of volition and thus unable to constitute an *actus interveniens*, the reinstatement of the standard test is to be welcomed.

(iii) Finally, even though not directly relevant to the basis of vicarious liability, it bears repeating that the basis (or reason) for vicarious liability (even in cases where a basis was accepted) has never been the same as the test for such liability. The *Rabie* case was, with respect, wrong in equating the two.

IN FREDERICKS
BSC MARTIN
University of the Western Cape

NALATIGE DOODSVEROORSAKING: STATUTÊRE HERVORMING VAN DIE ERFREG?

1 Inleiding

Die onbevoegdheid om te erf wat op persone rus wat 'n ander se dood veroorsaak het, spruit voort uit die gemeenregtelike beletsel wat vergestalt word in die stelreël *de bloedige hand er neemt geen erffenis*. Alhoewel daar geen onduidelikheid is oor die onbevoegdheid van 'n moordenaar om te erf nie, was daar voor die onlangse beslissing in *Casey v The Master* 1992 4 SA 505 (N) onsekerheid oor die vraag of 'n erfgenaam wat die erflater se dood op 'n nalatige wyse veroorsaak het, ook onbevoeg is om te erf. Skrywers soos Van der Merwe en Rowland *Die Suid-Afrikaanse erfreg* (1990) 104 – 105 is van mening dat alhoewel daar gemeenregtelike gesag is dat die reël aanwending sal vind in geval van nalatige doodslag, dié toepassing daarvan skynbaar in die praktyk nie wye aanwending vind nie. Isakow is dieselfde mening toegedaan (*The law of succession through the cases* (1985) 65).

Die enigste volledige bespreking oor die onderwerp is 'n artikel deur Van der Walt en Sonnekus "Die nalatige hand – neem dit erfenis?" 1981 *TSAR* 43. Na 'n deeglike ondersoek van gemeenregtelike bronne kom die skrywers tot die gevolgtrekking dat die nalatige doodsveroorsaker waarskynlik ook onbevoeg is om van die oorledene te erf.

Die oogmerk met hierdie bydrae is om te besin oor die wenslikheid van dié beletsel. Enkele voorstelle, gerig op regshervorming, word aan die hand gedoen.

2 Positiewe reg

In die *Casey*-saak *supra* is die hof vir die eerste keer direk gekonfronteer met die vraag of 'n erfgenaam wat op 'n nalatige wyse die dood van die erflater veroorsaak het, bevoeg is om te erf. (Die ongerapporteerde beslissing is bespreek deur Sonnekus en Van der Walt "Die nalatige bloedige hand – voor die hof en die wetgewer" 1992 *TSAR* 147 en die saak self is opgesom deur De Waal in "Oorsig van die regspraak" 1992 *De Rebus* 891.) Die feite is kortliks die volgende: Die oorledene (mevrou C) en dader (meneer D, die langslewende eggenoot) was binne gemeenskap van goed getroud. Hulle het 'n gesamentlike testament verly (gedateer 1985-10-17) waarin hulle mekaar oor en weer as die enigste erfgename benoem het. D was op die aand van 8 Februarie 1989 onder die invloed van sterk drank maar nie in so 'n mate dat hy nie geweet het wat hy doen nie. Toe hy gaan slaap, het hy soos gewoonlik sy vuurwapen saam met hom bed toe geneem. In die slaapkamer het hy die gelaaide vuurwapen oorgehaal. Sy duim het gegly waarop 'n skoot afgevuur is. C is noodlottig gewond. D word aangekla en skuldig bevind aan strafbare manslag.

Die applikant was die eksekuteur van C se boedel. Die hof moes beslis of die oorledene se eggenoot erfregtelike voordele ingevolge die gesamentlike testament kon ontvang. Regter McLaren bevind dat die beletsel *de bloedige hand er neemt geen erffenis* toepassing vind in geval van nalatige doodslag; dat die beletsel nie deur nie-toepassing verval het nie; en dat genoemde gemeenregtelike

reël steeds in ooreenstemming met moderne sienings van "principle and public policy" is. (In dié verband verwys die regter na die Engelse reg wat hierdie siening ondersteun.) Die regter bevind dat D, gegewe die feit dat hy die dood van die erflater op 'n nalatige wyse veroorsaak het, onbevoeg is om van haar te erf. Dit was egter gemeensaak tussen die partye dat D geregtig was om die helfte van die gemeenskaplike boedel te neem ingevolge die bepalings van die huweliksgoederereg. Alhoewel die regter voorsien dat die ongekwalifiseerde toepassing van die beletsel by nalatige doodsveroorsaking, en veral in die geval van nalatige bestuur van 'n motor, "harsh and out of touch with the spirit of the times" kan wees, is hy van mening dat dit die taak van die wetgewer is om enige verslapping in die toepassing van die reël teweeg te bring.

As steun vir die standpunt dat die beletsel ook van toepassing is in geval van nalatige doodsveroorsaking, word verwys na die artikel van Van der Walt en Sonnekus 1981 *TSAR* 37 en die Engelse reg (507 van die uitspraak):

> "In their article *Van der Walt and Sonnekus* review the Roman-Dutch law on the subject and at 36 state their conclusion with regard to the maxim '*de bloedige hand er neemt geen erffenis*': 'Uit hierdie behandeling van die beperking blyk na ons mening afdoende dat die beletsel in die Romeins-Hollandse reg in beginsel ook die nalatige doodsveroorsaker getref het.'"

3 Oorsig van die gemenereg

In bogenoemde artikel van Van der Walt en Sonnekus is 'n volledige ondersoek na die gemeenregtelike oorsprong en trefwydte van die beletsel gedoen. Die skrywers kom tot die gevolgtrekking dat daar in die Romeinse reg 'n uitgebreide kategorie persone bestaan het wat nie oor die *testamentum factio passiva* beskik het nie, onder andere 'n persoon wat die erflater se dood veroorsaak het. Vir gesag dat persone wat die erflater se dood veroorsaak het onbevoeg was om te erf, word gewoonlik gesteun op *D* 34 9 3 maar ook op *D* 49 14 9 en *D* 48 20 74. Van der Walt en Sonnekus maak gebruik van 'n vertaling van Scott *The civil law* (1893), wat *D* 34 9 3 soos volg vertaal:

> "The Divine Pius decided that a person was unworthy who was *clearly proved* to have permitted the women by whom he was appointed heir to die through his own *negligence* and fault" (my beklemtoning).

In hierdie teks kon *negligentia*, volgens Van der Walt en Sonnekus 1981 *TSAR* 31–32, die betekenis van sowel nalatigheid as verwaarlosing of versuim dra. Die skuldelement word egter sterk beklemtoon en die skrywers (*idem* 32) wys daarop dat in die regsliteratuur die begrip *negligentia* 'n min of meer vaste inhoud verkry het en dat dit in besonder op nalatigheid of onsorgsaamheid as 'n vorm van skuld dui. Indien nalatigheid wyer geïnterpreteer kon word sodat dit ook versuim of verwaarlosing insluit, verklaar dit waarom die Oud-Vaderlandse skrywers so 'n wye interpretasie aan die onwaardigheidsmet gegee het.

In die Romeins-Hollandse reg is die trefwydte van die beletsel aansienlik uitgebrei. Opsetlike, nalatige of onsorgsame doodsveroorsaking het onbevoegdheid om te erf tot gevolg gehad. Dit blyk uit veral Voet 34 9 6 7 8 en Matthaeus *Zinspreuken* se bespreking van bogenoemde tekste. Alhoewel die skuldelement steeds beklemtoon word, vind daar 'n klemverskuiwing plaas. Verwaarlosing en poging tot doodsveroorsaking kon ook tot onwaardigheid aanleiding gee. Van Leeuwen *Het Roomsch-Hollands recht* 3 3 motiveer die onbevoegdheid wat persone tref om erfregtelik bevoordeel te word, soos volg:

(a) geen persoon mag deur sy eie wandaad (*wrong*) bevoordeel word nie; of

(b) niemand mag voordeel trek uit dit wat strafbaar is nie (eie vertaling).

Wandade impliseer nie noodwendig misdade nie. Die nalatige maar ook die onagsame doodsveroorsaker se wandaad lei tot onwaardigheid. Die *ratio* vir die stelreël *de bloedige hand er neemt geen erffenis* word gekoppel aan die beginsel dat sekere persone onwaardig is om te erf op grond van moreel blaamwaardige (andersins onwaardige) gedrag en dat die doodsveroorsaker noodwendig hierby ingesluit is (sien Sonnekus en Van der Walt 1992 *TSAR* 148).

4 Regspraak voor die *Casey*-saak

In die Suid-Afrikaanse positiewe reg is die *ratio* vir die stelreël *de bloedige hand er neemt geen erffenis* ook die moreel blaamwaardige optrede van die erfgenaam. Isakow beskryf die onwaardigheid van die doodsveroorsaker en andersins onwaardige persone soos volg (64):

> "An indignus is a person who is legally unworthy to inherit from the decedent, for instance where he has unjustifiably and intentionally caused the decedent's death . . . [A] beneficiary may not take a benefit under a will if his conduct has made him 'unworthy' to do so, or because to allow him to benefit would conflict with the principle that no one may enrich himself by his own wrongful act or derive benefit from conduct which is punishable."

Vroeëre gerapporteerde sake het nie spesifiek met die stelreël as sodanig gehandel nie, maar met onwaardige persone in die algemeen. In dié sake is *obiter* bevind dat 'n persoon wat die dood van 'n erflater op 'n nalatige wyse veroorsaak het, onwaardig is om van die erflater te erf.

In *L Taylor v AE Pim* 1903 NLR 484 het 'n persoon deur sy nalatige optrede teenoor die oorledene bygedra tot haar dood. Hy is onbevoeg bevind om van haar te erf. Geen strafregtelike vervolging kon ingestel word nie. Regter Bale (491) verwys na die beginsel dat "no one can benefit by his own wrong, or profit by what is punishable", en regter Finnemore (496) vervolg:

> "According to the text writers on our law he is incompetent to succeed as heir . . . but because of his having caused her death either wilfully or through negligence . . ."

In *Ex parte Steenkamp and Steenkamp* 1952 1 SA 744 (T) 748 word die rede vir die onwaardigheid van die moordenaar om te erf soos volg geregverdig:

> "[D]it is omdat hy die erflater persoonlik die uiterste onreg of 'n smaad aangedoen het, dat die bevoordeelde regtens onwaardig geag word om in sy goed te deel" (748)

en:

> "[A]s rede of verdere rede waarom 'n onwaardige in sulke gevalle nie kan erf nie, word aangegee dat hy nie uit sy misdaad voordeel mag trek nie" (752G–H).

In *Caldwell v Erasmus* 1952 4 SA 43 (T) kom regter Blackwell, met verwysing na die gemeenregtelike onbevoegdheid van die moordenaar om te erf, tot die volgende gevolgtrekking:

> "The father stands charged with having murdered his son and, if he be convicted either on this charge or even on a lesser charge of culpable homicide, or possibly even of having caused the death by negligence, it is clear that he cannot be allowed to inherit . . . he would be disentitled as *indignus* . . . [P]ersonally I would prefer to arrive at the same conclusion on the principle followed in the English law, namely, that it is against public policy that a person who is guilty of feloniously killing another should take any benefit from that person's estate or under that person's will" (49).

Op die spoor van die Romeins-Hollandse reg word die *ratio* vir onwaardigheid dus gevind in moreel blaamwaardige optrede. Definitiewe parallelle word ook met die Engelse reg getrek waar die *ratio* vir 'n soortgelyke reël gebaseer word op die siening dat dit teen die openbare beleid is dat 'n nalatige doodsveroorsaker mag erf.

5 Evaluasie van die bestaande posisie

Indien die *ratio* vir die bestaan van die stelreël geleë is in die feit dat 'n persoon onbevoeg is om te erf, óf omdat sy gedrag moreel afkeurenswaardig (of blaamwaardig) is óf omdat dit teen die openbare belang is dat hy erf, kan die volgende gekonstateer word:

(a) Dit is nie nodig om die stelreël *de bloedige hand er neemt geen erffenis* losstaande van die algemene onwaardigheidsmet te sien nie; en

(b) daar is regverdiging vir die bestaan van die onwaardigheidsmet in geval van doodsveroorsaking of andersins afkeurenswaardige gedrag.

In dié verband is dit nodig om te let op enkele riglyne by die beoordeling van die vraag of onwaardigheid ter sprake kom.

5 1 Gemeenskapsopvatting as maatstaf

Vervolgens moet bepaal word watter soort gedrag die gemeenskap as moreel afkeurenswaardig of in stryd met die openbare belang sou beskou. Dit is natuurlik nie 'n maklike vraag om te beantwoord nie. 'n Mens kan nie absoluut vooraf oordeel of 'n sekere gedraging in alle omstandighede as afkeurenswaardig gekategoriseer moet word nie. So kan sommige nalatige optredes nie as moreel laakbaar of blaamwaardig beskou word nie. Neem die voorbeeld van nalatige bestuur. Die meeste moderne skrywers oor die onderwerp meen dat nalatige optrede wat 'n motorongeluk veroorsaak waarskynlik nie morele blaamwaardigheid tot gevolg het nie (sien Van der Merwe en Rowland 105; Cronjé en Roos *Erfreg vonnisbundel* (1993) 127; Sonnekus en Van der Walt 1992 *TSAR* 148). Heel moontlik is hierdie siening 'n korrekte aanduiding van die breër gemeenskapsopvatting hieroor. Sonnekus en Van der Walt *idem* 150 stel dit soos volg:

> "Die kwalifikasie van 'morele verwytbaarheid' verwoord in hierdie verband die gemeenskapsopvatting waarop die beginsel van erfregtelike onwaardigheid gebaseer is en dit dek nie ook tegniese, blaamlose, doodsveroorsaking nie."

Wat wel waar is, is dat waar 'n persoon skuldig is aan 'n misdaad (moord, strafbare manslag, dronkbestuur ens) dit *gewoonlik* 'n aanduiding is dat die gemeenskap sy optrede as afkeurenswaardig beskou. Nie alle misdade is volgens die Suid-Afrikaanse Regskommissie egter *per se* voorbeelde van moreel afkeurenswaardige gedrag nie. Die regskommissie *Hersiening van die erfreg* (1991) par 4 19 is die volgende mening toegedaan:

> "Gevalle kan bedink word waar die gemeenskap iemand se optrede sterk sal afkeur alhoewel hy slegs aan strafbare manslag en nie aan moord nie, skuldig bevind is. 'n Man rand byvoorbeeld sy vrou aan en sy sterf as gevolg van die aanval. Die man word aan strafbare manslag skuldig bevind. Hierteenoor kom gevalle van moord voor waar die gemeenskap nie 'n moordenaar se gedrag sterk afkeur nie, byvoorbeeld waar 'n seun sy pa wat aan ongeneeslike kanker ly, 'n genadeslag toedien."

5 2 Nalatigheid as maatstaf

As 'n mens "skuld" as maatstaf gebruik (soos blyk die geval te wees in die Romeinse reg), sluit dit opset én nalatigheid in. Nalatigheid strek, sover dit die onwaardigheidsmet aangaan, aan die een kant verder as nalatigheid in die sin dat daar strafregtelike vervolging moet wees. Aan die ander kant lyk dit ongewens dat alle vorme van nalatigheid in 'n strafregtelike sin tot onwaardigheid moet lei. Die toets vir nalatigheid in die Romeins-Hollandse reg was subjektief. Die vraag na morele blaamwaardigheid was dus relevant by die vraag na nalatigheid. In die Suid-Afrikaanse reg is die toets vir nalatigheid egter objektief.

Die doodsveroorsaker moet objektief gesproke dus nalatig gehandel het. Objektief gesproke sal 'n persoon wat die dood van die erflater in 'n motorongeluk nalatig veroorsaak het dus ook kwalifiseer en daarom onbevoeg wees om te erf. In die Suid-Afrikaanse reg word 'n skuldigbevinding aan 'n misdaad egter nie vereis alvorens 'n persoon uitgesluit word van 'n erfregtelike voordeel nie (sien die *Casey*-saak *supra* 511).

Die toets of 'n persoon se gedrag moreel afkeurenswaardig is, is myns insiens nie slegs 'n objektiewe toets na nalatige optrede nie. As 'n persoon objektief gesproke nalatig is, is daar 'n verdere toets, naamlik of die gemeenskap die spesifieke gedrag van die dader teenoor die erflater afkeur. Indien wel, behoort die dader onbevoeg te wees om te erf.

Daar word aan die hand gedoen dat regter McLaren in die *Casey*-saak *supra* tot die korrekte gevolgtrekking kom aangesien in dié geval die nalatige optrede van die dader ook moreel afkeurenswaardig was (sien ook Sonnekus en Van der Walt 1992 *TSAR* 150).

Regter McLaren (510) beveel aan dat die wetgewer behoort in te gryp en verligting van die reël moet bewerkstellig indien hy van oordeel is dat sekere nalatige optredes nie binne die kader van die onwaardigheidsmet moet val nie.

6 Regskommissie-verslag

Na 'n ontleding van die gemenereg en in die lig van die onsekerhede wat voor die *Casey*-saak *supra* bestaan het, het die regskommissie in sy verslag (*Hersiening van die erfreg*) aanbeveel dat 'n hof die bevoegdheid moet verkry om sowel die verwytbaarheid van 'n dader se optrede as die dader se vergifnis deur die erflater in ag te neem by beoordeling van die vraag of die dader testamentêre voordele van die slagoffer moet verbeur. Die howe moet oor hierdie bevoegdheid beskik in alle gevalle waar die dood opsetlik veroorsaak is of gepoog is om dit te doen, asook in gevalle waar die dood op nalatige wyse veroorsaak is en waarby aanranding betrokke was. Ten aansien van ander wyses van nalatige doodsveroorsaking van die erflater beveel die kommissie aan dat 'n dader nie testamentêre voordele moet verbeur nie. Die aanbevelings is vervat in klousule 1 van die Wetsontwerp tot Wysiging van die Erfreg W8/92 (AS) maar is deur die Gesamentlike Komitee op Justisie verwerp.

Indien die regskommissie se voorstelle wel in wetgewing vervat was, sou dit beteken dat die beletsel in 'n beperkte mate steeds aanwending sou vind, onderworpe daaraan dat 'n hof iemand wat as onbevoeg of onwaardig beskou word om 'n erfregtelike voordeel te ontvang omdat hy die dood van die erflater of dié van sy ouer, gade of kind opsetlik of op 'n nalatige wyse veroorsaak het, bevoeg kon verklaar om te erf. Die beletsel sou beperk word tot opsetlike doodsveroorsaking of poging daartoe en nalatige doodsveroorsaking waarby aanranding betrokke is. Ingevolge die regskommissie se voorstelle sou selfs 'n moordenaar dus bevoeg verklaar kon word om te erf.

Sonnekus en Van der Walt 1992 *TSAR* 153 kritiseer die formulering van die regskommissie. Die kritiek sluit die volgende in:

(a) Die onwaardigheidsmet sal nie in *alle* gevalle van nalatige optrede anders as by aanranding, toepassing vind nie. As aanranding nie bewys kan word nie sal 'n persoon dus bevoeg wees om te erf.

(b) Uit die bewoording word veronderstel dat die doodsveroorsaker inderdaad deur 'n vorm van aanranding *die dood veroorsaak het* en dus reeds skuldig bevind is. Dit verskraal die aanwendbaarheid van die onbevoegdheidsmet.

In beginsel voel hulle dat 'n algemene statutêre diskresie aan die hof gegee moet word om in sekere gevalle 'n onwaardige persoon bevoeg te verklaar. Hulle siening word soos volg saamgevat (153):

> "Onses insiens behoort die wetgewer eerder te volstaan met die algemene formulering van die diskresie van die hof om in die lig van die omstandighede en die morele verwytbaarheid te gelas dat 'n bepaalde bevoordeelde bevoeg (of onbevoeg) tot erfregtelike opvolging is."

7 Engelse reg

Die regter in die *Casey*-saak asook Sonnekus en Van der Walt 1992 *TSAR* 151 verwys na die Engelse reg. In die Engelse reg, soos in die Suid-Afrikaanse reg, was die opsetlike en nalatige doodsveroorsaker onbevoeg om te erf. Probleme oor die trefwydte van die reël het in die praktyk ontstaan. In *Re Giles* [1972] Ch 544; [1971] 3 All ER 1141 is 'n vrou wat haar man met 'n "domestic chamber pot" gedood het, skuldig bevind aan manslag. Die reël word toegepas (voor die inwerkingtreding van die Forfeiture Act op 1982-10-13) en die vrou word onbevoeg bevind om te erf.

Regter Pennycuick was van mening dat daar nie verligting verleen kon word nie:

> "Counsel for the widow pointed out . . . that the principle of public policy on which the courts act changes over the generation and centuries, but I am not persuaded that there is any sufficient ground for qualifying the established rule in the manner that the counsel seeks to qualify it, *and further I am quite satisfied that if the rule is to be qualified in any way that is something that can only be done by the higher tribunal*" (my kursivering).

Die wetgewer was genoop om statutêre maatreëls te tref in die Forfeiture Act van 1982. Die *ratio* vir onbevoegdheid om te erf word gevind in "public policy". Sherrin en andere (*Williams law relating to wills* 1 (1987) "The law of wills" 70) verduidelik dit soos volg:

> "The rule is a wholly judge made creation but the 1982 Act gives statutory recognition to it by stating that the 'forfeiture rule' means . . . 'the rule of public policy which in certain circumstances precludes a person who has unlawfully killed another person from acquiring a benefit in consequence of the killing'."

Ingevolge die bepalings van die Forfeiture Act kan 'n hof 'n persoon wat deur die beletsel geraak word tog bevoeg verklaar om te erf. Artikel 2 van die wet kan soos volg saamgevat word (Sherrin ea 72):

> "Where the court determines that the rule would apply to preclude a person who has unlawfully killed another from acquiring any 'interest in property', then the court may make an order under the Act modifying the effect of the rule. If there has been a conviction, the application must be brought within three months of the date of conviction. The court has no power to modify the rule in favour of a person who stands convicted of murder, and the jurisdiction is thus limited to offenders convicted of other forms of unlawful killing."

Die beletsel geld dus onvoorwaardelik in gevalle van moord. In geval van manslag of ander gevalle van onregmatige doodsveroorsaking, beskik 'n hof oor die diskresie om verligting van die reël te beveel. Ander gevalle van onregmatige doodsveroorsaking sluit in

> "a person who has unlawfully aided, abetted, counselled or procured the death of that other and references in this Act to unlawful killing shall be interpreted accordingly" (Wright *Succession cases and materials* (1986) 365).

Dit lyk dus of "public policy" aan die een kant die bestaan van die reël regverdig maar terselfdertyd in sekere gevalle verligting van die werking van die reël verg.

Daar is wel definitiewe raakpunte tussen die Engelse en die Suid-Afrikaanse reg. Die probleme wat ontstaan, behoort deur wetgewing uit die weg geruim te word.

8 Gevolgtrekking

Dat daar gevalle is waar nalatige doodsveroorsaking onbevoegdheid om te erf tot gevolg behoort te hê, is gewis. As aanvaar word dat 'n skuldigbevinding aan 'n misdaad nie vereis word ten einde erfregtelike voordele te verbeur nie, kan probleme ondervind word om die volgende vrae te beantwoord:

(a) Wat presies is die maatstaf om te bepaal wie onbevoeg is om te erf? en

(b) wie gaan besluit of 'n persoon onbevoeg is al dan nie?

Soos reeds hierbo aangetoon is, word aan die hand gedoen dat daar eerder van 'n "onwaardige persoon" as 'n "doodsveroorsaker" gepraat moet word aangesien die onbevoegdheidsbeletsel op grond van onwaardigheid die doodsveroorsaker insluit, maar nie tot hom/haar beperk is nie.

Om die eerste vraag te beantwoord, blyk dat in die lig van 'n gebrek aan statutêre maatreëls die gemenereg van deurslaggewende belang is. Uit die bespreking hierbo is dit duidelik dat daar reeds in die gemenereg 'n klemverskuiwing was. Die pleeg van 'n misdaad is nie van deurslaggewende belang nie maar wel die morele blaamwaardigheid van die dader. Selfs in die afwesigheid van 'n suksesvolle vervolging kan 'n persoon se optrede in sommige gevalle as moreel blaamwaardig beskou word.

Wat die tweede vraag betref, lyk dit of die eksekuteur aanvanklik sou moes besluit of 'n persoon, erfregtelik gesproke, onwaardig is om te erf. Dit beteken noodwendig dat die eksekuteur in 'n sekere sin die gemeenskapsopvatting moet vertolk. 'n Ander belanghebbende persoon sou ook kon beweer dat 'n erfgenaam onbevoeg behoort te wees om te erf. Wie ook al beweer dat 'n erfgenaam onbevoeg is om te erf, sal dit egter moet bewys, gegewe die feit dat die erfgenaam ingevolge die bepalings van die testament of die intestate erfreg *prima facie* op 'n erfenis geregtig is (die *Casey*-saak *supra* 507). Nadat 'n hof getuienis aangehoor het, kan bevind word dat 'n erfgenaam bevoeg of onbevoeg is om te erf deur net te bepaal of die beletsel van toepassing is of nie. Tans kan die hof nie verder as dit gaan nie.

Die regskommissie (par 4 9) verwys na die belangrikste besware teen die bestaande posisie waar 'n skuldigbevinding nie vereis word nie. Die besware is naamlik dat

(a) dit tot onsekerheid en gedingvoering lei;

(b) die eksekuteur nie bevoeg is om te beslis oor die verdagte se skuld of onskuld nie; en

(c) die beginsel dat die eksekuteur besluit oor die bevoegdheid al dan nie van 'n vermeende misdadiger om te erf, indruis teen die beginsel dat 'n persoon onskuldig is totdat hy skuldig bevind is.

Die kommissie wys egter daarop dat in die praktyk die eksekuteur altyd op 'n beslissing van die verhoorhof wag alvorens hy besluit of 'n erfgenaam onwaardig is om te erf. Dit skep natuurlik nie 'n probleem as die persoon aangekla en skuldig bevind word nie. Dit skep wel 'n probleem in gevalle waar 'n erfgenaam uitgesluit word onder die hoof "andersins onwaardig". Die eksekuteur is dan op homself aangewese om te besluit of 'n persoon onbevoeg is.

'n Persoon behoort in beginsel onbevoeg te wees om te erf as hy gemoor het of die dood van die erflater op nalatige wyse veroorsaak het of bevoordeel word uit 'n misdaad wat hy gepleeg het of andersins op 'n nalatige wyse bygedra het tot die dood van die erflater. Dit spruit daaruit voort dat die gemeenskap sy dade afkeur en voel dat hy getref moet word met 'n onwaardigheidsmet. Indien 'n regter as vertolker van die gemeenskapsopvatting voel dat die optrede van die dader nie tot onbevoegdheid om te erf aanleiding behoort te gee nie, behoort die hof (en nie die eksekuteur of die meester nie) te bepaal dat die persoon bevoeg is. Sonnekus en Van der Walt 1992 *TSAR* 151 maak die volgende stelling:

> "Onses insiens sou dit nie noodwendig vir 'n Suid-Afrikaanse regter nodig wees om in daardie gevalle te wag op die wetgewer se bydrae nie. Die geykte norm van die redelike man wat daagliks deur die howe in talle gevalle toegepas word, is immers niks anders as 'n verwoording van die geldende gemeenskapsopvatting oor wat onder andere moreel afkeurenswaardig is nie.
>
> Dit sou dus iedere regter in so 'n geval vry staan om ooreenkomstig sy eie diskresie in daardie gevalle van 'tegniese' nalatigheid te bepaal dat die tersaaklike doodsveroorsaking nie aan gemelde vereiste van moreel afkeurenswaardige gedrag voldoen nie."

Regter McLaren is nie bereid om so ver te gaan nie. Hy verklaar (510):

> "I am of the view that the Legislature should intervene and make provision for the relaxation of the maxim."

Vir my lyk die oplossing van die praktyksprobleem nie so voor die hand liggend nie. Dit lyk of die praktyksreël tot gevolg het dat daar in gevalle waar daar nie 'n skuldigbevinding was nie, nie van onbevoegdheid sprake sal wees indien daar nie 'n hofbevel te dien effekte is nie. Die eksekuteur is myns insiens nie die aangewese persoon om te oordeel of 'n erfgenaam onwaardig is of nie, tensy hy reeds skuldig bevind is aan moord of manslag. En selfs in gevalle waar daar wel 'n skuldigbevinding was, wil dit lyk of die gemeenskapsopvatting nie noodwendig onbevoegdheid verg nie.

Dit het miskien tyd geword om in die lig van die uitgebreide kondonasiebevoegdheid waaroor die howe tans beskik aan die hof ook die bevoegdheid te gee om te oordeel of 'n erfgenaam onwaardig is om te erf al dan nie. As die gemeenregtelike reëls tot gevolg het dat daar onduidelikheid is, is die wetgewer genoodsaak om in belang van regsekerheid effektiewe maatreëls neer te lê. Deur die reël behoorlik te formuleer, word nie afbreuk aan die gemeenregtelike beginsel gedoen nie. Om aan die hof die bevoegdheid te verleen om in sy diskresie te bepaal of die reël soms verlig kan word, bring aan die ander kant weer nie noodwendig regsekerheid nie, maar wel regsbillikheid.

MC SCHOEMAN
Universiteit van Pretoria

THE NEW DUTCH CIVIL CODE AND ROMAN-DUTCH LAW

Codification is a legal and political phenomenon that started to flourish from the 18th century onwards on the continent of Western Europe. According to an old definition of the English philosopher Jeremy Bentham (1748 – 1832),

the essence of codification is that the formal legislator codifies the whole body of the law (or a well-defined part of it) and that – as a consequence – the substance of the law is to be known directly from that codification.

As early as the 17th century, the diversity of the law in the several provinces and the lack of unity in the various countries in the continent of Western Europe was believed to create legal uncertainty and unacceptable inequalities. The pursuit of unification of the national law was the result of this belief. Local customs were recorded, but soon the striving was not restricted to local customs only. Codification of the whole body of law serves the feelings of national unity, and from this background, several countries began making national codifications, starting with the *Allgemeines Landrecht für die Preussischen Staaten* (1794), soon followed by the French *Code Civil* (1804) and the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch* (1811)).

The Netherlands also fell in with this development. In accordance with § 28 of the fundamental and civil rules of the charter of 1798, which was formulated at the beginning of the French occupation and modelled on the Declaration of the Rights of the Man and the Citizen, several endeavours were made to reach a codification of the civil law, among them by the committee under the presidency of the Amsterdam Professor Cras, and by the Amsterdam attorney Johannes van der Linden (1756–1835).

The New Dutch Civil Code will be the fourth to come into force in the Netherlands. The first one came into being in 1809, during the French occupation, by order of King Louis Napoléon, brother of the French emperor, as a result of the work of Johannes van der Linden; it had, however, may features in common with the French *Code Napoléon*. In 1811, after the incorporation of the Netherlands into the French Empire, it was replaced by a second, the *Code Napoléon* itself. Immediately after the liberation from French rule in 1813, attempts were made to draft a national code, which were finally crowned with success in 1838 when the third Dutch Civil Code came into existence. Apart from a number of more or less important topics in the law of persons and family law (notably the law of matrimonial property), the law of succession and the law of property, this Civil Code was – as far as its language, terminology and the subjects were concerned – for a considerable part based upon the *Code Napoléon*.

This does not hold true, however, for its system. A typical feature of the French Civil Code is found in the regulation that the contract of sale itself transfers property. Delivery is not necessarily part of the transfer. In contrast to Roman law, the contract of sale does not give rise to an obligation to deliver the property, the only obligation created being one of conveyance. Sale is a mode of acquisition of property according to French law, as is inheritance, and so on.

The Dutch Civil Code of 1838 returned to the genuine principles of Roman law and it consequently made a sharp distinction between the law of property and the law of obligations. These were set out in the second and third books respectively. The law of succession was also included in the second book. In addition, the 1838 Civil Code contained a fourth book with provisions on the law of evidence and the law of prescription.

The system of the 1838 Civil Code bears a striking resemblance to that of Hugo Grotius's *Introduction to the Dutch jurisprudence*, which dates back to

1631. The main difference with regard to the *Introduction* seems to be the separation between the Civil Code and the Commercial Code. After the French example (the French *Code de Commerce* had been in force in the Netherlands from 1811 onwards) civil and commercial law were distinguished and divided over two different codes. This distinction did not exist in the Dutch united provinces before the French revolution. The writers of the Roman-Dutch Elegant School – among whom were Grotius and Voetius – dealt with both branches of law in the same book. The French Revolution brought about the separation, introducing special mercantile courts and considering bankruptcy as a measure especially for merchants. In 1838, however, the mercantile courts were abolished, although the division of private and commercial law over two different codes was maintained.

Since 1896, bankruptcy has no longer been restricted to the merchants; all remaining differences between mercantile and non-mercantile affairs, between merchants and non-merchants were abrogated by law in 1934. As a consequence, it seemed appropriate to return to the system of Roman and Roman-Dutch law (as had been already proposed in 1789 by the Commission named after its chairman, the Commission Van der Linden). The main commercial act, the contract of sale, has never resided outside the Civil Code. The contract of sale has now been brought in in book 7, which deals with special contracts. Other aspects of commercial law are to be found in book 2 (legal persons) and book 8 (transport) of the New Civil Code.

The New Civil Code is the first of four which unite civil and commercial law. There is another important feature that is also common to the system of Grotius's *Introduction* and the new Civil Code. The substance of the law of civil procedure (law of evidence and law of prescription), which had been laid down in the fourth book of the Civil Code of 1838 in accordance with the Institutes of Gaius and Justinian, was removed from the Civil Code and brought into the Code of Civil Procedure. Only a number of general provisions on rights of action have preserved their place in the New Civil Code, book 3, title 11.

The two preceding remarks are, of course, not intended to imply that the New Civil Code in general returned to the system of Grotius's *Introduction*. The main elements, however, are recognised. Let us consider the structure of the New Civil Code more closely.

Book 1 deals with the law of persons and family law, including the law of matrimonial property. It was put into effect in 1970.

Book 2 comprises the law of legal persons. The concept of legal personality saw the light in the middle ages. The subject has been treated at various times and places in the context of the law of persons, of the law of contract or of the commercial law (company law). Here associations, foundations and companies are brought together under one heading. In accordance with the general structure of the whole Civil Code a number of general provisions precede the more specific ones.

Book 3 contains the most original part of the New Civil Code, namely, the general part of the patrimonial law. Unlike the German *BGB*, the New Civil Code does not include a general section on private law as such. As is mentioned above, the concepts of legal subjects and (legal) personality are dealt with in the first two books; only those issues which were traditionally treated in the law of contract, the law of property and/or the law of obligations, but are common to patrimonial law as a whole, have now been brought together.

This relates in the first place to a notion which came to light in the last century, the notion of the juridical act. In the second title of the third book, the general requirements for its validity (capacity; consent; statement) have been brought together, united with the rules concerning the protection of persons who rely on the appearance of a valid consent in good faith; conditions and terms; nullity and partial nullity; defects of consent; conversion, confirmation and some forms of legal relief.

In the second place there is the concept of things. Since the days of Roman law, it has been established that this notion stands for corporeal and incorporeal things alike. Obligations and other rights were considered to be incorporeal things. The rules governing the transfer of property of corporeal things were considered applicable to the transfer of obligations by analogy. This led to the unclear concept of transferable property of obligations, that is, the unintelligible concept of a real right to a personal right. The German and the Swiss Civil Codes facing the same problem, gave a restricted interpretation to the notions of things and real rights. In these codes the word "thing" refers only to corporeal things and real rights refer only to real rights having a corporeal thing as their object. In the German Civil Code there are only a few supplementary paragraphs on usufruct and pledge, having personal rights as their object.

The New Dutch Civil Code found another solution to the problem. Corporeal and incorporeal things are regarded as equivalent. General rules precede specific ones. Consequently those real rights which can have as their object both corporeal and incorporeal things, like usufruct, pledge and hypothec, find their place in the third book; the real rights which can have as their object only corporeal things, are dealt with in the fifth book; the law of obligations is located in the sixth book.

The New Civil Code brings together the rules for the transfer of corporeal and incorporeal things (§ 3:84). In harmony with Roman-Dutch law, the requisites for this transfer are the capacity of the alienator, the correct mode of transfer and a just cause. The New Civil Code upholds the Roman rule *nemo plus iuris in alium transferre potest, quam ipse haberet*, although it extends the number of exceptions known to the old Civil Code. Furthermore, the New Civil Code codifies the doctrine of *modus et titulus dominii transferendi* and declares it applicable to corporeal and incorporeal things alike. The mode of transfer varies according to the nature of the things: movables are transferred by conveyance, immoveables by inscription of the notarial act in the public registers, and obligations by making a written act and notification to the debtor. As far as just cause is concerned, an important innovation is to be observed. Fiduciary titles will no longer found the acquisition of title. For that reason transfer of property *fiduciae causa* will disappear. As was the case in Roman-Dutch law, real surety can be achieved by means of hypothec and pledge. The right of pledge can even be vested without transfer of the thing bound; in earlier days the term *hypothec on movables* was in use.

In this book, we find further rules of Roman-Dutch origin which have been retained, such as the rule that the time of uninterrupted possession required for acquisition and loss by prescription is fixed at three years for movables (§ 3:99). Another example is § 3:175: Any partner may dispose of his share in common property. A share which has been transferred is acquired subject to the obligation to compensate the community for what the alienator owed to

it, although the regulation that the alienator and the acquirer are liable for this compensation *in solidum* is new. The old *prestationes personales* (§ 3:184) belong in the same category: in the case of co-ownership, any one of the partners may, in a partition, demand that what another partner owes to the community be imputed to his share.

The fouth book deals with the law of succession. In the French Civil Code, the law of succession is regarded as a mode of acquisition of property; the old Civil Code followed the example of Grotius's *Introduction* and set out the law of succession in the second book, which dealt with the law of things, including property. The New Dutch Civil Code devotes a separate book to this, since it is not only property which passes but the patrimony of the deceased as a whole. In the case of an intestate deceased, it introduces as the dominant rule a legal usufruct over the whole estate in favour of the surviving partner. As there is strong opposition to this book, it is only likely to become operative at a later date.

Book five deals with a juridical notion which, as such, is unknown in countries belonging to the English common-law tradition: the concept of real rights. Roman law knew two different types of action, the *actiones in rem* and the *actiones in personam*. In the formula of the former the defendant's name did not (apart from exceptional cases) appear in the *intentio* at all, in a claim *in personam* it did of necessity. In the claim *in rem* the plaintiff averred that a relationship existed between himself and the thing he was claiming. If he was claiming *in personam*, that is, alleging that some other person was under a duty towards him, on the other hand, then to make the extent of his assertion clear, it was necessary for the name of the person from whom he was claiming (the defendant), to be mentioned. It was Hugo Grotius who recognised the many similarities in the situations in which one out of the five *actiones in rem* might apply – notably as far as the creation and/or termination, and the transferability were concerned. He created a correspondingly limited number of real rights: property (according to the medieval conception divided into *dominium utile* and *dominium eminens*), possession, inheritance, servitudes, pledge and hypothec. The continental codifications have maintained this limited character, which is contrary to the development of the law of contracts. In the provinces of the Netherlands, access to the courts has never been limited by means of a restricted number of actions if an obligation was involved. It was the jurist Wesembec who was the first to declare that all types of contracts are actionable.

But let us return to the real rights. There the number of actions, and as a consequence the number of rights, is limited. It has been questioned whether this closed system of real rights should be maintained in the New Civil Code or not. The first argument was that in the various countries whose codes contain a similar closed system of real rights (Austria, France, Italy, Switzerland), opinions differ about the exact meaning of the restriction. Often the parties involved are afforded an opportunity to create rights which are enforceable against third persons, although this possibility may be restricted by the limits imposed by the legal framework. The second argument was that an unlimited possibility to create real rights, which are by their very nature enforceable against third persons (in particular acquirers who did not know of the existence of the real right) would cause too many problems. The third argument was that, given the existence of real rights, it is very difficult to transplant the English system. Consequently, the choice has been made to maintain the closed system, which

originated in Roman-Dutch law, despite the fact that the possibility of enforcing contractual clauses even against the successor of the buyer of an immovable has been enlarged. These special contractual clauses must be entered in a public register.

The law governing the duties of neighbours is for the greater part in concordance with the existing law, which is mainly derived from Roman-Dutch law. A simple, typically Dutch, example is to be found in § 5:38, which provides that lower land must receive the water which flows naturally from higher lands. This rule came to the New Dutch Civil Code from Roman-Dutch law via the French *Code Civil* (§ 640) and the old Dutch Civil Code (§ 673).

The sixth book which consists of five titles, contains the general part of the law of obligations. In accordance with the usual structure of the code, the first title is devoted to rules pertaining to obligations in general, regardless of their source. Although this might be unintentional, there is a structural similarity with Grotius's *Introduction*. Many of these provisions are new, such as the general provisions on the natural obligations, the greater part of those on joint obligations and plurality of creditors, a separate chapter on default by the creditor, and chapters on performance and the effects of non-performance of obligations. It is noteworthy that the notions themselves are not new; the provisions, however, are. There is a chapter containing general provisions on compensation for damage, which applies to all obligations irrespective of their source.

The second title, which is devoted to the transfer of claims, is an elaboration of the general provisions pertaining to the acquisition and loss of property in the fourth title of the third book.

The following titles are devoted to the different sources of obligations – the Roman-Dutch divisions, which deals with obligations emanating from a contract, from delict or from another source, has been retained: Title five contains the general provisions of the law of contract, the special contracts being dealt with in the seventh book. This title is to a large extent under the influence of regulations and prescripts emanating from the European Community. This also holds true for the rules pertaining to standard terms and general conditions, which are usually fixed by one party and deposited at some place open to the public. The question arises as to the extent to which the other party is bound by these clauses, if he did not know their contents at the time the contract was entered into. The same holds true for the rules concerning so-called products liability.

Most contracts are assimilated to the Roman-Dutch consensual contracts. This follows from its partial derivation from the Uniform Law on Formation of Contracts for the International Sale of Goods, adopted at the Hague in 1964 (LUVI). This Uniform Law will, however, be superseded by a new Vienna Treatise on the same subject.

A specific new development is the introduction of the *clausula rebus sic stantibus*: under unforeseen circumstances it might be considered against good faith to hold the other party absolutely bound upon the terms which were agreed originally (§ 6:258): Upon the demand of one of the parties, the judge may modify the effects of the contract, or set it aside in whole or in part on the basis of unforeseen circumstances which are of such a nature that the co-contracting party, according to the criteria of reasonableness and equity, cannot expect the contract to be maintained in an unmodified form.

The annulment of obligations in the case of an error on the part of one or both parties occurs mainly in contracts, not in other juridical acts. For this reason error is dealt with in title five of the sixth book (§6:228). This is another striking example of international influence on the new codification, since this title stands largely under the influence of the English doctrine of misrepresentation.

In the law of delict the main development is a shift from liability based on fault to liability based on risk. The latter was not unknown in Roman-Dutch law (*obligationes quasi ex delicto*), but was restricted to vicarious liability for damage caused by employees, and by the collapse of buildings or vessels. In more recent times, strict liability was augmented to include the liability of the owners of motor cars. Furthermore, Roman-Dutch law recognised cases where a presumption of fault could be rebutted by the defendant; thus parents were liable for unlawful acts of their minor children, unless they could prove they had taken reasonable measures. In the New Civil Code the main element of liability for a person's own actions is that of fault. Personal defects, whether of a physical or a psychological nature, do not serve as an excuse in delictual actions (§ 6:165). Parents are absolutely liable for the acts of their children under 14 (§ 6:169), while employers are strictly liable for the acts of their employees (§ 6:170) and their independent contractors, provided that they were engaged in the business of the employer (§ 6:171).

One most important development should be noted in the law governing obligations emanating from other sources. The South African Supreme Court stated in the famous decision in *Nortje v Pool* 1966 3 SA 96 (A) that the old Roman-Dutch law did not know of a general action for unjust enrichment. According to this court only a restricted number of specific actions and *condictiones* existed in the law of restitution. In the later editions of his authoritative work on the subject, *Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg*, De Vos, following – amongst others – the Dutch scholar Feenstra, came to the opposite conclusion. His conclusion about the recognition of general liability for enrichment in Roman-Dutch and in modern South African law is, however, inconsistent with leading cases which have been decided since the publication of the work.

It was Peiris who re-examined the important question whether residual remedies which are undoubtedly part of the existing law, are not adequate to make good most of the lacunae that occur in the general enrichment action. This is exactly the question that had been asked by the scholar who bears the greatest responsibility for the New Dutch Civil Code, the late Meijers.

The answers of these scholars are, however, somewhat different. In his thesis Peiris expresses the opinion that the *condictio sine causa specialis* and the institution of the irregular *negotiorum gestio*, although subject to their own inherent limitations, may provide an adequate remedy against unjust enrichment. He nevertheless admits that the area of liability based on the irregular *negotiorum gestio* is more restricted than that based on the general enrichment action. This is because of certain limitations in regard to the juristic act giving rise to enrichment, which are formulated as part of the essential elements of the irregular *negotiorum gestio*. Meijers was of the opinion that these remedies are inadequate, and he cited a number of cases to illustrate this. This led him to the conclusion that the New Civil Code should follow the examples of the German

(1900), Swiss (1912), Italian (1942) and Greek (1940, set in force in 1946) Codes, and should contain a general action of unjust enrichment.

The seventh book will contain the rules governing special contracts. Only four titles were set in force on 1 January 1992: the rules governing contracts of sale (including exchange), mandate, deposit and suretyship. In accordance with Meijers's intention to bring private law as a whole into a single code, several contracts which are now classified in separate statutes (eg, lease of land and the collective labour contract) will be placed in this book, together with all the contracts that find their ruling in the Old Civil Code or the Commercial Code. They will be arranged in three successive groups: (a) contracts which lead to the transfer of a thing (sale, loan for consumption, gifts), or which grant the use of a thing (lease and hire; loan for use); (b) contracts governing activities undertaken by one party on behalf of another (mandate, publishing contracts, deposit, labour contracts, collective labour contracts, business contracts, partnership); (c) other contracts (surety, contract of settlement (including transaction), bills of exchange and cheques, and aleatory contracts, including insurance).

As can be seen from this list, the Roman-Dutch classification of contracts according to the way in which they come into existence (*re, verbis, litteris, consensu*) plays hardly any part. Only the contract of loan for use is still a real contract; all the other contracts are deemed to come into existence by mere consent.

The eighth book is devoted to transport law. It came into force during 1993; it contains regulations about transport by sea, by inland waterway, by road and by air. These themes were mainly dealt with in the previous Commercial Code. In concordance with the general system of the New Civil Code, it contains a title with general provisions on transportation contracts, including a section on travel contracts, and a section on the *moving* contract.

According to the original schedule, the ninth book was intended to deal with the third category of patrimonial rights, namely intellectual property rights, such as patents, trade marks, copyright, trade names, and so on. The situation with regard to these rights has, however, changed drastically during the last decades. Many international treaties have been entered into which contain their own provisions. For this reason it does not seem to be appropriate to duplicate these treaties partially or wholly in the New Civil Code. The final decision, however, has yet to be taken.

Conclusion

The fourth Dutch Civil Code differs from the third in many respects. Many uncertainties left by the old code have been eliminated; a great many new rules have been formulated to meet the needs of modern society. The sources of these innovations are manifold. Meijers made extensive use of his unrivalled knowledge of comparative law and legal history. For example, the fiduciary transfer of property was recognised as a valid transfer by the Supreme Court in 1929. In one case the Supreme Court admitted that a fiduciary transfer of property, combined with a conveyance *per constitutum possessorium*, enabled the parties to create a real security, even when the debtor retained possession of the thing. The debtor lost all his rights *in rem* with respect to the thing, retaining only a personal action against the creditor if the latter broke the agreement,

but he kept the use of the things given as security. In the second case, a number of composers had transferred their copyrights to a bureau (BUMA) so that their fees would be collected by this bureau. Several trust-like relations have been considered as variations of the same *fiducia cum amico*. Meijers had severely criticised these decisions as early as 1936: this method of exegesis of the legislation seems to be highly questionable, suspicious and dangerous. He drew attention to his opinion that the history of both Rome and England has taught us that this type of transfer of property is only used as a substitute as long as the right of pledge remains unknown. The development is, according to Meijers, invariably similar: either the title that is acquired, will be restricted in its enforceability against third persons and will in reality become similar to a right of pledge (as in England) or the right of pledge will be introduced openly and the fiduciary transfer of property will be abolished (as in Rome). For that reason Meijers explicitly rejected the possibility of a fiduciary transfer of property: a juridical act which is intended to transfer property for purposes of security or which does not have the purpose of bringing the property into the patrimony of the acquirer after transfer, does not constitute valid title for transfer of that property (§ 3:84,3).

This paragraph rests upon a mixture of arguments taken from comparative law and legal history. It is clear that the historical explanation remains important for the jurist who wants to describe the scope of the paragraph. Nevertheless the role of the historical explanation has changed. The third Civil Code envisaged, in a number of articles, a return to Roman or indigenous law and the casting off of the yoke of the French occupier. For this reason, this code contained a considerable number of paragraphs which could only be understood historically, for example, the paragraphs on the transfer of property. Historical arguments played a decisive part for those writers who tried to establish whether the *causa traditionis* required for the transfer of property necessarily had to be a valid cause or not. The same holds true for the statements on the validity of contracts in favour of a third person, on the requirements before an error may be raised, and so on. An appeal to Grotius, his contemporaries, the drafters of the French Civil Code, Pothier and so on, yielded a strong argument based on this type of legal interpretation, where the exact meaning of the wording of the text could only be discovered by calling on history.

This type of historical explanation will not return or will only rarely do so. There is, however, another historical interpretation as well. The creation of the New Civil Code is a link in a historical chain. A changing society requires a changing code. In the new legislation the law is fixed, but the result is not a *creatio ex nihilo*; it is a building that is newly erected on older foundations. These foundations are partly of Roman-Dutch and partly of French origin, partly taken from elsewhere. The previous code contained many materials taken from the French Civil Code; the most important example of French-Belgian inspiration of the New Civil Code is the shift to liability without fault in the law of delict. Common-law influence may be seen, for example, in the provisions dealing with error (where the original Roman notions of error and of latent defects play an important part as well), undue influence, anticipatory breach of contract and liability for independent contractors. German influence may be recognised not only in the abstract language and the systematic approach, but also in the new section on general conditions of contracts. The New Civil Code is

also indebted to the Uniform Sales Acts (the treaty of the Hague of 1964 and the treaty of Vienna of 1980).

One of the successors of Meijers as a drafter of the New Civil Code, the Attorney General of the Supreme Court, Hartkamp, quotes the authoritative textbook of Zweigert and Kötz *Introduction to comparative law* (1987), saying that there is merit in their observation:

> "It is very doubtful whether the new Civil Code still really belongs to the French tradition. As evidenced by the accompanying materials, it rests everywhere upon thorough comparative considerations, and it may be that it has found its own style, based upon a European *ius commune*."

Part of that European *ius commune* is formed by Roman-Dutch law. In that respect, but not only in that respect, Roman-Dutch law remains important, even after the new Civil Code has come into operation.

E SCHRAGE
Vrije Universiteit, Amsterdam
The Netherlands

VONNISSE

DIE KORREKTE KRITERIUM VIR DIE BEREKENING VAN BYDRAENDE NALATIGHEID

General Accident Versekeringsmaatskappy SA Bpk v Uijs
1993 4 SA 228 (A)

Die eiser was 'n passasier in 'n motorvoertuig wat in 'n botsing betrokke was waarin hy ernstige kopbeserings opgedoen het. Die botsing was te wyte aan die uitsluitlike nalatigheid van die bestuurder (Stander) van die voertuig waarin die eiser gereis het. Die verhoorhof het bevind dat die eiser bydraend nalatig was omdat hy doelbewus (ten spyte van 'n aanmaning) versuim het om sy veiligheidsgordel vas te gespe en dat sy skadevergoeding met 'n derde verminder moes word. Teen onder meer hierdie bevinding word deur beide partye appèl aangeteken. Die eiser (respondent) het hom vanselfsprekend vir 'n laer persentasie (25) en die verweerder (appellant) vir 'n hoër persentasie (50) as die 33⅓ beywer.

Vir ons doeleindes is net die kriteria vir die berekening van die persentasie bydraende nalatigheid van belang. Hieroor laat appèlregter Van Heerden hom soos volg uit:

> "Soos welbekend, bepaal art 1(1)*(a)* [van die Wet op Verdeling van Skadevergoeding 34 van 1956] dat waar iemand skade ly wat deels aan sy eie skuld en deels aan die skuld van 'n ander persoon te wyte is, 'n vordering ten opsigte van die skade nie ten gevolge van die skuld van die eiser verydel word nie, maar dat die verhaalbare skade in so 'n mate verminder word as wat die hof, met inagneming van die mate van die eiser se skuld met betrekking tot die skade, regverdig en billik ag. Wat betref skade gely as gevolg van 'n botsing tussen twee voertuie, vind art 1(1)*(a)* normaalweg toepassing indien die botsing aan die nalatigheid van altwee bestuurders te wyte was en albei as gevolg daarvan skade gely het. *In so 'n geval sou 'n bepaling van die graad van kousale nalatigheid van bestuurder A in baie gevalle – maar nie altyd nie (Jones NO v Santam Bpk* 1965 (2) SA 542 (A) op 555) – *ook uitsluitsel gee oor die skuldgraad van bestuurder B, en sou dit normaalweg billik wees om die skade van bestuurder A met die graad van sy nalatigheid te verminder.* Moeiliker is die toepassing van die subartikel in 'n geval soos die onderhawige, waar slegs Stander skuld met betrekking tot die veroorsaking van die botsing dra. Dit het [die eiser] se skade tot gevolg gehad en Stander se afwyking van die norm van die *bonus paterfamilias* kan op byna 100% gestel word. Maar wat nou as [die eiser] se afwyking van die norm ook op bykans 100% gestel word? Moontlik sou dan gesê kan word dat hy en Stander gelyke skuld met betrekking tot die veroorsaking van sy skade het. *Artikel 1(1)(a) bepaal egter nie dat 'n eiser se skade verminder moet word in verhouding tot sy skuld nie, maar wel tot die mate wat, met inagneming van die omvang van die eiser se skuld, regverdig en billik is. En in 'n geval soos die onderhawige verg regverdigheid en billikheid inagneming van die feit dat [die eiser] geensins tot die plaasvind van die botsing bygedra het nie, en dat sy skuld andersoortig as dié van Stander was*" (234I – 235E; ons beklemtoning).

Met inagneming van hierdie faktore besluit appèlregter Van Heerden dat die verhoorhof se beraming van die eiser se persentasie bydraende nalatigheid nie aanmerklik van sy eie beraming verskil nie en wys hy die appèl en kruisappèl van die hand (235H – I).

Ons lewer kortliks soos volg op die bostaande twee gekursiveerde gedeeltes van die uitspraak kommentaar.

1 Die beskouing dat die bepaling van die eiser se bydraende nalatigheid in baie gevalle – maar nie altyd nie – ook uitsluitsel gee oor die nalatigheidsgraad van die verweerder Ter wille van duidelikheid is dit nodig om enigsins oor die ontwikkeling van die kriteria vir die bepaling van bydraende nalatigheid in ons reg uit te wy.

Tot voor die uitspraak in die *Jones*-saak *supra* het die appèlhof (bv *South British Insurance Co Ltd v Smit* 1962 3 SA 826 (A) 835) aanvaar dat die mate of graad van die eiser se skuld ten opsigte van die skade (oftewel sy persentasie afwyking van die norm van die redelike man) *outomaties* die mate van die skuld van die verweerder bepaal. (Hierdie benadering is later weer in *AA Mutual Assurance Association Ltd v Nomeka* 1976 3 SA 45 (A) gevolg.) As die hof vasgestel het dat die eiser byvoorbeeld 20% nalatig was, word sonder meer aanvaar dat die verweerder 80% van die norm van die redelike man afgewyk het (sien Neethling, Potgieter en Visser *Law of delict* (1994) 149). In die *Jones*-saak *supra* 555 is egter 'n geheel ander benadering gevolg. Die mate van die eiser se skuld met betrekking tot die skade bepaal nie outomaties die mate van die verweerder se skuld nie. Om vas te stel in welke mate die eiser en verweerder nalatig was, moet die sorgvuldigheid van elkeen se gedrag afsonderlik aan die norm van die redelike man gemeet word. Dit is goedskiks moontlik dat die eiser byvoorbeeld 70% van die norm van die redelike man afgewyk het en die verweerder 80% (*idem* 149 – 150).

Aangesien die *Jones*-saak nie deur die latere *Nomeka*-saak herroep is nie, wil dit voorkom of beide sake die positiewe reg verteenwoordig en dat dit dus moontlik is om bydraende nalatigheid volgens beide benaderings te bereken (sien ook Burchell *Principles of delict* (1993) 112 – 113). Steun vir beide benaderings blyk dan ook uit die regspraak (sien ook Neethling, Potgieter en Scott 1993 *SALJ* 627 – 628). Aan die een kant onderstreep die appèlhof in *Union National South British Insurance Co Ltd v Vitoria* 1982 1 SA 444 (A) 462 – 463 (vgl ook 461) sonder verwysing na *Nomeka* sy beslissing in *Jones*:

> "Hoe moeilik dit ook al mag wees, moet, in ons reg, in elke geval die omvang van die skuld van die eiser en die omvang van die skuld van die nalatige bestuurder [verweerder] bepaal word."

Die vraag of die *Vitoria*-saak die uitspraak in *Nomeka* by implikasie herroep het (soos Dendy aan die hand doen: "*Case book on the law of delict/Vonnisbundel oor die deliktereg* by J Neethling, JM Potgieter and TJ Scott" 1993 *SALJ* 182; "Of case books and criticism, misreadings and misrepresentations: a reply to professors Neethling, Potgieter and Scott" 1993 *SALJ* 638 – 639), is debatteerbaar in die lig van die beslissings waarin dit voorkom of die *Nomeka*-saak by implikasie gevolg word (sien Neethling, Potgieter en Visser 150 vn 180). Uit geeneen van hierdie sake blyk naamlik dat die hof *uitdruklik* die omvang van elke party se graad van afwyking van die redelike man *selfstandig* bepaal nie, maar dat die hof, nadat vasgestel is dat die eiser *en* verweerder *beide* nalatig was, hulle onderskeie grade eenvoudig persentasiegewys in 'n verhouding uitdruk (bv: 65:35, 75:25, 70:30; vgl weer *ibid*).

Ter illustrasie kan na die beslissing in *Rabie v Kimberley Munisipaliteit* 1991 4 SA 243 (NK) verwys word (sien ons bespreking "Regsplig by 'n late en berekening van bydraende nalatigheid" 1992 *TSAR* 321). In hierdie saak was verkeersligte by 'n bepaalde kruising onder beheer van die verweerder, 'n munisipaliteit, defek. As gevolg hiervan het 'n botsing tussen die eiseres en 'n derde party plaasgevind. Daar was by die hof geen twyfel nie dat die munisipaliteit, deur in gebreke te gebly het om die verkeersligte te herstel, op 'n nalatige wyse die gevaarsituasie geskep het. Ook die eiseres en die derde party word bydraend nalatig bevind. Die hof bereken die onderskeie grade van nalatigheid van die eiseres en die verweerder en hul ooreenkomstige bydraes tot die skade soos volg:

> "Sy [die eiseres] was dus na my mening ook nalatig . . . Die feit dat sy 'n groen lig in haar guns gehad het en dat sy aangeneem het dat die ligte vir die [kruis-] verkeer . . . rooi sou gewees het, verminder egter haar nalatigheid aansienlik. Na my mening het haar [die eiseres se] nalatigheid 20% tot die oorsaak van die botsing bygedra. Die verweerder is derhalwe aanspreeklik om 80% van haar skade . . . te betaal" (261F).

(Die posisie tussen die derde party en die verweerder word op soortgelyke wyse op 60:40 gestel.) Regter Steenkamp se formulering is na ons mening 'n duidelike illustrasie van die *Nomeka*-benadering. Dendy 1993 *SALJ* 693 is egter van mening dat

> "the figures of 20 and 40 per cent mentioned by Steenkamp J did not reflect the deviation of the plaintiff and the third party respectively from the norm of reasonable care: those amounts represented the share of the blame that the court concluded the parties in question had to bear".

Dendy se afleiding is egter nie geregverdig nie; dít word bevestig deur appèlregter Van Heerden se opmerking dat die graad van nalatigheid van een party (A) in baie gevalle ook uitsluitsel gee oor die skuldgraad van die ander party en dat "dit normaalweg billik [sou] wees om *die skade van [A] met die graad van sy nalatigheid te verminder*" (235B; hierbo volledig aangehaal). Die graad van afwyking van die norm van die redelike man verteenwoordig in die reël dus ook die persentasie waarmee die eiser se skade verminder word: daarom was die 20 en 40 persent in die *Rabie*-saak terselfdertyd dan ook aanwysend van die "voorafbepaalde" afwyking van die eiseres en die derde party se grade van die norm van die redelike man (nalatigheid).

Ook Burchell 113 is van mening dat die *Nomeka*-benadering steeds gesaghebbend is. Hy verklaar:

> "In fact, Viljoen AJA regarded this automatic determination of the degree of the defendant's fault as indicating that it was not necessary to plead and claim apportionment specifically, provided the plaintiff's fault was put in issue."

(Vgl *Squire v Sasol Mynbou (Edms) Bpk* 1993 3 SA 298 (K) 302 waar die hof in lg verband goedkeurend na *Nomeka* verwys en dan later (305), nadat op die feite bevind is dat albei partye nalatig was, bloot verklaar:

> "Vir doeleindes van die bepaling van skadevergoeding word bevind dat die eiser bydraend nalatig was met [die werknemer van die verweerder] in 'n verhouding van 25% tot 75%.")

Uit die beklemtoonde gedeelte van die *Uijs*-saak blyk onomwonde dat die appèlhof ook aanvaar dat sowel die outomatiese (*Nomeka*-) as selfstandige (*Jones*-) benadering *de lege lata* in ons reg toepassing kan vind (en dat Dendy dus fouteer met sy verklaring dat "[t]here is . . . no room for the contention of Neethling, Potgieter and Scott that the approach in *Smit* and *Nomeka* still prevails" (1993 *SALJ* 693)).

Hoe dit ook al sy, ons wil opnuut onderstreep dat ons, soos ander juriste, die selfstandige (*Jones*-) benadering verkies (sien Burchell 113; Van der Merwe en Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 161 – 162; Dendy 1993 *SALJ* 637 – 638; Boberg *The law of delict I: Aquilian liability* (1984) 657 – 659; sien ook Neethling, Potgieter en Visser 150 – 151; Neethling en Potgieter 1992 *TSAR* 324 – 325; Neethling 1976 *THRHR* 412). Die blote feit dat die eiser byvoorbeeld 20% van die norm van die redelike man afgewyk het, kan tog nie sonder meer beteken dat die verweerder 80% nalatig was nie. Getoets aan die norm van die redelike man kon hy 100% of selfs maar 10% daarvan afgewyk het. In so 'n geval is die verhouding van die eiser se skuld tot dié van die verweerder nie 20:80 nie, maar 20:100 of 20:10. (Vgl ook die *Uijs*-saak 235C – D (hierbo aangehaal) waar appèlregter Van Heerden die afwyking van die *bonus paterfamilias* van elke party selfstandig op bykans 100% bereken het; 'n bevinding wat normaalweg 'n verdeling van 50:50 tot gevolg het – sien nietemin die bespreking hieronder.) Prakties kan die benadering van die *Jones*-saak dus 'n groot verskil maak en is dit ooglopend nader aan die ware toedrag van sake. Dat hierdie benadering die enigste sinvolle is, blyk nog duideliker in die geval waar die nalatigheid van die eiser, byvoorbeeld 'n pasiënt (redelike mantoets), anders beoordeel word as dié van die verweerder, byvoorbeeld 'n geneesheer (redelike deskundige-toets) (sien hieroor Neethling 1976 *THRHR* 414; Burchell 113).

In die lig van hierdie uiteensetting kan ons kwalik aanvaar dat die *Nomeka*-benadering inderdaad daarop neerkom dat die bepaling van die eiser se persentasie nalatigheid in totale isolasie geskied (met ander woorde sonder om hoegenaamd die verweerder se nalatigheid in berekening te bring), waarna die verweerder se graad van nalatigheid eenvoudig, sonder enige verdere ondersoek, outomaties as die restant-persentasie uitgedruk word. Wat waarskynlik in al hierdie gevalle gebeur, is dat die howe die bestaan van nalatigheid by elke party op die feite vasstel en daarna, by wyse van 'n denkproses (sonder om dit soos in die *Jones*-saak uit te spel) elkeen se graad van afwyking van die redelike man bepaal en dan sonder meer bloot die *resultaat* van hierdie denkproses in 'n persentasieverhouding uitdruk. Daarom het Dendy 1993 *SALJ* 639 waarskynlik reg dat minstens sommige van die sake wat na ons mening op die *Nomeka*-lees geskoei is, in der waarheid

> "assessed separately the degrees of negligence of the respective parties, compared the deviations and expressed them as a ratio of two figures totalling 100 – an application of the *Jones* approach, not of that in *Nomeka*".

Uit bostaande blyk duidelik dat daar alles behalwe klaarheid met betrekking tot die kriteria vir die berekening van bydraende nalatigheid bestaan. Na woordlui wil dit uit die *Nomeka*- en *Uijs*-saak voorkom of die outomatiese benadering steeds positiewe reg is. Soos ons verduidelik het, is hierdie benadering egter werklikheidsvreemd en word dit daarom waarskynlik nie deur die howe konkreet toegepas nie. Selfs in die sake waar die *Nomeka*-benadering op die oog af gevolg word, het 'n mens, soos Dendy 1993 *SALJ* 639 tereg aantoon, eintlik met 'n verskuilde *Jones*-benadering te make. So gesien, en ten einde verwarring uit te skakel, sal dit goed wees indien ons hoogste hof hom by geleentheid weer hieroor uitspreek.

2 Die beskouing dat die omvang van die eiser se skuld net een van meerdere faktore is wat die hof in ag kan neem ten einde die eiser se skadevergoeding volgens billikheid en regverdigheid te verminder Appèlregter Van Heerden is van mening dat by die vermindering van die eiser se skadevergoeding, artikel 1(1)*(a)*

van die Wet op Verdeling van Skadevergoeding 34 van 1956 verg dat nie net die omvang of graad van die eiser se skuld (afwyking van die redelike man) nie, maar ook ander faktore ooreenkomstig die kriteria van regverdigheid en billikheid 'n rol kan speel. Artikel 1(1)*(a)* bepaal:

> "Waar iemand skade ly wat deels aan sy eie skuld en deels aan die skuld van 'n ander persoon te wyte is, word 'n vordering ten opsigte van bedoelde skade nie ten gevolge van die skuld van die eiser verydel nie, maar word die skadevergoeding wat ten opsigte daarvan verhaalbaar is in so 'n mate deur die hof verminder as wat die hof met inagneming van die mate van die eiser se skuld met betrekking tot die skade regverdig en billik ag."

Alhoewel dit met die eerste oogopslag uit die bewoording van die artikel voorkom of die omvang van die eiser se skuld die enigste of uitsluitlike faktor is wat 'n rol mag speel by die bepaling van die vermindering van sy skadevergoeding, kan regter Van Heerden se wyer vertolking tog in die lig van die kriteria van regverdigheid en billikheid geregverdig word. Ten einde regverdigheid en billikheid werklik te laat geskied, behoort nie net die omvang van die eiser se skuld nie, maar ook ander faktore in ag geneem te word.

In casu het die feit dat die eiser nie tot die skadeveroorsakende gebeurtenis (botsing) bygedra het nie maar slegs tot die vermeerdering van sy skade, en die feit dat "sy skuld andersoortig as dié van Stander was" (235E; hierbo vollediger aangehaal), ook 'n rol gespeel. Waarskynlik was daar sprake van bewuste nalatigheid (*luxuria*: sien Neethling, Potgieter en Visser 118) by die eiser omdat hy doelbewus geweier het om die gordel te dra – die regter het aanvaar dat sy weiering "irrasioneel en halsstarrig" was (235F). ('n Mens wonder of hierdie inagneming van die *tipe of soort* skuld (wat *in casu* eintlik op *dolus eventualis* neerkom) nie die deur open vir die verdeling van skadevergoeding ook waar die eiser *opsetlik* tot sy eie skade bygedra het terwyl die verweerder net bydraend nalatig was nie: sien ons betoog in dié verband in Neethling, Potgieter en Visser 148 vn 170.)

Ons vertrou dat die howe hierdie benadering van die appèlhof sal navolg ten einde regverdigheid en billikheid by die toepassing van die Wet op Verdeling van Skadevergoeding te bevorder.

J NEETHLING
JM POTGIETER
Universiteit van Suid-Afrika

DIE PERSOONLIKE DELIKTUELE AANSPREEKLIKHEID VAN UITVOERENDE AMPSDRAERS

Trevor Ivory Ltd v Anderson 1992 2 NZLR 517 (CA); Hamman v South West Africa People's Organisation 1991 1 SA 127 (SWA)

Die beginsel neergelê in *Salomon v Salomon & Co Ltd* 1897 AC 22 (HL) vorm steeds een van die hoekstene van feitlik al die maatskappyregtelike sisteme wat op die Engelse reg gebaseer is. Dit beteken dat die maatskappy met sy totstandkoming

selfstandig draer van regte en verpligtinge word, regspersoonlikheid verkry en onafhanklik van sy lede en direkteure bestaan (Cilliers *et al Korporatiewe reg* (1992) 7 par 1 17). Hierdie beginsel lei egter tot eiesoortige probleme. So ontstaan die vraag in hoever diegene wat as maatskappyorgane (bv die direksie of besturende direkteur) opgetree het, en deur wie se optrede *die maatskappy* deliktueel aanspreeklik is, ook in persoonlike hoedanigheid deliktuele aanspreeklikheid in die oë staar. Hierdie probleem het die afgelope aantal jare gereeld in ander jurisdiksies, soos Engeland, Kanada en Australië, voor die howe gedien en tot uiteenlopende menings aanleiding gegee (kyk die bespreking van verskillende gewysdes deur Du Plessis en Henning "Die deliktuele aanspreeklikheid van persone wat as maatskappyorgane opgetree het" 1989 *THRHR* 542 – 550). Die vraag na persoonlike deliktuele aanspreeklikheid kom egter ook voor by die ampsdraers van ander regspersone aangesien die maatskappyregtelike analogie ook daar aanwending vind. In hierdie bydrae word aandag geskenk aan die deliktuele aanspreeklikheid van die besturende direkteur van 'n eenpersoonmaatskappy (die *Trevor Ivory*-saak) en van 'n uitvoerende lid van 'n politieke organisasie se militêre vleuel (die *Hamman*-saak).

Die feite van die *Trevor Ivory*-saak ('n uitspraak van die Nieu-Seelandse Court of Appeal) was heel eenvoudig. Die respondent was die eienaar van 'n framboosplantasie. As land- en tuinboukundige adviseur is die eenpersoonmaatskappy (Trevor Ivory Ltd), met Trevor Ivory as besturende direkteur, aangestel. Die framboosoes is bedreig deur gras rondom die framboosplantasie. Op aanbeveling van Trevor Ivory is die onkruiddoder, "Roundup", gebruik ten einde die gras uit te roei. Daar is eers 'n proefneming gedoen en toe geen newe-effekte op die framboosplante waargeneem kon word nie, is voortgegaan om alle randgras te bespuit. Ivory het nie geadviseer dat die framboosplante teen die onkruiddoder beskerm moes word nie. Daar is klaarblyklik effektief ontslae geraak van die gras maar die betrokke jaar se framboosoes het 'n ernstige knou gekry. Die uiteinde was dat alle framboosplante uitgegrawe moes word.

In die verhoorhof het die eiser beide op grond van kontrakbreuk en delik ("tort") geëis teen sowel die maatskappy (Trevor Ivory Ltd) as Trevor Ivory persoonlik. Die verhoorhof het bevind dat die maatskappy sowel kontraktueel as deliktueel aanspreeklik is. Ivory word aanspreeklik gestel aangesien bevind is dat hy 'n *duty of care* teenoor die eisers verskuldig was en hy *nalatig* was deur nie die gevare van die onkruiddoder aan die eisers uit te wys nie. 'n Bedrag van $145, 332 skadevergoeding word toegestaan teen die partye (Trevor Ivory en die maatskappy). Beide die maatskappy en Ivory appelleer teen hierdie bevinding en wel op grond van die verhoofhof se bevinding ten aansien van nalatigheid, die verhoorhof se versuim om 'n bevinding oor bydraende nalatigheid te maak, die *quantum* skadevergoeding en die bevinding dat Ivory persoonlik aanspreeklik is. Die respondente was onsuksesvol ten aansien van alle aspekte behalwe die appèl teen die persoonlike aanspreeklikheid van Ivory. Die gerapporteerde saak handel gevolglik ook net oor hierdie aspek (kyk die *Trevor Ivory*-saak 517 – "Editorial note").

In sy uitspraak begin regter Cooke met die basiese probleem wat hier voorhande is, naamlik "[that] [i]t is elementary that an incorporated company and any shareholder are separate legal entities, no matter that the shareholder may have absolute control" (520 lyn 5). Dieselfde probleem wat in *Yuille v B & B*

Fisheries (Leigh) Ltd and Bates (The "Radiant") 1958 2 L11 Rep 596 geïdentifiseer is, naamlik

> "[w]hat he [maatskappyorgaan] does as a director is, so far as his own liability is concerned, a matter between him and the company: any act of his as director is the company's act, and in law can render only the company liable",

word ook treffend deur regter Cooke saamgevat: "If a person is identified with a company vis-à-vis third parties, it is reasonable that prima facie the company should be the only party liable" (520 lyn 20).

Met verwysing na onder andere *White Horse Distillers Ltd v Gregson Associates Ltd* 1984 RPC 61 en *C Evans & Sons Ltd v Spritebrand Ltd* 1985 2 All ER 415 (CA) word die punt gemaak dat in sekere gevalle dit inderdaad moontlik is dat maatskappybeamptes of dienare persoonlik teenoor derdes aanspreeklik is (520 – 522; vgl ook Du Plessis en Henning 544 – 545). Volgens die regter bied die Engelse gewysdes egter nie werklik leiding op hierdie gebied nie aangesien die uitsprake dáár nie trag om 'n beginselmatige oplossing vir die probleem aan die hand te doen nie, maar eerder op die spesifieke feite van elke individuele saak ingestem is (522 lyne 1 tot 5; vgl ook Du Plessis en Henning 549 – 550). Ook in Nieu-Seeland is daar voorbeelde waar individue persoonlik aanspreeklik gehou is ondanks die feit dat hul verweer was dat die optrede namens die maatskappy was en die maatskappy derhalwe aanspreeklik gehou moes word (*Centrepac Partnership v Foreign Currency Consultants Ltd* 1989 4 NCCLC 64 94; *Morton v Douglas Homes Ltd* 1984 2 NZLR 584).

In hierdie sake het daar egter eiesoortige omstandighede gegeld. In die *Centrepac*-saak was daar naamlik aanduidings dat daar 'n kontrak tussen die eiser en die verweerder persoonlik bestaan het en daar skyn ook 'n "high degree of foreseeability and in that sense, proximity" te gewees het (kyk 523 lyne 25 – 35). In die *Morton*-saak weer was daar "an assumption of responsibility" (527 lyne 23 – 37). Hierdie uitsonderlike gevalle doen egter nie afbreuk nie aan die eiesoortige maatskappyregtelike beginsels wat oor baie jare ontwikkel is en wat tot gevolg het dat

> "it behoves the Courts to avoid imposing on the owner of a one-man company a personal duty of care which would erode the limited liability and separate identity principles associated with the names of Salomon ['n sinspeling op *Salomon v Salomon & Co Ltd supra*] and Lee" ['n sinspeling op *Lee v Lee's Air Farming Ltd* 1961 AC 12 (PC)]" (sien die *Trevor Ivory*-saak 523 lyn 50).

Ter afsluiting stel regter Cooke dit onomwonde dat daar *in casu* besigheid gedryf is in naam van die maatskappy en nie in persoonlike hoedanigheid nie (523 lyne 54 – 55):

> "In the instant case it is patent that the object of Mr Ivory in forming a limited liability company, an object encouraged by long-established legislative policy, would be undermined by imposing personal liability . . . But it seems to me that something special is required to justify putting a case in that class [gevalle van persoonlike aanspreeklikheid]. To attempt to define in advance what might be sufficiently special would be a contradiction in terms. What can be said is that there is nothing out of the ordinary here" (524).

Ook die ander twee regters (Hardy Boys en McGechan) kom tot dieselfde gevolgtrekking.

Dit is duidelik uit die *Trevor Ivory*-saak dat die korporatiewe sluier ook deur die Nieu-Seelandse howe met respek bejeën word. Hierdie respek is noodsaaklik want as die korporatiewe sluier te geredelik gelig kan word, word die wese

van die selfstandigheid van die maatskappy as ingelyfde regspersoon ernstig aangetas. Verder sou dit beteken dat die prinsipiële grondslae vir die bestaan van hierdie juridiese skepping bevraagteken moet word. (Du Plessis en Henning 551. Larkin "Regarding judicial disregarding of the company's separate identity" 1989 *SA Merc LJ* 282 stel dit soos volg:

> "The Companies Act unqualifiedly provides for a company to be a body corporate. As such, it can pursue any legal purpose. The idea of 'entity subject to equity' tampers with the means which the law has chosen to serve its ends."

Vgl ook Sealy "Directors' 'wider' responsibilities – problems conceptual, practical and procedural" 1987 *Monash University LR* 181.)

Myns insiens is die uitstaande kenmerk van die saak dat daar gebruik gemaak word van 'n spesifieke toets, naamlik die "assumption of responsibility"-toets (kyk veral 424 527 530 – 532) ten einde te bepaal wanneer die individu, wat as maatskappyorgaan opgetree het (*in casu* die besturende direkteur), ook persoonlik teenoor die benadeelde aanspreeklik is. Solank die optrede in die hoedanigheid van maatskappyorgaan verrig is, dan is die maatskappy, en nie die individu nie, aanspreeklik. Beteken dit nou dat óf net die maatskappy óf net die individu aanspreeklik is? Daar word aan die hand gedoen dat dit nie is wat die hof probeer sê nie. Uiteraard kan daar 'n gedeeltelike "assumption of responsibility" wees. Die maatskappy én die individu is dan aanspreeklik. Regter Cooke (524 lyn 45) en regter McGechan (532 lyn 23) stel dit juis onomwonde dat daar nie *a priori* vasgestel moet word in watter gevalle persoonlike aanspreeklikheid voorhande sal wees nie. Elke geval sal op eie meriete beoordeel moet word.

Daar is voorheen aan die hand gedoen dat van die beginsels wat dien om die korporatiewe sluier te lig, gebruik gemaak moet word ten einde vas te stel of die persone wat as maatskappyorgane opgetree het, ook persoonlik deliktueel vir hierdie optrede aanspreeklik is (Du Plessis en Henning 551). Is die "assumption of responsibility"-toets allesomvattend, of is daar nog gevalle waar die beginsels om die korporatiewe sluier te lig, aangewend behoort te word? In die *Trevor Ivory*-saak is daar in werklikheid 'n oplossing gevind onafhanklik van die korporatiewe sluier, naamlik in die optrede van die individu ("assumption of responsibility") wat 'n *nexus* direk tussen hom en die benadeelde tot gevolg gehad het. Die beginsels om die korporatiewe sluier te lig, behoort egter steeds aanwending te vind ten einde te oorweeg of die individu of individue (in gevalle waar daar nie 'n "assumption of responsibility" was nie) wat as maatskappyorgane opgetree het, nie moontlik weens beleidsoorwegings persoonlik deliktueel aanspreeklik is nie. Dit is juis hier waar die "balancing test" ter sprake kom. (Kyk Domanski "Piercing the corporate veil – a new direction?" 1986 *SALJ* 234 – 235:

> "[N]o categories . . . [i]nstead, the court lays down a broad principle that requires an evaluation of competing policy considerations in order to determine whether or not the veil of incorporation should be pierced."

Vgl verder Du Plessis en Henning 551 – 553 554; Beck "The two sides of the corporate veil" in Farar (red) *Contemporary issues in company law* (1987) 74.) Du Plessis en Henning 551 – 553 554 het reeds aangetoon dat daar in die Suid-Afrikaanse deliktereg sekere beginsels bestaan wat in verskeie opsigte nou aansluit by dit wat Domanski 'n "balancing test" noem. Dit is naamlik dat daar van die howe verwag word om oor sekere aangeleenthede 'n "regterlike waardeoordeel" te vel (Van der Walt "Nalatige wanvoorstelling en suiwer vermoënskade: die appèlhof spreek 'n duidelike woord" 1979 *TSAR* 154). Die vraag

of die korporatiewe sluier gelig moet word ten einde te bepaal of die persone wat as maatskappyorgane opgetree het persoonlik deliktueel aanspreeklik is, is tipies een waaroor daar 'n waarde-oordeel gevel behoort te word. Wanneer die hof sy waarde-oordeel uitoefen, behoort dit hom vry te staan om 'n wye verskeidenheid faktore te oorweeg. Die eiser se nadeel en die beskerming wat deur die korporatiewe sluier aan die verweerder-direkteur gebied word, kan byvoorbeeld teenoor mekaar opgeweeg word. Is die hof van oordeel dat daar weens die bestaan van die korporatiewe sluier 'n groot juridiese wanbalans voorhande is, kan hy besluit om die korporatiewe sluier te lig ten einde die persone wat as organe opgetree het, persoonlik aanspreeklik te hou. Die hof sal uiteraard ook mag kyk na die mate van berekendheid waarmee daar tot die nadeel van onskuldige derdes opgetree is, en of die rigtinggewende orgaan binne of buite die vermoë en bevoegdheid van die maatskappy opgetree het. Hierdie benadering strook ook met die benadering wat in onlangse tye deur ons howe ten aansien van "lifting of the corporate veil" neergelê is. Die uitgangspunt is dat dit besondere gronde sal verg om die korporatiewe sluier te lig (*Botha v Van Niekerk* 1983 3 SA 513 (W) 523H; *Dithaba Platinum (Pty) Ltd v Erconovaal* 1985 4 SA 615 (T) 624F; *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1993 2 SA 784 (K) 821H – 821C). As algemene maatstaf geld wat regter Flemming in *Botha v Van Niekerk supra* 525F neergelê het, naamlik dat die korporatiewe sluier gelig sal word as daar 'n "onduldbare onreg" voorhande is.

Ook in die *Trevor Ivory*-saak is daar aanduidings dat die howe in sekere gevalle, ondanks die feit dat daar geen "assumption of responsibility" was nie, bereid sal wees om die individue wat as maatskappyorgane opgetree het persoonlik aanspreeklik te stel. Dit het onder andere betrekking op "the personal injuries field" (524 lyn 14, per Cooke R) en waar "a director is said to have authorised, directed or procured the commission of a tort by his company . . ." (527 lyn 43, per Hardy Boys R). Daar word aan die hand gedoen dat dit meer gefundeerd sou wees as die regters ook in hierdie gevalle 'n beginselmatige verklaring vir die persoonlike aanspreeklikheid van die individue probeer soek het eerder as om na spesifieke gevalle te verwys. Die benadering in die Engelse sake *White Horse Distillers Ltd* en *C Evans & Sons Ltd* (*supra*) is immers juis gekritiseer omdat die uitsprake nie trag om 'n beginselmatige oplossing vir die probleem voorhande te bied nie, maar eerder op die spesifieke feite van elke individuele saak ingestem is (kyk bespreking hierbo).

Daar behoort weer eens verwys te word na die beskouing wat daarop neerkom dat dit eintlik onnodig is om die deliktuele aanspreeklikheid van persone wat as maatskappyorgane opgetree het, te benader uit die oogpunt van die bestaan van die korporatiewe sluier of die orgaan- of vereenselwigingsteorie. Ingevolge hierdie benadering is die orgaan- of vereenselwigingsteorie ontwikkel om die *maatskappy* se aanspreeklikheid te verklaar en behoort die teorie gevolglik nie verhef te word tot 'n verweer teen die deliktuele aanspreeklikheid van persone wat as maatskappyorgane opgetree het nie. Gevolglik is ook diegene wat as maatskappyorgane opgetree het, deliktueel teenoor die benadeelde aanspreeklik. Die eiser het eenvoudig 'n keuse om die geding teen die maatskappy, die persoon wat as maatskappyorgaan opgetree het of teen beide aanhangig te maak (kyk Du Plessis en Henning 553 – 554). Wishart ("The personal liability of directors in tort" 1992 *Company and Securities LJ* 365) kritiseer

juis die *Trevor Ivory*-saak op grond van die feit dat die uitwerking van die saak is dat direkteure oormatig beskerm word. Hy motiveer sy standpunt soos volg:

> "[T]he principles of limited liability and separate legal personality are examples of the much touched 'fuzzy' law: we all know what the principles mean, therefore there is no need to exhaustively define them. Unfortunately, most of us are mistaken when we think limited liability extends to directors. That doctrine is about the liability of shareholders for debts of the company" (365).

Tot dusver het hierdie benadering egter nog nie aanklank in die howe gevind nie. Die howe is eerder geneig om klem te lê op die eiesoortige oorwegings wat geld by regspersone wanneer daar sprake is van die persoonlike deliktuele aanspreeklikheid van diegene wat deel was van 'n regspersoon se uitvoerende besluitnemingsorgaan. 'n Goeie illustrasie hiervan is *Hamman v South West Africa People's Organisation*. In hierdie saak het dit onder andere gehandel oor die persoonlike deliktuele aanspreeklikheid van die tweede verweerder, Hendrik Witbooi. Hy was te alle wesenlike tye onder meer lid van SWAPO se Sentrale Komitee en Politieke Buro. Die vraag wat toe ter sprake gekom het, was of hy persoonlik aanspreeklik is teenoor die eiser (Hamman) vir skade wat aan die eiser se eiendom aangerig is tydens 'n vuurpyl- en/of mortierbombardering deur die militêre vleuel (PLAN – "Peoples Liberation Army of Namibia") van dié organisasie. Die maatskappyregtelike analogie word getref, naamlik dat "the decisions of the directors of a company are the decisions of the company concerned" (142F). Die gevolge van hierdie opvatting word soos volg verduidelik:

> "Consequently, while a person can obviously be guilty of conspiring with a company, he cannot be guilty of conspiring with a company of which he is the only director. The director's mind is the company's mind and it is not possible for one mind to conspire with itself" (142G).

Die regsbeginsels word dan soos volg op die feite toegepas:

> "Inasmuch as second defendant's 'mind was the mind' . . . of first defendant (albeit only a portion of that mind as he was not the only person who sat on those committees), it would be ignoring the law applicable to corporations to hold him liable with the corporation for what he did in formulating the corporation's mind and policy, particularly as it is because of that policy that the corporation itself is liable for the acts of its agents (134B) . . . The effect is not that a director can never be liable for a delict of the company. He would be liable if it can be shown (*and therefore it must be pleaded*) that he expressly authorised the act complained of, or that he directed the company or its servants in committing the act" (143E).

Uit 'n maatskappyregtelike oogpunt beoordeel, is die gevolgtrekking dat die tweede verweerder nie aanspreeklik is nie, verstaanbaar, maar dit lyk of hier 'n denksprong gemaak word. Ten einde vas te stel of *die regspersoon* aanspreeklik is, moet eers vasgestel word of die handeling verrig is deur die "directing mind and will of the corporation" (*Lennard's Carrying Company Limited v Asiatic Petroleum Company Limited* 1915 AC 705 (HL) 713 – ook na verwys in die *Hamman*-saak 141E – F; kyk ook Du Plessis en Henning 551). Hierdie "directing mind and will of the corporation" word juis vergestalt deur die optrede van die individu wat as orgaan optree. Hoe word daar nou vasgestel wanneer die individu "*expressly* authorised the act complained of" (eie beklemtoning), of wanneer "he *directed* the company or its servants in committing the act" (eie beklemtoning)? Dit was juis as gevolg van die *magtiging* van die orgaan en as gevolg van die *rigtinggewende aard* van die optrede dat *die regspersoon* aanspreeklik is; daarom bestaan daar 'n probleem om die *individu* persoonlik deliktueel aanspreeklik te stel.

> ("[W]hat he [maatskappyorgaan] does as a director is, so far as his own liability is concerned, a matter between him and the company: any act of his as director is the

company's act, and in law can render only the company liable'' – *The* ''*Radiant*''-saak *supra*;

of, soos in die *Trevor Ivory*-saak gestel, ''[i]f a person is identified with a company vis-à-vis third parties, it is reasonable that prima facie the company should be the only party liable'' (520 lyn 20) – kyk bespreking hierbo.) Soos hierbo verduidelik is, word aan die hand gedoen dat die beginsels wat geld om die korporatiewe sluier te lig die enigste geordende wyse bied om in hierdie gevalle die persoonlike deliktuele aanspreeklikheid van die persone wat as maatskappyorgane opgetree het, te verklaar. Só beskou, wonder 'n mens of die korporatiewe sluier nie in die *Hamman*-saak op grond van beleidsoorwegings gelig moes gewees het nie. Behoort individue werklik agter die korporatiewe sluier te kan skuil as daar berekend opdrag gegee is om, die gevolge wat dit vir lewe en eiendom inhou ten spyt, voort te gaan met vuurpyl- en/of mortierbombarderings? In 1897 was die House of Lords bereid om die *Salomon*-beginsel te vestig toe dit gehandel het oor die vraag of hy as versekerde skuldeiser op die volle betaling van 'n skuldbrief geregtig was (*Salomon*-saak *supra*). In 1960 het die Privy Council die *Salomon*-beginsel aangewend om te bevestig dat die ''governing director'' (wat ook die maatskappy-vlieënier was) onderskeidelik orgaan en werknemer van die maatskappy was; dat die maatskappy 'n afsonderlike entiteit is en dat die eiseres gevolglik as eggenote van die oorlede werknemer 'n eis teen die maatskappy gehad het (*Lee v Lee's Air Farming Ltd supra*). Maar het die Lords werklik beoog (of selfs kon droom) dat die gedaante van die korporatiewe sluier mettertyd na gepantserde beton sou verwissel om selfs die aanslae van 'n vuurpyl- en/of mortierbombardering te deurstaan?

In die *Trevor Ivory*-saak wys regter Cooke daarop dat sommige persone die debat rondom die persoonlike deliktuele aanspreeklikheid van diegene wat as maatskappyorgane optree as ''unduly theoretical, if not heterodox'' kan beskou (524 lyn 35). Wishart stel dit dat ''[t]he 'fuzzy' law of limited liability permitted decidedly fuzzy thinking'' (365). Hierdie debat illustreer egter ook, soos regter Coetzee dit stel, dat die maatskappyreg ''has its own inner logic which requires to be identified and mastered'' (*Ex parte NBSA Centre Ltd* 1987 2 SA 783 (W) 785G) en wanneer hierdie innerlike logika nie behoorlik raakgesien of bemeester word nie, lei dit dikwels tot skrikwekkende resultate.

JJ DU PLESSIS
Randse Afrikaanse Universiteit

VIGS, VERTROULIKHEID EN 'N PLIG OM IN TE LIG?

Jansen van Vuuren v Kruger 1993 4 SA 842 (A)

Inleiding

Hierdie beslissing van die appèlhof kan verwelkom word omdat die hof dit duidelik stel dat die dodelike en ongeneeslike aard van VIGS op sigself nie afbreuk doen aan die reg op privaatheid van 'n geïnfekteerde persoon nie. So 'n persoon

se persoonlikheidsregte, waaronder sy reg op privaatheid, is steeds beskermingswaardig.

As finale vertolker van die gemeenskap se regsoortuigings gee die hof ook uitsluitsel oor die netelige kwessie van wanneer dit vir 'n geneesheer geregverdig sou wees om sy pasiënt se HIV-infeksie aan sy (die geneesheer se) kollegas bekend te maak. Die hof stel besliste perke aan wat as regmatige optrede van geneeshere in hierdie verband beskou sal word.

Feitestel en beslissing van die hof *a quo*

Die feite van die saak was kortliks soos volg: Die appellante was die eksekuteurs van die boedel van McGeary, die eiser in die hof *a quo* wat tydens die verhoor aan 'n VIGS-verwante siekte gesterf het. (Sien *McGeary v Kruger en Joubert* 1991-10-16 saaknr 25317/90 (W). Vir 'n bespreking van hierdie saak sien Van Wyk "VIGS, *boni mores* en vertroulikheid" 1992 *THRHR* 116 ev.) In die verhoorhof is 'n eis om skadevergoeding weens die beweerde inbreukmaking op die eiser se reg op privaatheid van die hand gewys. Kruger, die respondent (verweerder), was die eiser se geneesheer.

Die eiser wou aansoek doen om lewensversekering en moes gevolglik 'n HIV-toets ondergaan. Die laboratorium wat die toetse uitgevoer het, het Kruger op ongeveer 5 April 1990 in kennis gestel dat die eiser HIV-positief getoets het. Kruger het die eiser op ongeveer 10 April hieroor ingelig. Tydens 'n potjie gholf op 11 April het Kruger die eiser se HIV-status bekendgemaak aan 'n tandarts en 'n algemene praktisyn wat die eiser by vorige geleenthede behandel het. Vandaar het die nuus verder versprei. Kruger het nie probeer om die pasiënt se toestemming vir hierdie bekendmaking te verkry nie. Inteendeel, hy het beloof om die inligting geheim te hou. Die pasiënt het ook nouliks die kans gehad om self die inligting oor te dra.

In die hof *a quo* het die eiser aangevoer dat die verweerder sy plig tot geheimhouding verbreek het deur sy infeksie aan sy twee kollegas bekend te maak, ten gevolge waarvan die eiser se persoonlikheidsregte en meer spesifiek sy reg op privaatheid geskend is. Sy eis is gebaseer op die *actio iniuriarum* en vergoeding ten bedrae van R50 000 is aanvanklik geëis, maar die bedrag is later met die instemming van die hof tot R250 000 verhoog.

Beide die hof *a quo* en die appèlhof beklemtoon dat geneeshere nie slegs 'n etiese plig het om vertroulike inligting van hul pasiënte vertroulik te hou nie, maar dat hierdie plig ook 'n regsplig is. Die regsplig spruit voort uit die geneesheer-pasiëntverhouding, wat op sy beurt weer op die kontrak tussen geneesheer en pasiënt gegrond is. Die bekendmaking van private feite strydig met die regsplig om die inligting vertroulik te hou, kom in beginsel op 'n onregmatige skending van privaatheid neer.

Die pasiënt se reg op privaatheid en die vertrouensplig van die geneesheer is egter nie absoluut nie en botsende belange (die eiser se reg op privaatheid, die reg van ander geneeshere om tersaaklike inligting te ontvang en die breë openbare belang in die inligting) moet opgeweeg word. Regverdiging vir die bekendmaking van vertroulike inligting kan bestaan indien die geneesheer se verpligting teenoor die samelewing swaarder weeg as sy verpligting teenoor die individu.

'n *Prima facie* skending van vertroulikheid kan dus in sekere omstandighede geregverdig wees, en die regverdiging hef die onregmatigheid van die bekendmaking op. In die saak onder bespreking is drie alternatiewe regverdigingsgronde (verwere) deur die respondent geopper: (a) die mededeling is gemaak tydens 'n geprivilegieerde geleentheid; (b) dit was die waarheid en is in die openbare belang bekendgemaak; en (c) die bekendmaking was geregverdig, gemeet aan die openbare belang en beleid en aan die algemene standaard van redelikheid (*boni mores*) soos dit in die samelewing toegepas word.

In die hof *a quo* is veral aan laasgenoemde verweer aandag gegee. Waarnemende regter Levy het die maatstaf van redelikheid (*boni mores*) klaarblyklik as onafhanklike kriterium toegepas in sy beoordeling van die regmatigheid al dan nie van die geneesheer se optrede. Die volgende faktore is by hierdie beoordeling in aanmerking geneem: die dodelike en ongeneeslike aard van VIGS, die waarskynlikheid (na die hof se oordeel) dat die eiser nie self ander betrokke gesondheidswerkers oor sy infeksie sou ingelig het nie, die moontlikheid dat die eiser Kruger se kollegas in die toekoms weer sou raadpleeg (al het hy intussen na 'n ander dorp verhuis) en die etiese riglyne vir en beleidsverklaring ten opsigte van die behandeling van pasiënte met HIV-infeksie van onderskeidelik die Suid-Afrikaanse Geneeskundige en Tandheelkundige Raad (SAGTR) en die Suid-Afrikaanse Kollege van Geneeskunde. (Sien onderskeidelik "Ethical considerations in the management of patients with H.I.V. infection" 1989 *SA Praktykbestuur* 21 en "Management of HIV-positive patients" 1991 *SAMT* 688.) Ten spyte daarvan dat die SAGTR-riglyne 'n geneesheer aanraai om eers met die betrokke pasiënt te konsulteer en hom te wys op die noodsaaklikheid daarvan dat ander behandelende gesondheidswerkers die inligting moet ontvang, en dit duidelik stel dat die geneesheer die inligting slegs sonder toestemming mag oordra indien die pasiënt weier om hom toe te laat om dit namens hom te doen, beslis die hof dat die bekendmaking van die vertroulike inligting nie onregmatig was gemeet aan die algemene redelikheidsmaatstaf (die geldende norme en waardes van die samelewing) nie. Volgens regter Levy vereis die dodelike en ongeneeslike aard van VIGS dat die belange van die pasiënt ondergeskik gestel moet word aan die behoefte van gesondheidswerkers om ten volle ingelig te word oor sy infeksie.

Die implikasie van hierdie beslissing was dat 'n geneesheer sy kollegas by die eerste beste geleentheid oor die HIV-infeksie van sy pasiënt kon inlig, mits die moontlikheid maar bestaan het dat hulle by die behandeling van die betrokke pasiënt gemoeid was of sou wees. Regter Levy het trouens gemeen dat die verweerder 'n "plig" gehad het om sy kollegas in te lig. Ongelukkig het die regter dit nie duidelik gemaak of hy na 'n etiese verpligting in die lig van etiese riglyne in hierdie verband of na 'n regsplig verwys het nie. Indien 'n regsplig om positief op te tree ten einde skade van ander af te weer wel bestaan, sal 'n versuim om in te lig in beginsel aanleiding kan gee tot 'n eis om skadevergoeding teen die geneesheer. In 'n bespreking van die vonnis is die hoop uitgespreek dat die appèlhof groter duidelikheid sou gee oor die kwessie van geneeshere se regsplig in hierdie verband (Van Wyk 1992 *THRHR* 124).

Beslissing

Waarnemende appèlregter Harms (soos hy toe was) lewer die eenparige uitspraak van die appèlhof. Hy bevind dat daar nie gesteun is op die verweer van waarheid

en die openbare belang nie en dat niks wesenliks geopper is ten aansien van die verweer van die *boni mores* nie. (Die pleit toon volgens hom net 'n herhaling van die algemene maatstaf vir onregmatigheid en het niks bygedra tot die ontkenning van onregmatigheid in die onderhawige saak nie (851).) Hy het gevolglik die oorblywende verweer, naamlik privilegie, oorweeg. Alhoewel die volgende kriterium oorspronklik in die konteks van laster gebruik is (Burchell *Principles of delict* (1993) 180) het die hof dit op die verweer van privilegie toegepas (851):

> "It is lawful to publish . . . a statement in the discharge of a duty or the exercise of a right to a person who has a corresponding right or duty to receive the information. Even if a right or duty to publish material and a corresponding duty or right to receive it does not exist, it is sufficient if the publisher had a legitimate interest in publishing the material and the publishee had a legitimate interest in receiving the material."

Die hof het gevolglik ondersoek ingestel na die bestaan al dan nie van 'n sosiale, etiese of regsplig om in te lig. ('n Regsplig bestaan bv om 'n aanmeldbare siekte ingevolge a 45 van die Wet op Gesondheid 63 van 1977 aan te meld.) Die hof het onder meer die volgende objektiewe faktore oorweeg (852–855):

(a) HIV-infeksie en volskaalse VIGS is ongeneeslik en meestal dodelik en word deur baie mense as die ernstigste gesondheidsbedreiging van ons tyd beskou.

(b) Alhoewel die HI-virus oordraagbaar is, is dit minder aansteeklik as baie ander gewone virusse en word dit slegs deur die uitruil van sekere liggaamsvloeistowwe oorgedra.

(c) Geen bevestigde geval van gesondheidswerkers wat HIV-infeksie in die loop van hul professionele diens opgedoen het, is in Suid-Afrika bekend nie.

(d) Daar is baie siektekieme, soos hepatitis B, wat aansteekliker is as HIV. 'n Mediese praktisyn moet normaalweg voorsorg daarteen tref en sommige van hierdie maatreëls is voldoende om die verspreiding van HIV in professionele verband te voorkom.

(e) Volgens reël 16 van die SAGTR se gedragskode kom dit op onbehoorlike gedrag neer om enige inligting oor 'n pasiënt se aandoening, wat nie bekendgemaak behoort te word nie, bekend te maak sonder die uitdruklike toestemming van die pasiënt. Die etiese riglyne van die SAGTR en die Kollege van Geneeskunde vir die behandeling van pasiënte met HIV-infeksie bevestig hierdie verpligting tot vertroulikheid, maar raai 'n geneesheer aan om sy pasiënt in te lig oor die noodsaaklikheid dat ander behandelende gesondheidswerkers oor sy toestand ingelig moet word, om sy toestemming vir hierdie bekendmaking te probeer verkry en indien die pasiënt weier, *om die pasiënt in te lig oor sy (die geneesheer se) (etiese) verpligting om die inligting aan sodanige werkers te gee.*

(f) Weens die aard van HIV-infeksie en VIGS is dit noodsaaklik dat persone wat 'n risiko van infeksie loop, mediese advies moet inwin. Om hul samewerking te verkry, moet vertroulike inligting beskerm word. Bekendmaking van infeksie het ook ernstige persoonlike en sosiale gevolge vir die pasiënt, en kan selfs die ontwikkeling van volskaalse VIGS verhaas.

(g) HIV-infeksie en VIGS is nie aanmeldbare toestande ingevolge artikel 45 van die Wet op Gesondheid nie. (Die stelling wat die hof maak (855A–B) dat "VIGS- verwante siektes" nie aanmeldbaar is nie, is nie korrek nie. Dit is bekend dat tuberkulose en malaria toenemend VIGS-verwant is (sien Martin ea "AIDS and tuberculosis" 1990 *SAMT* 533; Goodgame "AIDS in Uganda – clinical and social features" 1990 (323) *NEJM* 383). Beide hierdie siektes is aanmeldbare mediese toestande (GK R328 van 1991-02-22).)

(h) Geen bewys is gelewer dat die twee mediese praktisyns aan HIV blootgestel was toe hulle die eiser geneeskundig behandel het nie. Dit was ook onwaarskynlik dat die eiser hulle weer sou raadpleeg aangesien hy hom 'n paar maande voor die bekendmaking op die gholfbaan op 'n ander dorp gevestig het.

Om te bepaal of Kruger enige sosiale of morele plig in die lig van bostaande gehad het om sy twee kollegas in te lig, pas die hof die maatstaf van die redelike man toe (waarskynlik as verfyningsmiddel om te bepaal of daar inderdaad aan die vereistes van privilegie voldoen is). Die hof kom tot die gevolgtrekking dat daar geen sodanige plig om die inligting oor te dra of reg om die inligting te ontvang, bestaan het nie. By implikasie bevind die hof dat daar ook geen regsplig aanwesig was nie. Regter Harms beslis dat die bekendmaking van die vertroulike inligting onredelik en gevolglik ongeregverdig en onregmatig was. Die hof bevind ook dat die vereiste *animus iniuriandi* aanwesig was. 'n Toekenning van R5 000 is gemaak en die appèl met koste gehandhaaf.

Bespreking

Geweldige klem word in die literatuur gelê op die vertroulike verhouding wat tussen geneesheer en pasiënt moet bestaan omdat die mediese beroep slegs in hierdie omstandighede doeltreffend kan funksioneer. Pasiënte moet die vrymoedigheid hê om geneeskundige advies te soek sonder vrees dat hul private sake blootgelê sal word (sien bv Laufs en Laufs "Aids und Arztrecht" 1987 *NJW* 2257 2264). Soos hierbo gemeld is, kan die bestaan van 'n hoër regsgoed egter die verbreking van die swygplig regverdig. In die hof *a quo* het die regter die *boni mores* so geïnterpreteer dat weens die ongeneeslike en dodelike aard van VIGS, die belange van die HIV-positiewe pasiënt moes swig voor die belang wat gesondheidswerkers in die inligting het.

Die appèlhof het veel groter klem op die regte van die pasiënt gelê. Die hof stel dit duidelik dat die dodelike en ongeneeslike aard van VIGS op sigself nie afbreuk doen aan die reg op privaatheid van 'n geïnfekteerde persoon nie – veral waar dié reg gegrond is op die verhouding tussen hom en sy geneesheer – en dat 'n pasiënt steeds van sy geneesheer kan verwag om volgens die etiese standaarde van sy professie op te tree.

Wat die verweer van privilegie betref, is dit wel so dat die 1989-SAGTR-riglyne 'n verpligting oplê om kollegas in te lig, maar 'n baie spesifieke voorafgaande prosedure word voorgeskryf: Die behandelende geneesheer word aangeraai om die noodsaak met sy pasiënt te bespreek dat ander gesondheidswerkers ingelig moet word oor sy toestand. Indien die pasiënt sy toestemming daartoe weerhou,

> "the patient should be told that the doctor is duty bound to divulge this information to the other health care workers concerned with the patient".

(Versuim in dié verband wat daartoe lei dat 'n ander gesondheidswerker onnodig aan HIV blootgestel word, sal in 'n ernstige lig deur die SAGTR beskou word.) Hierdie verpligting om in te lig, is waarskynlik hoogstens 'n etiese verpligting. Selfs al is dit "slegs" 'n etiese een, is dit nouliks denkbaar dat die nakoming daarvan onregmatig kan wees (sien Van Wyk *Aspekte van die regsproblematiek rakende VIGS* (LLD-proefskrif Unisa 1991) 414). In die onderhawige geval het die respondent egter juis nie in ooreenstemming met die riglyne opgetree nie omdat die pasiënt nie in die saak geken is nie en sy persoonlike outonomie verontagsaam is.

(Die SAGTR het intussen, in April 1993, nuwe riglyne vir die behandeling van pasiënte met HIV-infeksie of VIGS aanvaar. Alhoewel hierdie riglyne uiteraard nie

op die saak onder bespreking van toepassing is nie en hulle nog nie wyd gepubliseer is nie (en moontlik selfs nog gewysig kan word) moet daarop gelet word dat die 1993-riglyne geen etiese verpligting op geneeshere lê om bedreigde derdes in te lig nie. Wat betref die prosedure wat gevolg moet word voordat 'n geneesheer derdes mag inlig, wyk die nuwe riglyne nie wesenlik van die voriges af nie.)

Waarnemende appèlregter Harms lê ook klem daarop dat die twee persone wat ingelig is en wat die eiser by geleentheid behandel het, objektief gesproke nie aan risiko blootgestel was nie en dat daar geen rede was om te aanvaar dat hulle toekomstige blootstelling sou hoef te vrees nie (856FG). Die implikasie is dat die plig om sodanige inligting te gee net geld teenoor diegene wat objektief gesproke die risiko van infeksie loop en dat slegs sodanige bekendmaking geregverdig sou wees.

Wie moet almal in hierdie kategorie tuisgebring word? Aan die een kant kan geargumenteer word dat dit daardie gesondheidswerkers is wat daadwerklik by die pasiënt se sorg betrokke is. So 'n interpretasie sou ooreenstem met die etiese riglyne van die SAGTR en die beleidsverklaring van die Suid-Afrikaanse Kollege van Geneeskunde waarna die hof telkens verwys. Kennis van 'n spesifieke pasiënt se infeksie sou gesondheidswerkers in staat stel om groter versigtigheid in die behandeling van HIV-positiewe pasiënte aan die dag te lê en hul blootstelling verder te beperk. Voorsorg wat getref word, kan nooit die risiko volledig uitskakel nie. (Handskoene kan bv skeur tydens operasies en stukkende vel aan bloed blootstel.) Dit is ongelukkig waarskynlik ook haas onmoontlik om universele voorsorgmaatreëls in elke kontaksituasie tussen gesondheidspersoneel en pasiënte in Suid-Afrika toe te pas vanweë die koste wat daaraan verbonde is (sien SA Kollege van Geneeskunde se beleidsverklaring 1991 *SAMT* 688 en die Mediese Vereniging van Suid-Afrika (MVSA) se *Riglyne vir die hantering van MIV/VIGS* (1992) 6 12).

Regter Harms se woorde kan egter ook so vertolk word dat indien dit blyk dat die voorgeskrewe universele voorsorgmaatreëls (wat penetrasie van die vel deur besmette skerp voorwerpe, en die besmetting van die vel – veral stukkende vel, slymvliese en konjunktiva – moet voorkom) nougeset getref word, die inligting oorbodig en die skending van vertroulikheid nie geregverdig sou wees nie. So 'n interpretasie is in ooreenstemming met die MVSA se riglyne in hierdie verband alhoewel die hof nooit daarna verwys nie (sien MVSA *Riglyne* 10 en 1993 (83) *SAMT* xvii vir die MVSA se positiewe kommentaar op die uitspraak).

Die kruks van die saak is dus die betekenis van die frase "blootgestel aan HIV/objektief gesproke die risiko van HIV-infeksie loop". In oorweging word gegee dat eersgenoemde interpretasie die aanneemlikste is. Al is die risiko van infeksie uiters gering waar die nodige voorsorg getref word, is die gevolge van infeksie dodelik. Die inligting behoort egter streng beperk te word tot diegene wat werklik 'n belang by die inligting het, met ander woorde tot diegene wat daadwerklik by die pasiënt se versorging en behandeling betrokke was/is of waarskynlik sal wees. Bekendmaking aan die betrokke gesondheidswerkers moet as 'n laaste uitweg geskied, dit wil sê nadat die pasiënt om sy samewerking gevra is, hy dit weier en hy ingelig is omtrent die geneesheer se etiese verpligting om hierdie persone in te lig. Mediese praktisyns sou gevolglik wys wees om die riglyne van die SAGTR in hierdie verband noukeurig te volg.

In die lig van die feit dat die appèlhof bevind dat geen sosiale of morele/etiese plig bestaan het wat as regverdiging vir die geneesheer se optrede kon dien nie, was dit nie vir die hof nodig om in te gaan op die vraag na die bestaan van 'n regsplig in die verband nie. Waarskynlik sal ons howe met groot omsigtigheid

te werk gaan alvorens situasies erken word waar 'n regsplig om in te lig bestaan. Geen algemene plig om skade van ander af te weer, bestaan in ons reg nie (Strauss "Legal issues concerning AIDS: an outline" 1988 (1) *SA Praktykbestuur* 13 14). In *Minister van Polisie v Ewels* 1975 3 SA 590 (A) kom die hof egter tot die gevolgtrekking dat die regsoortuiging van die gemeenskap in sekere omstandighede kan verlang dat 'n late as onregmatig beskou behoort te word en dat die gelede skade vergoed behoort te word deur die persoon wat nagelaat het om daadwerklik op te tree (597A – B). Die SAGTR-riglyne van 1989 (maar waarskynlik nie dié van 1993 nie) kan moontlik die regsoortuiging van die gemeenskap beïnvloed om in sekere omstandighede (bv waar die potensiële benadeeldes maklik identifiseerbaar en bereikbaar is) 'n regsplig om in te lig, te erken. (Neethling, Potgieter en Visser *Deliktereg* (1992) 34 lei so 'n inligtingsplig af uit die wete of kennis dat 'n bepaalde persoon of persone benadeel kan (gaan) word.) Die howe as vertolkers van die gemeenskapsoortuiging sal moet bepaal in watter omstandighede, indien wel, so 'n regsplig erken sal word. Die erkenning van so 'n plig kan uiteraard beïnvloed word deur die voorkoms van werkverwante HIV-infeksie onder gesondheidswerkers en deur nuwe wetenskaplike insigte.

CW VAN WYK
Universiteit van Suid-Afrika

CONCURRENCE OF CONTRACTUAL AND DELICTUAL CLAIMS AND THE DETERMINATION OF DELICTUAL WRONGFULNESS

Tsimatakopoulos v Hemingway, Isaacs & Coetzee CC
1993 4 SA 428 (C)

1 Introduction

The possibility of claims based on breach of contract and delict respectively arising from the same conduct has quite frequently been considered in case law (see eg *Van Wyk v Lewis* 1924 AD 438; *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A); *Correira v Berwind* 1986 4 SA 60 (ZH); *Otto v Santam Versekeringsmaatskappy Bpk* 1992 3 SA 615 (O)). A situation involving such a possibility occurred in *Tsimatakopoulos v Hemingway, Isaacs & Coetzee CC*. The decision raises a number of interesting points concerning the concurrence of contractual and delictual liability and the determination of delictual wrongfulness which deserve closer scrutiny.

2 Facts

Second defendant, one C, engaged first defendant, a firm of engineers, to design a retaining wall on one of the boundaries of his property in 1987. C rejected the first design submitted because the wall would be too costly to build, and

first defendant submitted a second design with lower cost implications. Hereafter first defendant's mandate was terminated. The second design was approved by the relevant local authority and a retaining wall was duly built substantially in accordance with its specifications. C also had a swimming pool built at a slightly higher level than that indicated in the approved design. As a result of the construction of the pool, fill was placed between the edge of the swimming pool and the boundary wall.

Early in 1989, C sold his property to plaintiff. Towards the end of that year, the boundary wall began to tilt as a result of the pressure exerted on it by the fill and plaintiff had to take steps to restore the stability of the wall. The parties agreed that even if the swimming pool had been constructed at the correct level indicated in the design, the wall would still have failed. The plaintiff claimed the cost of restoring the stability of the wall as damages from first and second defendants, and in the alternative, a reduction in the purchase price of the property from second defendant. Second defendant had in the meantime been finally sequestrated, and accordingly only plaintiff's claim for damages against the firm of engineers was considered by the court.

3 Issues for decision

Since no contractual nexus ever existed between the plaintiff and the engineering firm, the claim was necessarily based on delict (433B). In terms of rule 33(4) of the Uniform Rules of Court, the parties requested that the court rule only on the question whether the engineering firm owed the plaintiff a duty of care. In his decision, Foxcroft J, correctly preferring to use the term "legal duty" in this regard (429I 431C), accepted that this question concerned the policy-based aspect of the duty concept, as explained by Millner *Negligence in modern law* (1967) 230 (432D – E). Citing *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A) 833, where Rumpff CJ quoted Fleming (*The law of torts* 4th ed 136), the judge affirmed that the recognition of a legal duty entails

> "the outcome of a value judgment that the plaintiff's invaded interest is deemed worthy of legal protection against negligent interference by conduct of the kind alleged against the defendant" (431H – I).

This determination of the existence of a legal duty of course concerns the question of delictual wrongfulness, and the judge accordingly proceeded to determine whether defendant's act was a wrongful one for purposes of Aquilian liability (see eg 432F – G 433B 433E).

4 Concurrence of contractual and delictual liability

The issue of the possibility of concurrence of contractual and delictual liability and its influence on the determination of delictual wrongfulness was raised by defendant's argument that the decision in *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd supra* was authority for the proposition that policy considerations prohibited the imposition of delictual liability for the negligent breach of a contract of professional employment (432C). The imposition of delictual liability was inappropriate and indeed impermissible where the relationship between plaintiff and defendant had its "origins in contract" (433D). The argument was that, because defendant's act constituted a breach of his contract with C and thus rendered him liable in contract to C, he could not be liable in delict for the same act to plaintiff, whose relationship

to defendant, as successor-in-title to C, had its origin in the contract between defendant and C.

The court quite correctly rejected this argument because it was of the opinion that the decision in the *Lillicrap* case was not directly in point in the present circumstances. In that case the court had to decide whether, in a contractual relationship, the breach of contractual duties to perform professional work *per se* constituted a delict, and thus grounded Aquilian liability in addition to liability for breach of contract between the parties to the contract (see the quotes from the *Lillicrap* case and from *Bayer South Africa (Pty) Ltd v Frost* 1991 4 SA 559 (A) at 432E – F 432G 432J – 433A). The court thus held that the decision in *Lillicrap* concerned the question

> "whether the breach of contractual duties not infringing the respondent's rights of property or person can ground Aquilian liability" (432G).

The distinction between the situation in *Lillicrap* and the present one lies in the fact that in the former case, the plaintiff was in a direct (tripartite) contractual relationship with the defendant (433F). In the present case there was never any contract between plaintiff and defendant (*ibid*). The enquiry thus did not concern the question whether a breach of contract *per se* also gave rise to delictual liability between the same parties, but had to determine whether defendant's conduct, which amounted to breach of his contract with C, could constitute a wrongful act, and thus ground Aquilian liability, towards plaintiff. The *Lillicrap* decision did not bar the coexistence of contractual and delictual liability. Indeed such a possibility was expressly recognised, even where the parties were in a direct contractual relationship,

> "where the acts of the defendant satisfied the independent requirements of both a contractual and an Aquilian action" (432H).

The court thus held that "*Lillicrap's* case is no bar to an action *in delict* by plaintiff in a situation such as the present one" (433A).

This decision is to be welcomed since it goes some way towards clarifying the existing confusion concerning the possible concurrence of contractual and delictual liability apparent from arguments such as those raised by defendant and cases such as *Otto v Santam Versekeringsmaatskappy Bpk supra*, which will be discussed presently. The coexistence of contractual and delictual liability arising from the same conduct is the most common practical example of the legal phenomenon known as concurrence of actions or claims.

In its widest sense, a concurrence of claims occurs in private law where the simultaneous applicability of different private-law rules to the same set of facts results in different claims arising from that situation. Concurrence in this wide sense occurs quite frequently: examples include adultery, which gives rise to an action for divorce as well as a delictual claim against the co-respondent; theft, which gives rise to the *rei vindicatio* as well as a delictual claim for damages against the thief; and assault, which gives rise to the Aquilian action and the *actio iniuriarum*. This type of concurrence in the wide sense, where the different claims arising do not have the same purpose or are not aimed at the protection of the same interest, is not problematical and the law places no restrictions on the concurrence of such claims. In fact, both a breach of contract and a delict can in itself give rise to this type of concurrence between the different remedies the law provides: specific performance or rescission and a claim for damages for patrimonial loss in the case of breach of contract; and claims for

patrimonial loss with the Aquilian action, for certain types of non-patrimonial loss with the action for pain and suffering and for satisfaction with the *actio iniuriarum* in the case of a delict (see in this regard Van Aswegen *Die sameloop van eise om skadevergoeding uit kontrakbreuk en delik* (LLD thesis Unisa 1991) 4 – 10 127 – 132).

Concurrence of claims does, however, become problematical where the different claims arising from a particular set of facts all have the same purpose or contents, such as different claims for the recovery of the same loss. Such instances of narrow or strict concurrence of claims include situations where the conduct of the defendant grounds both the Aquilian action and the *actio de pauperie* for the recovery of patrimonial loss, or where conduct causing patrimonial loss constitutes both a breach of contract and a delict giving rise to the Aquilian action. The law then has to decide what the relationship is between these competing claims (*idem* 10 – 11 133 – 134). However, where the different claims arising from the same set of facts lie against different defendants, or at the instance of different plaintiffs, a strict concurrence of claims does not occur. The problem of concurrence of claims in private law is restricted to claims between the same parties (Van Aswegen 11 and authority quoted in fn 31; Midgley "Concurrence of actions" 1993 *THRHR* 308). I shall return to this point presently.

The problem of concurrence of claims, in its wide and strict senses, gives rise to two distinct enquiries (in this regard see Van Aswegen 96 – 103; Midgley "The nature of the inquiry into concurrence of actions" 1990 *SALJ* 626 – 629; Midgley 1993 *THRHR* 308; Lubbe and Murray *Farlam and Hathaway: Contract – cases, materials and commentary* (1988) 10 – 12). In the first place it has to be determined whether different claims in fact arise on the given facts in each instance. For this to occur, all the requirements for each of the different claims must be met. In the context of the concurrence of contractual and delictual liability, it is generally accepted that the conduct in question must meet the independent requirements for delictual liability as well as constitute a breach of contract: the so-called "independent-delict" test (*Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd supra* 499; see further Van Aswegen "Die toets vir die bestaan van 'n 'onafhanklike delik' in die geval van kontrakbreuk" 1992 *THRHR* 273 – 277 for a detailed discussion of this whole issue). Once it has been established that a concurrence of claims does indeed occur in the sense that the defendant's conduct indeed grounds different claims, the second enquiry concerns the relationship between the concurrent claims. Should the plaintiff be restricted to either one of the claims or should he be allowed a free choice between them or even to combine different aspects of the competing claims? As explained earlier, this question holds no problems in the case of concurrence in the wide sense where the different claims do not compete with each other: the plaintiff can institute all of the claims without restriction. However, it is of crucial importance in the case of narrow or strict concurrence, where it determines which of the competing claims will be recognised. Policy considerations dictate the solution adopted by the law to this question (Van Aswegen 98 381ff; Midgley 1990 *SALJ* 626 – 629; Lubbe and Murray 11).

A failure to distinguish accurately between situations giving rise to concurrence in its strict sense and those instances where different claims lie against different defendants or at the instance of different plaintiffs, lies at the root of arguments denying any delictual liability in a contractual context. Defendant's arguments in *Tsimatakopoulos v Hemingway, Isaacs & Coetzee CC* and the

decision in *Otto v Santam Versekeringsmaatskappy Bpk supra* are examples in point. In the latter case Otto claimed damages jointly and severally from Santam for breach of contract and from a garage in delict for loss he had suffered as a result of negligently executed repairs done to his motor vehicle by a garage contracted by Santam. The latter had had the vehicle repaired in accordance with the terms of its insurance contract with Otto. The claim against Santam succeeded but, relying on the *Lillicrap* case, the judge refused the delictual claim. Like defendant's arguments in the *Tsimatakopoulos* case, this decision overlooks the fact that the situation in *Otto* differs from that in *Lillicrap*, in that no direct contractual link existed between plaintiff and defendant, which was the deciding factor prohibiting the imposition of delictual liability in *Lillicrap*. In *Lillicrap*'s case, the situation gave rise to a concurrence of claims in the strict sense, in *Otto*'s and *Tsimatakopoulos*'s cases it did not (see in this regard Midgley 1993 *THRHR* 306 – 309). The considerations influencing the decision whether to allow the delictual claim differ substantially between the two types of situation. The value of the decision in *Tsimatakopoulos v Hemingway, Isaacs & Coetzee CC* lies in the fact that it correctly distinguishes between the different situations.

The differences between a case of concurrence of claims in its strict sense and a situation such as prevailed in the *Tsimatakopoulos* case are emphasised by the assumption underlying defendant's argument that plaintiff could have taken cession of C's contractual claim against defendant (433E). This rests on the incorrect assumption that C has a claim for damages against defendant on account of the latter's breach of contract. That defendant's conduct constituted a breach of his contract with C is beyond dispute. However, a claim for damages for breach of contract arises only where the breach has actually caused patrimonial loss to the innocent contracting party. Unless plaintiff had already succeeded in recovering his loss as a result of the failure of the wall from C by means of an action based on the contract of sale between them (probably a claim for reduction of the purchase price based on the warranty against latent defects), C, who is no longer the owner of the property, suffered no loss as a result of defendant's breach of contract. There was accordingly no contractual claim for damages to cede to defendant. The situation therefore could not give rise to a concurrence of claims at all, since the requirements for a contractual claim for damages were not met. The merit of defendant's submission concerning cession of C's action to plaintiff was not considered by the court, since it regarded the fact that the plaintiff might have taken cession from C as irrelevant where he had an independent claim in delict (*ibid*).

In a situation such as the one in *Otto*'s case, different claims for damages for the same loss against different defendants do exist, although, as I pointed out earlier, this situation is not classified as concurrence. An analogous situation occurs where different plaintiffs have a claim against the same defendant for the same loss, for example, the recognition of a delictual claim by both the owner and the hire-purchaser or lessee of a thing against a person who negligently or intentionally damages the thing (*Smit v Saipem* 1974 2 SA 918 (A); *Botha v Rondalia Versekeringskorporasie van SA Bpk* 1978 1 SA 996 (T)). However, in this type of case the coexistent claims do not compete against each other. In the first instance, a single recovery of compensation for his loss by the plaintiff against one of the defendants will result in the extinction of the coexistent claim since a requirement of the latter, namely loss suffered, will have fallen away. If the claims are instituted against both defendants jointly and

severally, compensation for the loss will in any case only be awarded once. In the second instance, the principle of *ne bis in idem* will prevent compensation for the same loss being recovered twice, and a plaintiff will be non-suited if another plaintiff has already instituted a successful claim against the defendant.

A further problem concerning the treatment of concurrence of claims in the strict sense in case law fell outside the ambit of the decision in the *Tsimatakopoulos* case. I refer to the failure of the court in the *Lillicrap* case to distinguish between the two different aspects of the problem of concurrence of claims explained earlier. Policy considerations applicable to the decision concerning the appropriate solution the law should prescribe in the case of a strict concurrence of claims, were relied on to decide the first stage of the enquiry, namely whether a concurrence of actions indeed occurred in that the independent requirements for the concurrent claims were met. The result was that conduct which is generally recognised as giving rise to delictual liability where no contract exists between the parties, was held to be not delictually wrongful in a situation of concurrence. The inappropriateness and dangers of this approach have been fully canvassed elsewhere (Van Aswegen 103 292 – 299; Van Aswegen "Policy considerations in the law of delict" 1993 *THRHR* 192 – 193; Van Aswegen 1992 *THRHR* 276; cf also Midgley 1990 *SALJ* 623 – 624 626 – 628; Midgley 1993 *THRHR* 308) and will not be discussed in detail. However, reference to this mistaken viewpoint bears repetition in the light of the fact that it probably contributed to the misconception inherent in the argument that delictual liability does not arise in a contractual context.

5 The determination of wrongfulness

Some points requiring brief comment arise concerning the enquiry in the *Tsimatakopoulos* case into the wrongfulness of defendant's conduct. After disposing of defendant's arguments in favour of denying delictual liability on the basis of the decision in the *Lillicrap* case, the judge proceeded to consider defendant's contention that allowing plaintiff's delictual claim against defendant in the present situation would open the door to a possible multiplicity of actions and the claim should therefore be refused for reasons of policy (433G). He referred to the decision in *Administrateur, Natal v Trust Bank supra* to the effect that the question of "oewerlose aanspreeklikheid" is a factor to be taken into account in determining the existence of a legal duty (433I – 434A). He seemed to accept plaintiff's argument that in the present instance the loss is finite since the wall has fallen and all the damage it caused is known, so that "the spectre of an unlimited class of possible plaintiffs cannot haunt on the present facts" (434D).

The judge then referred briefly to the present position in English law where the decision in *Murphy v Brentwood District Council* [1991] 1 AC 398 [1990] 2 All ER 908 (HL) denies the existence of a duty of care on the part of a local authority when approving building plans, towards subsequent purchasers to prevent damage to the building itself (434E – 435A). He pointed out that this decision does not influence the present enquiry, *inter alia* since it rests on the "artificial distinction" in English law between economic loss and damage to person or property, which does not exist in our law (435B). Finally, relying on the decision in *Perlman v Zoutendyk* 1934 CPD 151, where a claim for pure economic loss was recognised, Foxcroft J held that the existence of a duty depends on the reasonable foreseeability by the defendant of harm to someone in the position

of the plaintiff (435D). He also referred to the English "neighbour principle" and the role of proximity in determining the existence of a duty, and accepted the explanation in the *Perlman* case to the effect that the duty-relationship extends to where the

> "act complained of directly affects a person whom the person alleged to be bound to take care *would know* would be directly affected by the careless act" (435G; my emphasis).

He thus decided that

> "defendant, in the position of a professional engineer, should have foreseen the likelihood of harm being caused to someone in the position of the plaintiff. *He must have known* that the wall would not remain stable . . . and that this negligent act was likely to cause that person [plaintiff] harm" (435H; my emphasis).

It is a pity that the judge fell back on the typically English "duty-of-care" terminology linking the determination of the existence of a duty to reasonable foreseeability. This approach can easily lead to confusion between the determination of wrongfulness and the test for negligence. The judge's reference to *culpa* (435E – F), even though the question of negligence was never in issue in the present case, illustrates this contention. Nevertheless, the judge's emphasis on the *subjective knowledge* on the part of the defendant that his conduct would harm a subsequent purchaser of the property, and his earlier treatment of the question of multiplicity of actions, is in keeping with the preferable approach to the determination of the existence of a legal duty, and thus of wrongfulness, in cases of pure economic loss. This approach determines the existence of a legal duty in accordance with the *boni mores* or legal convictions of the community, utilising policy considerations in the enquiry. The subjective foresight or knowledge of the defendant that his conduct will cause harm to the plaintiff and the possibility of "oewerlose aanspreeklikheid" are factors often emphasised by the courts in this regard as respectively indicative of or denying the existence of a legal duty (see eg *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D); *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 1 SA 783 (A); and cf Neethling, Potgieter and Visser *Law of delict* (1994) 281 – 286; Van Aswegen 1993 *THRHR* 183 – 185).

ANNÉL VAN ASWEGEN
University of South Africa

PROKUREUR SE REG OP TERUGHOUDING VAN DOKUMENTE

Botha v Mchunu & Co 1992 4 SA 740 (N)

1 Inleiding

Hierdie uitspraak handel oor 'n baie interessante aangeleentheid en het wesenlike teoretiese en praktiese implikasies. Die hof moes die baie belangrike praktiese vraag beantwoord of 'n prokureur 'n terughoudingsreg op dokumente in sy besit het ten einde sy kliënt te verplig om sy skuld aan die prokureur te vereffen.

Die uitspraak is egter nie net om hierdie rede van belang nie, maar ook in 'n breër verband aangesien dit die komplekse aard van die Suid-Afrikaanse regsisteem na vore bring. Die aangeleenthede wat in hierdie verband bespreking verdien, is die volgende: die aanwending en waarde van die Romeins-Hollandse reg as bron van die Suid-Afrikaanse reg; die werking en effektiwiteit van die presendentestelsel; die toepaslikheid van die beginsel *judicis est jus dicere, non dare*; die invloed van die Engelse reg op die vroeë Suid-Afrikaanse regsontwikkeling; en die belangrike rol wat advokate in gedingvoering speel.

2 Uitspraak

2 1 Feite

Slegs sekere feite van hierdie saak is vir die betrokke bespreking van belang en kan kortliks soos volg saamgevat word: Ene mevrou Zulu het in haar hoedanigheid van eksekutrise in haar man se boedel vir Mchunu & Kie, 'n prokureursfirma en die respondent in die betrokke aansoek, aangestel om namens haar die boedel te likwideer en te verdeel. Sy is later weens versuim om aan sekere vereistes te voldoen as eksekutrise onthef en Botha, 'n prokureur en die applikant in die saak, is in haar plek aangestel.

Botha het die betrokke boedellêer aangevra, maar Mchunu het geweier om dit te oorhandig op grond daarvan dat 'n bedrag geld deur mevrou Zulu aan hom verskuldig is. Hy het te kenne gegee dat hy nie van plan is om die boedellêer te oorhandig alvorens die geld betaal is of hy voldoende waarborg vir betaling daarvan ontvang het nie. Mchunu was ook nie bereid om Botha se skriftelike onderneming te aanvaar dat Mchunu se regte gerespekteer sou word nie. Botha het hom tot die Natalse prokureursorde gewend wat bepaal het dat die dokumente oorhandig moet word, maar ook hieraan het Mchunu geen gehoor gegee nie.

2 2 Regshulp aangevra en advokate se betoë

Die applikant het by die hof aansoek gedoen om 'n bevel wat:

(a) die respondent beveel om die inhoud van die boedellêer aan die applikant te oorhandig;

(b) die applikant magtig om die lêer deur te gaan;

(c) die applikant magtig om alle dokumente in die betrokke lêer wat hy vir die afhandeling van die boedel benodig, uit te neem en te behou, hangende die finalisering van die boedel; en

(d) die respondent beveel om die koste van die aansoek te dra (741C – F).

In sy stawende verklaring sit die applikant uiteen waarom hy die dokumente benodig, waarop die respondent onder andere antwoord dat:

(a) hyself geen belang in die dokumente het nie behalwe om betaling van die fooie wat mevrou Zulu hom skuld, af te dwing;

(b) wat hom betref, Botha as eksekuteur in die skoene van mevrou Zulu getree het en as sodanig gebonde is aan die kontrakte wat sy met hom gesluit het (742C – D).

Hierop het Botha geantwoord dat Mchunu namens mevrou Zulu as eksekuteur opgetree het en dat hy dus geregtig is op eksekuteursfooie wat eers na afhandeling van die boedel opeisbaar is. Hy het egter ook toegegee dat Mchunu geregtig

is op vergoeding vir die dienste wat hy aan mevrou Zulu gelewer het en om dokumente te behou wat hy voorberei het terwyl hy haar opdrag uitgevoer het, maar hy was van mening dat hy nie dokumente kon behou wat hy nie self opgestel het nie (742E – F).

Applikant se advokaat het betoog dat die respondent alle dokumente wat aan die boedel behoort het, aan applikant moet oorhandig. Hiervoor het hy steun gevind in voorskrifte wat ingevolge artikel 74 van die Wet op Prokureurs 53 van 1979 neergelê is. Die regter self het 'n verslag van die meester aangevra waarin die meester aangetoon het dat hy van mening is dat die respondent net 'n retensiereg (''lien'') het op dokumente wat deur homself opgestel is, en nie op daardie dokumente wat slegs in sy besit is maar eintlik aan die boedel behoort nie (742H – 743A).

2 3 Bevinding

In sy bespreking van die regte van prokureurs op dokumente in hulle besit, gebruik regter Combrinck die volgende stelling as uitgangspunt:

> ''The right of an attorney to retain papers and documents which he has drawn up or upon which he has done work arises from one of the retention liens, the so-called debtor and creditor lien'' (743B).

Hierdie stelling maak hy sonder verwysing na enige gesag. Alhoewel die regter verwys na die definisie van 'n skuldeiser-skuldenaar-retensiereg in *Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons* 1970 3 SA 264 (A) 270E waaruit die wesenlike kenmerke van sodanige retensieregte blyk, gaan hy voort, sonder om eers vas te stel of die retensiereg waarop die prokureur in die onderhawige saak steun wel volgens hierdie vereistes toepassing vind, en verwys na die sake en handboeke wat handel oor die prokureur en advokaat se retensiereg ten opsigte van dokumente in sy besit wat aan sy kliënt behoort.

Uit die gesag wat hy aanhaal, is dit duidelik dat daar geen sekerheid is of 'n prokureur of advokaat wel 'n retensiereg het, en indien wel, wat die aard en omvang daarvan is nie. Alhoewel die regter duidelik ontevrede is met die wyse waarop die aangeleentheid in die regspraak en handboeke hanteer word, dring hy myns insiens nie tot die kern van die saak deur nie. Hy ontleed nie self die Romeins-Hollandse gesag of die sake waarna die handboekskrywers verwys nie. Hy pas ook glad nie die beginsels wat by skuldeiser-skuldenaar-retensieregte aanwending vind, korrek op die betrokke feite toe nie.

'n Studie van die aangehaalde gesag bring aan die lig dat daar oor die volgende vrae onsekerheid bestaan: of die prokureur se retensiereg Romeins-Hollandsregtelik of Engelsregtelik van aard is; of die retensiereg voorkeur bo ander skuldeisers van die kliënt verleen of nie; watter skulde deur die reg gedek word; op watter dokumente dit van toepassing is; en of dit ook op geld van toepassing is. Soos ek hieronder sal aantoon, bring 'n behoorlike ontleding van hierdie gesag 'n mens by 'n ander gevolgtrekking as dié waartoe die handboekskrywers en die regter kom.

Na 'n bespreking van gesag wat nie direk toepaslik is nie (byvoorbeeld die retensiereg van argitekte), wys die regter daarop dat moderne handboekskrywers saamstem dat prokureurs hulle retensiereg slegs mag uitoefen ten aansien van dokumente wat deur hulle voorberei is en nie op briewe en ander dokumente wat in hulle besit gekom het nie, selfs al was hierdie dokumente nodig om ander dokumente voor te berei of ander werk vir die kliënt te verrig (745A – B). (Die

regter haal in die besonder uit die tweede uitgawe van Silberberg en Schoeman se *The law of property* (1983) aan. Die mening van die skrywers van die derde uitgawe van hierdie handboek is woordeliks dieselfde as dié van die tweede uitgawe (sien Kleyn en Boraine *Silberberg and Schoeman's The law of property* (1993) 466 vn 47).)

Gesien die regter se aanvaarding van die feit dat 'n mens hier met 'n skuldeiser-skuldenaar-retensiereg te make het en sy siening dat die huidige regsposisie onlogies is (745H), is dit vreemd dat hy nie onmiddellik aantoon wat volgens hom presies onlogies aan die skrywers se standpunt is nie. Hulle standpunt is egter nie onlogies nie maar in stryd met sowel die beginsels wat op skuldeiser-skuldenaar-retensieregte van toepassing is as die Romeins-Hollandse gesag.

Die belangrike punt om hier in gedagte te hou, is die feit dat 'n skuldeiser-skuldenaar-retensiereg beskikbaar is

> "to anyone who, in terms of an agreement, has performed work pertaining to someone else's property, irrespective of whether the work was necessary, useful, enhanced the value of the property or was trifling"

(Nienaber AR in *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 1 SA 77 (A) 85D – H; sien ook die uiteensetting van hierdie tipe retensiereg in *Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons supra* 270E). Een van die vereistes vir die bestaan van dié retensiereg is juis dat die persoon wat daarop aanspraak maak, arbeid aan iemand anders se saak moet bestee het; dit sluit dus in eerste instansie dokumente in wat aan die kliënt behoort, en dokumente wat aan die prokureur behoort, uit. Indien daar dus van die standpunt uitgegaan word dat 'n mens hier met 'n skuldeiser-skuldenaar-retensiereg te make het, behoort slegs dokumente wat deur die prokureur opgestel is, probleme te verskaf en nie ook dokumente wat aan die kliënt behoort en aan die prokureur oorhandig is nie. Ek sal egter hieronder op hierdie aspek terugkom.

Regter Combrinck is duidelik ontevrede met die huidige regsposisie soos deur die handboekskrywers uiteengesit. Hy wys op die volgende anomalieë in hulle standpunt:

> "I have some difficulty with the notion that the lien which an attorney has for work done attaches only to documents prepared by him . . . It seems to me to be illogical. The attorney is employed for his skill and expertise in his field. His work and labour is bestowed on the property of the client, not only by creating something, but by perusing, analysing, consulting and advising on the property of the client. He may not be improving on a particular document or letter but in order to effectively carry out his duties and fulfil his mandate he has to devote time and energy to each document and letter. *We are after all dealing here with a debtor and creditor lien which arises ex contractu and not with an improvement lien*" (745E – I; my kursivering).

Die regter oorweeg nie eers die waarskynlikheid dat 'n mens hier met 'n besondere gemeenregtelike terughoudingsbevoegdheid te make het nie, maar aanvaar eenvoudig dat dit slegs die gewone skuldeiser-skuldenaar-retensiereg kan wees. In plaas daarvan om dan in ooreenstemming met sy uitgangspunt eenvoudig die vereistes vir skuldeiser-skuldenaar-retensieregte op die feite toe te pas, skenk hy veral aandag aan die aard van die arbeid wat 'n prokureur aan dokumente bestee asof dit bepalend is vir die tipe dokumente wat teruggehou kan word, en boonop die oorsprong van die probleem is (745E – I).

Dit is nie vir my duidelik wat die regter se oogmerk met die gekursiveerde gedeelte van die aanhaling is nie. Die stelling versterk geensins sy argument dat hierdie soort retensieregte ook na ander dokumente uitgebrei moet word nie.

Die onderskeid tussen 'n verbeteringsretensiereg en 'n skuldeiser-skuldenaar-retensiereg lê nie in die aard van die arbeid wat aan die saak bestee is nie, maar in die grondslag en werking daarvan. Volgens die tradisionele siening (sien daarteenoor Sonnekus "Sekerheidsregte – 'n nuwe rigting?" 1983 *TSAR* 104) van retensieregte in die Suid-Afrikaanse reg is verbeteringsretensieregte op verryking gebaseer en dus saaklike regte wat selfs teenoor derdes afdwingbaar is, terwyl skuldeiser-skuldenaar-retensieregte persoonlike regte is wat hulle oorsprong in 'n kontrak het en slegs teenoor die ander kontraksparty afgedwing kan word. In albei gevalle moet daar egter tyd en arbeid aan iemand anders se saak bestee word.

Vanweë die feit dat regter Combrinck laasgenoemde vereiste oor die hoof sien en van die standpunt uitgaan dat die handboekskrywers die prokureur se retensiereg tereg as 'n skuldeiser-skuldenaar-retensiereg klassifiseer wat slegs geld ten opsigte van dokumente wat deur homself opgestel is, bepleit hy hier dus 'n uitbreiding van die werking van die prokureur se retensiereg:

> "Applying the general principles enumerated above I cannot see why the retention lien should only be restricted to documents prepared by the attorney" (746I).

Die regter fouteer as hy die rede vir hierdie situasie, wat volgens hom 'n anomalie is, soek sowel in 'n verwarring ten opsigte van die aard van 'n verbeteringsretensiereg en 'n skuldeiser-skuldenaar-retensiereg, as in 'n versuim om tussen die twee te onderskei. Ek sal hieronder aantoon dat die terughoudingsbevoegdheid van die prokureur waarskynlik 'n besondere regsmiddel was wat gegeld het slegs ten opsigte van dokumente wat hy self opgestel het en nie 'n gewone skuldeiser-skuldenaar-retensiereg is soos laasgenoemde in die Suid-Afrikaanse reg ontwikkel het nie. As die gewone skuldeiser-skuldenaar-retensiereg hier ter sprake was, is die geval wat die regter as 'n uitbreiding van die normale geval beskou, eintlik die geval wat volgens die gewone beginsels van skuldeiser-skuldenaar-retensieregte die reël behoort te wees en is die geval wat hy as die reël beskou, moeilik daaronder tuis te bring.

Uitgaande van sy standpunt dat hierdie anomalie ontstaan het vanweë 'n versuim om tussen die twee tipes retensieregte te onderskei en om sy argument te versterk dat die tipe arbeid 'n rol speel, sit die regter dan die vereistes vir 'n prokureur se skuldeiser-skuldenaar-retensiereg soos volg uiteen:

> "For the lien to operate what is required is:
>
> (a) a contract express or implied;
> (b) as a term of the contract the doing of work on the property of the client for reward;
> (c) the doing of such work; and
> (d) possession by the attorney of the property on which the work was so performed" (747C – D).

Voorts formuleer hy die toets vir die toestaan van sodanige retensiereg soos volg:

> "The test as I see it should simply be that if the attorney is entitled to charge his client a fee in respect of a document in his possession, then he should be entitled to exercise a lien over it because then it is recognised that he expended work and labour on it. On that basis documents in his possession which were irrelevant to his mandate, even though he claims to have expended time and labour on them, cannot be retained" (747C – E).

In beginsel is daar nie veel fout te vind met die regter se uiteensetting van die vereistes nie, behalwe dat hy ook hier geen aandag aan vereiste (b) gee nie, naamlik dat die arbeid ten opsigte van die eiendom van die kliënt bestee moet gewees het.

Hoe dit ook al sy, die regter laat geen twyfel nie dat hy van mening is dat 'n prokureur 'n skuldeiser-skuldenaar-retensiereg het ten opsigte van alle dokumente van sy kliënt waaraan hy tyd of arbeid bestee het en wat hy in sy besit het. Daar is egter ook 'n beperking opgesluit in bogenoemde aanhaling waarin die regter die toets formuleer aangesien die retensiereg geld ten opsigte van die betrokke dokument vir uitgawes wat ten opsigte van daardie dokument aangegaan is.

Die regter se siening van die toepassingsveld van hierdie tipe retensiereg en veral sy handhawing daarvan ten gunste van Mchunu teenoor Botha is geheel en al verkeerd. Hy sit die posisie soos volg uiteen:

> "The respondent (Mchunu) was instructed and given his mandate by Grane Zulu in her capacity as executor of the estate of the late Samuel Zulu. The work which he did he did on behalf of the estate and the documents he prepared and received were the property of the estate. His mandate has been terminated and he is entitled to be remunerated for the work done – provided he has done it competently and satisfactorily. He is entitled to exercise that lien against the applicant who is Grane Zulu's *successor in title as executor of the estate.*
>
> I am of the view that the respondent's lien attaches to all documents belonging to the estate which he had to devote time and labour on in order to effectively wind up the estate" (747F – H; my kursivering).

Hier begaan die regter na my mening 'n fout aangesien die regsverhouding tussen mevrou Zulu en Mchunu op 'n lasgewingsooreenkoms berus het ingevolge waarvan hy opdrag van haar gekry het om namens haar die take wat sy as eksekuteur moes behartig, uit te voer. Sy het egter eksekutrise gebly en Mchunu was slegs haar lashebber. Botha se aanstelling as eksekuteur in mevrou Zulu se plek het hom nie wat die lasgewingsooreenkoms betref in die skoene van mevrou Zulu laat tree nie. Sy is as eksekutrise onthef en Botha is opnuut aangestel om die boedel af te handel.

Die regter is bewus van die onbevredigende situasie wat sy uitspraak tot gevolg het ("[t]he applicant's difficulty is understandable" (747I)), sonder om te besef dat hy self die probleem vir die applikant geskep het aangesien hy die werking van die prokureur se besondere terughoudingsbevoegdheid oor die hoof gesien het en met sy uitbreiding van die regsfiguur wat hy meen toepassing vind, te wete 'n skuldeiser-skuldenaar-retensiereg, boonop die beginsels van daardie regsfiguur verkeerd op die feite toegepas het. 'n Skuldeiser-skuldenaar-retensiereg het slegs betrekking op iemand anders se goed wat in die skuldeiser se besit is en het net werking teenoor die kontrakspartye; sonder 'n sessie of delegasie kon Mchunu dus geen regte teen die boedel of teen Botha as eksekuteur van die boedel verkry het nie.

Die regter se benadering kom voorts ook vreemd voor omdat hy self erken dat Mchunu slegs op sy vergoeding uit die lasgewingsooreenkoms geregtig is op grond van die werk wat hy vir mevrou Zulu gedoen het (747I).

Die regter wend hom dan tot 'n oplossing wat hy as prakties beskou en beveel dat Mchunu 'n lys moet maak van die dokumente waarop hy 'n retensiereg het, dat hy die res aan Botha beskikbaar moet stel en dat die lêer aan die meester oorhandig moet word om te bepaal watter bedrag aan Mchunu verskuldig is. Daarna moet hy alle dokumente aan Botha vrystel teen voldoende sekerheid vir betaling van die bedrag wat die meester mag bepaal (747J – 748A).

3 Gevolgtrekking

Aangesien hierdie uitspraak nie alleen belangrike teoretiese implikasies het nie maar ook groot invloed in die praktyk kan hê, moet die volgende aspekte daarvan waarteen ernstige besware geopper kan word, verder toegelig word: die wyse waarop die regter die bronne hanteer; sy versuim om die implikasies in te sien van die verskil tussen dokumente wat deur die prokureur self opgestel is en dié wat hy van die kliënt ontvang het; sy hantering van die beginsels van skuldeiser-skuldenaar-retensieregte en die toepassing daarvan op die betrokke feite; en die resultaat wat hy bereik.

Voorts stem hierdie uitspraak, soos gesê (*supra* par 1), die regsgeleerde tot nadenke oor die volgende aspekte van die Suid-Afrikaanse regsisteem: die gebruik en waarde van die Romeins-Hollandse bronne; die werking en effektiwiteit van die presedentestelsel; die toepaslikheid van die beginsel *judicis est jus dicere, non dare*; die invloed van die Engelse reg op die Suid-Afrikaanse reg; en die belangrike rol wat advokate in die regspleging speel.

Hierdie aspekte sal nou elkeen afsonderlik kortliks bespreek word.

3 1 Kritiese evaluasie van uitspraak

3 1 1 Bronnehantering

Die opvallende aspek van die wyse waarop die regter die bronne in die saak hanteer, is die feit dat hy nie self die ou bronne of die sake geraadpleeg het wat oor hierdie besondere onderwerp handel nie. Dit wil voorkom of hy hom eenvoudig op sommige handboekskrywers verlaat het.

(a) Gemeenregtelike skrywers

Die Romeins-Hollandse skrywers wat uitdruklik oor die prokureur se terughoudingsbevoegdheid op dokumente in sy besit handel, is Van Leeuwen (*Censura forensis* 1 4 37 11, 2 1 5 12) Voet (*Commentarius ad pandectas* 3 1 5) en Groenewegen (*De legibus abrogatis ad D* 3 3 25).

Volgens Van Leeuwen (*Censura forensis* 1 4 37 11) was dit vir advokate en prokureurs geoorloof om dokumente terug te hou totdat hulle honoraria betaal is, behalwe as dit in die belang van die staat is dat die dokumente blootgelê word. Van Leeuwen wys egter ook daarop dat advokate en prokureurs volgens die Franse reg nie toegelaat is om, met die oog op betaling van hulle honoraria en verdienste (*merx*), dokumente wat hulle ontvang het met die oog op die instel en verdediging van regsgedinge terug te hou nie.

Die hoofstuk waarin Van Leeuwen hierdie posisie bespreek, is getitel "De retentione". In die tweede deel van sy *Censura forensis* (2 1 5 12) waar hy die posisie van prokureurs in die algemeen bespreek, meld hy dat hulle die *instrumenta litis* mag behou totdat hulle salaris (*salarium*) wat uit die lasgewing ontstaan het, betaal is. Hy vermeld vervolgens dat dit volgens sekere instruksies van die Hof van Holland en volgens die Franse reg egter uitdruklik verbied was.

Voet (*Commentarius ad pandectas* 3 1 5) maak die stelling dat, alhoewel advokate en prokureurs wel op vergoeding vir hulle dienste in die voer van 'n geding kan aanspraak maak, hulle tog nie geregtig is om dokumente wat met die geding te make het, terug te hou om betaling van hulle vergoeding te verseker nie. Hy voeg egter as uitsondering by dat hulle gemeenregtelike

terughoudingsbevoegdheid hulle nie ontsê mag word nie waar hulle uitgawes ten opsigte van die dokumente aangegaan het. Dit is ook belangrik om daarop te let dat hy 'n verdere beperking op prosesverteenwoordigers plaas deurdat hy uitdruklik vermeld dat hulle vir hulle geen voorkeur bo ander skuldeisers van 'n skuldenaar kan beding nie. Hierdie terughoudingsbevoegdheid geld dus net ten opsigte van die betrokke dokumente waarop uitgawes aangegaan is en kon nie teenoor derdes, skuldeisers van die kliënt, afgedwing word nie.

In sy bespreking van die regsreëls uit die *Digesta* wat nie meer in Holland toepassing vind nie, meld Groenewegen ten aansien van *D* 3 3 25 dat prokureurs in sy tyd nie meer toegelaat is om dokumente terug te hou ten einde betaling van hulle salaris af te dwing nie en dat dit ook die posisie in die Franse reg is. Hy wys egter daarop dat hulle wel dokumente mag terughou op grond van werklike uitgawes ten opsigte daarvan aangegaan en dat dit ook die posisie volgens die Franse reg is. Groenewegen meld met ander woorde dieselfde beperking op die terughoudingsreg van die prokureurs waarna Voet hierbo verwys.

(Daar kan hier ook net sydelings vermeld word dat *retentio* in die Romeins-Hollandse reg waarskynlik slegs 'n terughoudingsbevoegdheid en nie 'n saaklike reg was nie. Volgens Sonnekus (1983 *TSAR* 104) het *retentio* niks met saaklike regte of selfs persoonlike regte te make gehad nie. Sien veral die definisie van Kersteman van "retentie" soos deur Sonnekus aangehaal en die algemene argument ten opsigte van die aard van retensieregte in die Romeins-Hollandse reg. Hiervolgens was 'n *retentio* eintlik slegs 'n soort afweermiddel. Na my mening het Sonnekus se standpunt meriete en verdien verdere ondersoek.)

Om saam te vat: daar kan gesê word dat die Romeins-Hollandse reg 'n besondere terughoudingsbevoegdheid aan prokureurs verleen het om dokumente ten opsigte waarvan hulle uitgawes gehad het, terug te hou totdat hulle vir daardie uitgawes vergoed is. Hierdie reg het egter geen voorkeur aan die prokureurs bo ander skuldeisers van die kliënt verleen nie.

(b) Positiewe reg

As die sake ontleed word, word gevind dat daar uiteenlopende menings en onsekerheid is oor die aard en omvang van prokureurs se reg om dokumente terug te hou. Die Romeins-Hollandsregtelike beginsel dat die prokureur se terughoudingsbevoegdheid slegs betrekking het op dokumente wat hy self opgestel het, vind toepassing in die uitspraak van hoofregter De Villiers in *Hudson's Trustee v Wiley* (1884) 4 EDC 299 300:

> "If he had prepared those title deeds he would have had a tacit hypothecation in respect of his charges for preparing them, but he has by our law no lien upon them merely because they were handed over to him for the purpose of passing the mortgage bonds."

Die interessante aspek van hierdie uitspraak is dat die regter in die een geval van 'n "tacit hypothecation" praat en in die ander geval van 'n "lien". Dit is nie duidelik of hy 'n onderskeid tussen die twee terme wil maak nie, en indien wel, is dit ook nie seker wat die basis vir die onderskeid is nie. Na my mening kan geargumenteer word dat hierdie "tacit hypothecation" 'n besondere terughoudingsbevoegdheid is wat 'n ooreenkoms vertoon met dié van die verkoper van 'n saak wat die koopsaak regmatig mag terughou totdat die koopprys betaal is.

Van Leeuwen (*Censura forensis* 1 4 37 11) verwys in dieselfde hoofstuk waarin hy die terughoudingsbevoegdheid van prokureurs en advokate bespreek na

laasgenoemde geval en ook na die verhuurder se stilswyende hipoteek. (Hier kan net terloops genoem word dat die stilswyende hipoteek van die verhuurder eers by beslaglegging saaklike werking verkry: sien bv *Kleinsakeontwikkelingskorporasie Bpk v Santam Bpk* 1988 3 SA 266 (K).) Dit is voorts opvallend dat hoofregter De Villiers die terughoudingsbevoegdheid beperk tot die koste verbonde aan die opstel van die bepaalde dokumente, soos wat Voet (*Commentarius ad pandectas* 3 1 5) en Groenewegen (*De legibus abrogatis ad D* 3 3 25) ook bepaal.

In *Trustees of Tritsch v Berrange & Son* (1884) 3 SC 217 kry hoofregter De Villiers weer eens geleentheid om uitspraak oor hierdie aangeleentheid te gee. Hy verwys na sy uitspraak in *Kellar's Trustee v Edmeades* (1884 – 5) 3 Juta 25 en bevind dat die prokureur se "right of retention" by insolvensie geen voorkeur aan hom verleen nie; dit geld slegs ten opsigte van koste by die opstel van die dokumente aangegaan (219).

In 'n baie kort saak, *Queen's Town Assurance Co v Wood's Trustee* (1887) 5 SC 327, word beslis dat

> "as the expenses were absolutely necessary in order to effect the final transfer, the Attorney was entitled to a lien upon that document for all such expenses".

In *Trustee of Murtha v Coghlan* 1 HCG 511 het die prokureur eintlik staat gemaak op 'n retensiereg op die geld wat hy namens die kliënt in 'n geding ontvang het, maar regter-president Buchanan stel die twee gevalle gelyk:

> "With regard to this alleged lien, it is a matter of some doubt whether, according to the Roman-Dutch law and the law of this Colony, an attorney possesses a lien in ordinary circumstances on documents *or moneys* which come into his possession on behalf of his clients. It is still more doubtful whether such a lien can exist, after the insolvency of the client, as between the attorney and the trustee in his insolvent estate" (516; my kursivering).

Eintlik was die vraag of sodanige retensiereg ook van toepassing is op die geld wat deur die prokureur ingevorder is. Dié vraag is in slegs een vroeëre saak (*Thomas v Barker* (1834) 2 M 321) geopper en oopgelaat. In verskeie van die ou sake het die advokate verwys na die feit dat sodanige retensiereg wel in die Engelse reg bestaan het. Dit het egter nie in die Romeins-Hollandse reg voorgekom nie.

Regter-president Buchanan besluit in elk geval om nie oor die hele aangeleentheid te beslis nie, maar dit te laat oorstaan totdat die prokureur se kostebevel getakseer is. Regter Jones verwys na die onsekerheid wat daar in die Romeins-Hollandse reg ten opsigte van die prokureur se terughoudingsbevoegdheid ten aansien van dokumente in sy besit bestaan het, maar laat die aangeleentheid ook oorstaan. Hy toon egter taamlik duidelik aan dat die posisie in die Romeins-Hollandse reg nie in ooreenstemming met die Engelse reg is nie. Regter Laurence wys op die posisie in die Engelse reg ten opsigte van die prokureur se retensiereg op die geld, maar laat die, volgens hom, moeilike vraag of dieselfde posisie in die Kaapkolonie geld, onbeantwoord.

In *African Mines Corporation Ltd (In liquidation) v Kruger* 1908 TS 812 814 laat regter Wessels hom nie uit oor die vraag of 'n trustee aanspraak kan maak op oorhandiging van dokumente wat 'n prokureur terughou op grond daarvan dat hy dit voorberei het en nie daarvoor betaal is nie, maar bevind dat 'n likwidateur in elk geval nie sodanige reg het nie.

Die regter begaan egter twee belangrike foute: hy meen dat die aangeleentheid nie in *Trustees of Tritsch v Berrange & Son supra* beslis is nie terwyl dit

uitdruklik gedoen is; en hy beweer dat die trustee volgens die gemenereg nie aanspraak op die dokumente gehad het nie maar daardie bevoegdheid aan die Cape Insolvency Ordinance ontleen het. Wat die regter egter uit die oog verloor, is die feit dat die gemenereg bepaal het dat die prokureur geen voorkeur op sodanige dokumente het nie – dit was 'n terughoudingsbevoegdheid wat hy slegs teen die ander kontraksparty kon afdwing (sien die bespreking hierbo van die posisie in die gemenereg en veral Voet se standpunt). Alhoewel die regter dus sy uitspraak op 'n interpretasie van die insolvensiewetgewing baseer, wysig hy by implikasie die gemenereg aangesien die prokureur volgens die gemenereg nie 'n voorkeur bo die ander skuldeisers van sy kliënt kon verkry nie.

Regter Buchanan kry weer geleentheid om oor die aard en omvang van die prokureur se terughoudingsbevoegdheid te besin in *Schultz v Dreyer's Trustees and Cape of Good Hope Savings Bank Society* 1911 CPD 797 801. Hy beslis dat die retensiereg wat die prokureur ten opsigte van die titelaktes van sy kliënt het, beperk moet word tot die uitgawes wat ten aansien van daardie dokumente aangegaan is; en dat alhoewel besit van dié dokumente nie aan hom by insolvensie 'n voorkeurreg op die grond verleen nie, hy dit nietemin teenoor die trustee mag terughou totdat hy vir sy uitgawes vergoed is (802).

Hierdie uitspraak is in stryd met die uitsprake in *Kellar's Trustee v Edmeades supra*, *Trustees of Tritsch v Berrange & Son supra* en *African Mines Corporation Ltd (In Liquidation) v Kruger* supra en die gemenereg.

In *Stoffberg v Ludorf and Strange* 1912 TPD 226 kom die kwessie van die prokureur se terughoudingsbevoegdheid weer voor die Transvaalse hof; die uitspraak van die regters kan in die woorde van regter Wessels saamgevat word:

> "[T]he lien of the conveyancer is not only for the actual fees with regard to the preparation of the documents, but for all expenses which were necessary on behalf of his client in order to get matters into such a position that the documents were capable of being prepared and lodged by the registrar" (235).

In hierdie saak word die werking van die prokureur se terughoudingsbevoegdheid vir die eerste keer uitgebrei, sonder verwysing na enige gesag en inderdaad in stryd met vorige uitsprake.

Ongeveer vyftig jaar later besluit dieselfde hof in *Wells v Molin* 1965 4 SA 480 (T) om die aangeleentheid oop te laat aangesien daar nie genoegsame feite was om die kwessie te besleg nie. Waarnemende regter Van Wyk de Vries maak die stelling dat hy feitelik nie in die posisie is om te beslis of die Suid-Afrikaanse reg 'n algemene retensiereg erken op alle dokumente van die kliënt wat in die prokureur se besit is nie, soortgelyk aan dié een wat deur die Engelse reg erken word. In sy bespreking van 'n skuldeiser se retensiereg teen die trustee of die likwidateur hou hy ook nie rekening nie met die feit dat die prokureur se terughoudingsbevoegdheid volgens die Romeins-Hollandse reg in elk geval van voorkeur uitgesluit was.

In *Goodricke & Son v Auto Protection Insurance Co Ltd (In liquidation)* 1968 1 SA 717 (A) 724A wys appèlregter Potgieter op die onsekerheid wat oor die aard en omvang van die prokureur se terughoudingsbevoegdheid bestaan. Hy aanvaar ter wille van die advokaat se argument dat die prokureurs in die onderhawige geval op sommige van die dokumente in hulle besit 'n retensiereg gehad het, maar verwerp dan tog die argument van die advokaat.

As die posisie in die Suid-Afrikaanse positiewe reg saamgevat moet word, kan inderdaad gesê word dat daar onsekerheid heers oor die aard en omvang

van die prokureur se reg op terughouding van dokumente. Dit is egter redelik duidelik dat die uitsprake op die gemenereg gebaseer is en dat die posisie wat daar gegeld het, in 'n groot mate gehandhaaf is.

Daar kan myns insiens met redelike sekerheid beweer word dat die terughoudingsbevoegdheid wat hier ter sprake is, 'n besondere regsmiddel was wat aan prokureurs toegestaan is om dokumente wat hulle vir hulle kliënt voorberei het, terug te hou totdat hulle vergoed is vir alle uitgawes aangegaan ten opsigte van die betrokke dokument. Voorts is dit ook duidelik dat hierdie terughoudingsbevoegdheid nie 'n voorkeurreg aan prokureurs bo ander skuldeisers van die kliënt verleen het nie: dit was nie 'n gewone skuldeiser-skuldenaar-retensiereg vir uitgawes aangegaan aan iemand anders se saak ingevolge 'n ooreenkoms tussen die prokureur en die kliënt nie.

(c) Handboekskrywers

Die handboekskrywers is duidelik ook nie seker oor die aard, omvang of beginsels van die beweerde retensiereg van prokureurs ten opsigte van dokumente in hul besit nie. Sommige skrywers gee 'n definisie van 'n skuldeiser-skuldenaar-retensiereg, 'n definisie wat ook nie altyd met dié van ander ooreenstem nie, en verskaf dan voorbeelde van sodanige retensieregte. Dat daar nie sekerheid oor die bestaan en aard van hierdie retensiereg is nie, kan ook afgelei word uit die feit dat sommige skrywers die bespreking van hierdie aangeleentheid inlei met woorde soos "analogously" (Erasmus, Van der Merwe en Van Wyk *Lee and Honoré: Family, things and succession* (1983) par 494 vn 2), "analoog" (Van der Merwe *Sakereg* (1989) 717) en "similarly" (Scott 15 *LAWSA* par 119). (Oor die gebruik en gevare van 'n analogiese argument, sien Hahlo en Kahn *The South African legal system and its background* (1973) 308 ev.) Scott (15 *LAWSA* par 120 en Scott en Scott *Wille's law of mortgage and pledge in South Africa* (1987) 94 huldig dieselfde mening en noem hierdie gevalle nie gewone ("ordinary") retensieregte nie.

Sommige skrywers (Kleyn en Boraine 466) aanvaar eenvoudig dat prokureurs 'n skuldeiser-skuldenaar-retensiereg het, terwyl ander bloot na 'n "right to retain" verwys (De Villiers en Macintosh *The law of agency* (1981) deur Silke 433).

In die onderhawige saak negeer regter Combrink die standpunt van die gemeenregtelike skrywers en, sonder om die vroeëre sake oor die punt te evalueer, besluit hy, waarskynlik in navolging van die handboekskrywers, dat 'n mens hier met 'n skuldeiser-skuldenaar-retensiereg te make moet hê. Vanweë die feit dat hy geen aandag aan die ou bronne of die sake gee nie, oorweeg hy ook nie die moontlikheid dat hierdie 'n selfstandige terughoudingsbevoegdheid is wat spesifiek aan prokureurs en advokate verleen is nie.

Voet (*Commentarius ad pandectas* 3 1 5) bespreek hierdie terughoudingsbevoegdheid in sy afdeling oor advokate, terwyl Van Leeuwen (*Censura forensis* 1 4 37 11) dit bespreek in die boek wat handel oor verbintenisse, kontrakte en die aksies wat daaruit ontstaan. Hy bespreek dit in 'n hoofstuk wat spesifiek oor terughouding handel en noem dan verskillende gevalle waar persone sake regmatig mag terughou totdat hulle vergoed of betaal is of skuldvergelyking plaasgevind het. Van Leeuwen noem onder hierdie gevalle ook die verkoper se reg om die koopsaak terug te hou totdat die koopprys betaal is, die verhuurder se stilswyende hipoteek op die *invecta et illata* ensovoorts. (Oor die

vervolmaking van hierdie hipoteek, sien hierbo.) Van Leeuwen (*Censura Forensis* 2 1 5 12) noem hierdie terughoudingsbevoegdheid later weer.

3 1 2 Versuim om implikasies in te sien van verskil tussen dokumente wat deur prokureur self opgestel is en ander dokumente

Alhoewel die prokureur se terughoudingsbevoegdheid volgens die Romeins-Hollandse reg 'n besondere regsmiddel is en die volgende argument dus sou neerkom op 'n negering van die Romeins-Hollandse reg en die vroeëre sake oor hierdie onderwerp, moet toegegee word dat die beginsels van 'n gewone skuldeiser-skuldenaar-retensiereg in beginsel wel moontlik hier ter sprake kan kom. Hierdie soort retensiereg kan egter slegs ter sprake kom as 'n mens te doen het met uitgawes wat ten opsigte van 'n ander se saak aangegaan is (*Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons supra* 270E; *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd supra* 85E), en ook net ten opsigte van uitgawes in verband met die betrokke saak.

Indien die regter genoegsaam aandag aan hierdie vereiste gegee het, sou hy dadelik besef het dat die gemeenregtelike terughoudingsbevoegdheid van prokureurs nie 'n gewone skuldeiser-skuldenaar-retensiereg kan wees nie omdat dit (volgens die skrywers en die howe (743B ev)) slegs bestaan ten aansien van dokumente wat deur die prokureur self opgestel is.

As die terughoudingsbevoegdheid wat hier ter sprake is wel 'n gewone skuldeiser-skuldenaar-retensiereg was, sou dit van toepassing gewees het juis op dokumente wat aan die kliënt behoort. Dit is juis die feit dat die dokumente deur die prokureur self opgestel is, wat probleme by die toepassing van die beginsels van 'n gewone skuldeiser-skuldenaar-retensiereg verskaf aangesien die prokureur dan nie arbeid of tyd aan die saak van iemand anders bestee het nie. Dokumente wat deur die prokureur opgestel is, is en bly sy eiendom en kan gevolglik nie aan die vereiste voldoen dat arbeid aan die saak van 'n ander bestee moet word nie (*Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons supra* 270E; *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd supra* 85E; en *Botha v Mchunu & Co* 747C). Die prokureur gebruik immers sy eie papier en skryf self op die dokumente. As die prokureur 'n skuldeiser-skuldenaar-retensiereg daarop wil uitoefen, moet die kliënt eers op een of ander manier eienaar van die dokumente word. Op watter manier kan die kliënt eienaar daarvan word sodat die prokureur 'n skuldeiser-skuldenaar-retensiereg daarop kan vestig?

Daar kan moontlik geargumenteer word dat die prokureur as die verteenwoordiger van die kliënt bedoel het om eiendomsreg van die dokumente aan die kliënt oor te dra en namens hom te ontvang, maar dan ontstaan die vraag wat die *causa* vir die oordrag is.

Verder sou ook aangevoer kon word dat die prokureur die bedoeling gehad het om die papier aan sy kliënt te verkoop, dat hy namens hom die papier oorgedra en ontvang het, dat die dokumente wat hy opgestel het gevolglik op die kliënt se papier gedoen is en dus die eiendom van die kliënt was.

Hierdie argumente is egter hoogs gekunsteld en, behalwe vir moontlik die laaste een, onaanvaarbaar. Alhoewel laasgenoemde argument ook maar gekunsteld is, vestig dit darem 'n juridiese basis vir die argument dat ook hierdie dokumente, wat eintlik volgens die regter in die reël aan die skuldeiser-skuldenaar-retensiereg onderworpe is, onder dié retensiereg tuisgebring kan word.

Die realiteit van die saak is egter dat die dokumente wat die prokureur self opgestel het, sy eiendom is en dat hy slegs 'n besondere terughoudingsbevoegdheid verkry teen die kliënt se kontraktuele eis vir oorhandiging van die dokumente totdat hy vir sy dienste vergoed is; 'n gedeelte van sy vergoeding is dan eintlik betaling van die koopsom van die dokumente. Laasgenoemde is ook die trant van Van Leeuwen (*Censura forensis* 1 4 37 11) se bespreking van die terughoudingsbevoegdheid van 'n verkoper van 'n koopsaak totdat die koper die koopprys betaal het en sluit aan by die uitspraak van hoofregter De Villiers in *Hudson's Trustee v Wiley supra* 300 (sien die bespreking hierbo).

Die terughoudingsbevoegdheid waarna die sake en die gemeenregtelike bronne verwys, is myns insiens dus nie 'n gewone skuldeiser-skuldenaar-retensiereg nie, maar heel waarskynlik 'n besondere terughoudingsbevoegdheid (sien Van Leeuwen *Censura forensis* 1 4 37 11; Voet *Commentarius ad pandectas* 3 1 6; *Hudson's Trustee v Wiley supra* 300) wat nie in die handskoen van die gewone skuldeiser-skuldenaar-retensiereg ingepas kan word nie. Sowel laasgenoemde belangrike aspek as die feit dat daar moeilik sprake van 'n skuldeiser-skuldenaar-retensiereg kan wees ten aansien van dokumente wat deur die prokureur opgestel is, ontglip die regter se aandag egter geheel en al.

3 1 3 Hantering en toepassing van beginsels van skuldeiser-skuldenaar-retensieregte

Hierbo is reeds aangetoon dat die regter nie genoegsaam aandag gee aan die feit dat 'n skuldeiser-skuldenaar-retensiereg ten opsigte van iemand anders se eiendom geld, of aan die feit dat dit slegs teenoor die ander kontraksparty geld en nie teenoor derdes nie. Die regter bevind gevolglik dat Mchunu wel 'n retensiereg op die dokumente het en dat hy dit mag terughou totdat hy vergoed is vir die dienste wat hy aan mevrou Zulu gelewer het (747J – 748A).

Sou volgens die algemeen geldende beginsels aanvaar word dat Mchunu wel sowel dokumente wat hy self opgestel het as dokumente wat aan mevrou Zulu behoort het, kon teruggehou het totdat hy die vergoeding ontvang het wat hom uit hoofde van die uitvoering van sy mandaat toekom, sou hy hierdie skuldeiser-skuldenaar-retensiereg egter in elk geval nie teenoor Botha kon handhaaf nie aangesien laasgenoemde nie 'n party tot die kontrak tussen Mchunu en mevrou Zulu was nie. Mchunu het nie 'n eis vir eksekuteursfooie teen die boedel nie; hy het 'n eis op grond van lasgewing teen mevrou Zulu vir die uitvoering van sy opdrag.

Sou mevrou Zulu nie onthef gewees het van haar eksekuteurskap nie en sou die boedel behoorlik afgehandel gewees het, sou sy op eksekuteursfooie aanspraak kon maak, en Mchunu op vergoeding van sy dienste ingevolge die lasgewing. Om betaling van hierdie vergoeding af te dwing sou hy, volgens die uitspraak, aanspraak kon maak op die retensiereg ten opsigte van die dokumente. In so 'n geval sou die belangrike vraag ook ontstaan het of die Suid-Afrikaanse reg 'n retensiereg verleen op die geld wat hy namens haar as eksekuteursfooie aanvaar het (sien in hierdie verband *Thomas v Barker supra*).

Ons reg erken wel dat skuldvergelyking tussen sy eis teen haar vir vergoeding van sy dienste en haar eis vir oorbetaling van gelde wat hy namens haar ontvang het (in dié geval die eksekuteursfooie) (Van Leeuwen *Censura forensis* 1 4 37 12), maar anders as die Engelse reg erken ons reg blykbaar nie 'n retensiereg op die geld nie.

Sou 'n mens aanvaar dat die besondere *retentio* van prokureurs waarvan Van Leeuwen melding maak, hier toepassing vind, is dit taamlik seker dat dit ook net afdwingbaar sou wees teen die ander kontraksparty en nie teen derdes nie, en dat die dokumente in elk geval blootgelê sou moes word as die belange van die staat dit geverg het.

3 1 4 Resultaat

Die regter se bevinding dat 'n prokureur 'n skuldeiser-skuldenaar-retensiereg kan handhaaf ook teen derdes ten aansien van alle dokumente wat in sy besit is, is in stryd met die gemenereg, die positiewe reg, die bepalings neergelê ingevolge artikel 74 van die Wet op Prokureurs 53 van 1979, die meester se siening van die regsposisie en die algemene beginsels van skuldeiser-skuldenaar-retensieregte. Wat laasgenoemde betref, bots dit met sowel die vereiste dat arbeid aan die saak van iemand anders bestee moet word, as die beginsel dat sodanige retensiereg slegs teen die ander kontraksparty afdwingbaar is.

Die effek van die uitspraak is dat die besondere terughoudingsbevoegdheid van beperkte omvang waarvolgens prokureurs spesifieke dokumente kon terughou waarop hulle uitgawes aangegaan het en wat aan hulle geen voorkeur bo ander skuldeisers van die kliënt verleen het nie, nou deur die regter omskep is in 'n gewone skuldeiser-skuldenaar-retensiereg wat op alle dokumente wat in besit van die prokureur is, van toepassing blyk te wees vir betaling van die ooreengekome vergoeding vir dienste deur die prokureur gelewer. Volgens die regter geld hierdie gewone skuldeiser-skuldenaar-retensiereg van die prokureur nie net teenoor die ander kontraksparty nie, maar ook teenoor derdes (die nuwe eksekuteur in die betrokke geval), en geniet dit by insolvensie soos enige ander gewone skuldeiser-skuldenaar-retensiereg ook voorkeur (Scott 15 *LAWSA* par 132 – 133).

Die standpunt dat 'n skuldeiser-skuldenaar-retensiereg voorkeur by insolvensie verleen (Scott 15 *LAWSA* par 132 – 133) is myns insiens vatbaar vir kritiek. Selfs al sou 'n mens aanvaar dat dit wel so is en dat 'n prokureur in die geval van die insolvensie van sy kliënt dokumente (dit wil ook vir my voorkom of besit van sodanige dokumente ingevolge artikel 47 in elk geval nie voorkeur kan verleen nie) wat aan die boedel behoort (laasgenoemde is die vereiste wat die Insolvensiewet 24 van 1936 stel; sien die woordomskrywing van sekuriteit in artikel 2) en dus nie deur homself opgestel is nie, as 'n sekuriteit kan beskou waaruit sy vorderingsreg teen die insolvent bevredig moet word (hierdie standpunt lyk vir my in stryd met artikel 47 van die Insolvensiewet 24 van 1936), het hierdie sekuriteit weinig waarde, indien enige, want hierdie reg verleen aan hom 'n voorkeur ten opsigte van die opbrengs van die spesifieke saak. Na my mening het dokumente wat aan iemand anders behoort, weinig of geen verkoopswaarde nie.

'n Meer aanvaarbare standpunt wat die regter sou kon ingeneem het, sou een wees waarvolgens geargumenteer word dat die besondere terughoudingsbevoegdheid wat die gemenereg aan die prokureur verleen het ten aansien van dokumente wat hy self opgestel het wel in die Suid-Afrikaanse reg bestaan en erken word, maar dat dit beperkend werk en, omdat die regter dit as onlogies beskou dat hierdie terughoudingsbevoegdheid van die prokureur nie ten aansien van ander dokumente geld nie, hy bevind dat die gewone skuldeiser-skuldenaar-retensieregte naas eersgenoemde bestaansreg het en op laasgenoemde gevalle van toepassing moet wees. Al is sodanige standpunt in stryd met die gemeenregtelike

posisie, sou dit meer aanvaarbaar wees as die resultaat wat die regter in die uitspraak bereik het.

3 2 Suid-Afrikaanse regsisteem

Die Suid-Afrikaanse regstelsel met sy besondere ontstaansgeskiedenis en ontwikkeling skep vandag in vele opsigte vir juriste probleme. Baie van hierdie probleme word beklemtoon deur die hele problematiek rondom die vraag na 'n prokureur se reg op terughouding van dokumente, veral soos dit in die saak gehanteer is. Ek sal vervolgens kortliks op sekere probleemaspekte wys.

3 2 1 Gebruik en waarde van Romeins-Hollandse bronne

Alhoewel die Romeins-Hollandse skrywers steeds een van die belangrike kenbronne van die reg is, word hulle bykans glad nie meer geraadpleeg nie en in elk geval nie meer in hulle oorspronklike vorm nie. Ek bepleit nie dat daar in elke saak na die ou bronne gekyk moet word asof dit 'n ewige bron van waarheid is nie; waar daar egter, soos hier, onsekerheid onder die hedendaagse skrywers en in die positiewe reg bestaan, sou 'n mens verwag dat 'n regter tog miskien net sal gaan kyk na wat die gemeenregtelike posisie was.

Soos ek hierbo aangetoon het, is ek ook van mening dat die betrokke uitspraak op 'n ander meer aanvaarbare manier benader kon gewees het. Met die Romeins-Hollandsregtelike terughoudingsbevoegdheid van prokureurs as uitgangspunt kon moontlik op grond van veranderde omstandighede bevind geword het dat die gewone skuldeiser-skuldenaar-retensieregte nie prokureurs ontneem moet word soos wat klaarblyklik die geval in die Romeins-Hollandse reg was nie. 'n Behoorlike ondersoek na die redes vir die verbod, die huidige regsgevoel van die gemeenskap en die regsposisie in ander regstelsels kon sodanige argument moontlik versterk het en moes ten minste behoorlik oorweeg gewees het voordat so 'n bevinding gemaak kon word.

3 2 2 Werking en effektiwiteit van presedentestelsel

Die regter het hom eintlik glad nie aan presedente gesteur nie. Hy verwys byvoorbeeld na 'n saak (*Goodricke & Son v Auto Protection Insurance Co Ltd (In liquidation) supra*) wat glad nie uitspraak oor die aangeleentheid gee nie, maar nie na 'n ander een (*Wells NO v Molin supra*) waarin die probleem ook aangeraak maar onbeantwoord gelaat word nie.

Die regter ontleed nie die sake wat direk oor die aangeleentheid handel en waaruit die huidige regsposisie volgens die presedentestelsel bepaal moet word nie. Hy verkies om die standpunt van handboekskrywers as uitgangspunt te neem en dan die regsposisie uit te brei soos dit na sy mening behoort te wees.

3 2 3 Toepaslikheid van beginsel *judicis est ius dicere, non dare*

Hierdie uitspraak is myns insiens 'n duidelike voorbeeld van 'n geval waar die regter nie reg gespreek het nie maar reg geskep het.

Regter Combrinck het aangeneem dat die regsposisie soos dit deur handboekskrywers weergegee word, korrek is sonder om vas te stel of hierdie standpunt met die Romeins-Hollandse reg, die positiewe reg of die basiese beginsels van die toepaslike regsfiguur ooreenstem. Met die standpunt van die handboekskrywers as uitgangspunt, meen hy dat 'n mens hier met 'n gewone skuldeiser-skuldenaar-retensiereg te doen het. Omdat die regsposisie soos die handboekskrywers dit

uiteensit vir hom egter onlogies is, het hy die toepassingsveld uitgebrei sonder om die beginsels van die regsfiguur wat hy meen toepassing vind, korrek op die bepaalde geval toe te pas, en sonder om te besef dat die betrokke regsfiguur nie van toepassing kan wees op die geval waartoe die skrywers dit wil beperk nie (die geval waar die prokureur self die dokumente opgestel het), maar slegs geld in die geval waarna hy dit wil uitbrei, naamlik die geval waar die dokumente aan die kliënt behoort.

Indien die regter die ware gemeenregtelike posisie as uitgangspunt geneem het, kon hy moontlik, soos reeds aangetoon is, vanuit 'n beleidsoogpunt geargumenteer het dat die bestaande regsposisie onaanvaarbaar is en aangepas moet word. In so 'n geval sou daar egter eers ingegaan moet gewees het op die vraag waarom die gemenereg en die vroeëre sake so 'n beperkende uitleg aan die prokureur se retensiereg gegee het, en veral op die feit dat daar selfs 'n verbod in die howe van Holland en die Franse reg op 'n algemene *retentio* ten gunste van prokureurs was. Die regter behoort ten minste ook die standpunt van die prokureurs in ag te geneem het soos weerspieël in die bepalings wat hulle ingevolge artikel 74 van die wet uitgevaardig het.

Dit is klaarblyklik nie die taak van die regter om nuwe regsbeginsels te formuleer wat in stryd met die gemenereg en die positiewe reg is nie. Die wetgewer moet hierdie taak verrig.

3 2 4 Rol van advokate

Hierdie saak beklemtoon weer eens die belangrike rol wat advokate in gedingvoering speel. Indien hulle nie die korrekte gesag aan die regter voorlê of moeite doen om uit te vind of die gesag waarna hulle verwys hulle wel steun nie, rus daar 'n ondraaglike las op die regter as hy alles wat hulle aan hom voorlê, moet nagaan en boonop moet probeer vasstel of daar iets is wat hulle nagelaat het om aan hom voor te lê. Daar rus ook 'n groot verantwoordelikheid op advokate om seker te maak dat hulle op die hoogte van die regsposisie is en om hulle saak te voer op 'n wyse wat in die beste belang van hul kliënte is.

Na my mening het die advokate in die betrokke saak nie genoeg moeite gedoen om vas te stel wat die regsposisie is nie; hulle het hul op die handboekskrywers verlaat sonder om self die positiewe reg na te gaan. Die advokaat vir die applikant het byvoorbeeld aangevoer dat Mchunu namens mevrou Zulu opgetree het in haar hoedanigheid van eksekutrise en dat hy op eksekuteurskommissie geregtig sou gewees het as die boedel behoorlik afgehandel sou word (742E – F). Dit kon wees dat die vergoeding vir die uitvoering van sy mandaat wel met die eksekuteurskommissie kon ooreenstem, maar die grondslag van Mchunu se eis is nog altyd die lasgewing. Mevrou Zulu was slegs kontraktueel teenoor hom verplig om sy kommissie te betaal en dit het sy gebly selfs nadat die nuwe eksekuteur aangestel was. Laasgenoemde was nie verplig om Mchunu te betaal nie want Mchunu het nie 'n eis teen die boedel gehad op grond van die eksekuteursfooie nie, maar 'n eis teen mevrou Zulu vir kommissie op grond van die lasgewing.

Die advokaat van die respondent het eweneens beweer dat Botha as eksekuteur in die skoene van mevrou Zulu getree het en dat hy dus ook gebind was ten opsigte van die lasgewing wat sy met Mchunu aangegaan het (742D – E). Na my wete is daar geen regsreël waarvolgens 'n opvolgende eksekuteur in die skoene tree van 'n vorige eksekuteur wat van sy pligte onthef is ten aansien van regshandelinge

wat die vorige eksekuteur in sy eie naam met derdes aangegaan het nie. In die afwesigheid van sessie of delegasie kan die nuwe eksekuteur nie in die plek van die ou eksekuteur tree ten opsigte van regshandelinge wat deur hom in sy persoonlike hoedanigheid aangegaan is nie.

3 2 5 Invloed van Engelse reg op Suid-Afrikaanse reg

In die vroeë sake was die rol van die Engelse reg onseker maar dit het tog op een of ander wyse invloed op die regsontwikkeling gehad. In *Thomas v Barker supra* (1834) word slegs na Engelsregtelike gesag verwys. In *Kellar's Trustee v Edmeades supra* (1884) verwys die advokate na Engelse gesag en hoofregter De Villiers bespreek ook die Engelse reg maar hy wys daarop dat die Romeins-Hollandse reg daarvan verskil. In *Trustee of Murtha v Coghlan supra* verwys die advokate hoofsaaklik na Engelse reg; die werk van Van Zyl oor koste waarna die regter verwys, meld ook dat die Engelse reg en die Romeins-Hollandse reg oor die aangeleentheid dieselfde is. Regter Jones haal die Romeins-Hollandse gesag aan en wys daarop dat dit nie dieselfde is nie, terwyl regter Laurence die Engelse reg aanhaal en beweer dat daar onsekerheid oor die posisie in die Kaapkolonie is.

Die invloed van die Engelse reg op die regsontwikkeling aan die Kaap in hierdie verband is op die oog af gering, maar tog nie sonder gevolg nie.

Dit wil my voorkom of daar 'n groot mate van onsekerheid in die positiewe reg en onder handboekskrywers is oor die aard en omvang van 'n prokureur se terughoudingsbevoegdheid op dokumente in sy besit. Uit die gemenereg en die positiewe reg is dit duidelik dat prokureurs 'n besondere terughoudingsbevoegdheid van beperkte omvang gehad het. In die onderhawige uitspraak het die regter hierdie regsposisie op 'n onbevredigende wyse uitgebrei en is sy toepassing van die beginsels van die regsfiguur wat hy as uitgangspunt vir doeleindes van die uitbreiding gekies het, naamlik die gewone skuldeiser-skuldenaarretensiereg, onder verdenking. Alleen die wetgewer of die Appèlafdeling van die Hooggeregshof kan die probleem oplos.

SUSAN SCOTT
Universiteit van Suid-Afrika

DELIKTUELE AANSPREEKLIKHEID VAN DIE STAAT VIR ONREGMATIGE VRYHEIDSONTNEMING AS GEVOLG VAN 'N REGTERLIKE FOUT

Hoge Raad 12 Februarie 1993, 1993 NJ 524

1 Inleiding

Die feite van dié saak was in 'n neutedop soos volg: E is op grond van 'n regterlike magtiging, na 'n versoek van sy vader, in 'n psigiatriese inrigting opgeneem. Hy is egter later uit die inrigting ontslaan. Hy eis vervolgens genoegdoening

van die staat weens onregmatige vryheidsontneming. Die vraag wat ter beslissing voor die Hoge Raad gedien het, was of genoemde regterlike magtiging in stryd is met artikel 5(5) van die Europese Konvensie vir die Regte van die Mens (EKRM) omdat die regter nagelaat het om 'n regsverteenwoordiger (raadsman) vir E by die verwysingsprosedure aan te stel (sien ook HR 19 Jan 1990, 1990 NJ 442).

2 Menseregtelike dimensie

Die reg op regsverteenwoordiging, veral as 'n persoon se bewegingsvryheid ontneem kan word, word deur internasionale aktes van menseregte verskans (sien artikel 6(3)(c) EKRM; dit is ook die houding van die Amerikaanse Supreme Court (*Argersinger v Hamlin* 407 US 25 (1972)). Die Duitse konstitusionele hof (*Bundesverfassungsgericht*) beskou die reg op regsverteenwoordiging as 'n uitvloeisel van die regstaatbeginsel (BVerfG *NJW* 86, 767 771; BVerfG *NJW* 83, 1599; Spaniol *Das Recht auf Versteidingungsbeistand im Grundgesetz und in der europäischen Menschenrechtskonvention* (1990) 7 – 10; Van Dijk *The right of the accused to a fair trial under international law* (1983) 23). Die Europese Menseregtehof het in *Megyeri v Germany* 1992 ECHR 1 beslis dat 'n persoon wat weens die "pleeg van 'n misdaad" in 'n psigiatriese inrigting opgeneem is, kragtens artikel 5(4) EKRM op regsbystand geregtig is in 'n latere proses wat sy voortgesette aanhouding hersien. Ek het in ander publikasies aangetoon dat die deliktuele beskerming van bewegingsvryheid wêreldwyd, ook in Suid-Afrika, 'n menseregtelike en volkeregtelike dimensie het ("Beskerming van bewegingsvryheid: opmerkinge oor die menseregtelike onderbou van deliktuele aanspreeklikheid" 1992 *THRHR* 235; "Deliktuele beskerming van bewegingsvryheid: Bestaan daar 'n volkeregtelike dimensie by onregmatigheid?" 1992 *De Jure* 510; "Deliktuele beskerming van die bewegingsvryheid van die gevangene" 1993 *Stell LR* 130).

Wat duidelik blyk, is dat die mens se reg op bewegingsvryheid internasionaal as 'n fundamentele reg beskou word. Dit blyk ook uit die onderhawige beslissing van die Hoge Raad.

3 Die staat se aanspreeklikheid vir regterlike foute

Die hedendaagse regsposisie in dié verband in Suid-Afrika is duidelik: 'n *bona fide* uitoefening van 'n regterlike diskresie, al sou dit foutief wees, lei nie tot deliktuele aanspreeklikheid nie (*Groenewald v Minister van Justisie* 1973 3 SA 877 (A) 883 – 884; *Moeketsi v Minister van Justisie* 1988 4 SA 797 (T); Neethling "Amptelike bevoegdheid: die aanspreeklikheid van 'n regterlike beampte vir onregmatige vryheidsberowing" 1989 *THRHR* 468).

Die Belgiese Hof van Cassatie het op 19 Desember 1991 in die sogenaamde "Anca-arrest" beslis dat die staat in die reël vir regterlike foute aanspreeklik gehou kan word. Hierdie beslissing word tereg deur Storme as rewolusionêr beskou ("De rechterlijke macht" 1993 *NJB* 917).

Uit die beslissing van die Hoge Raad in die onderhawige saak blyk dit dat die staat deliktueel aanspreeklik is as die regterlike fout van so 'n fundamentele aard is dat van 'n eerlike en onpartydige behandeling van die saak nie sprake kan wees nie. In die lig van die hopelose posisie van 'n persoon wie se gedwonge plasing in 'n psigiatriese inrigting gesoek word "terwijl hij niet door een raadsman wordt bijgestaan, [is] van zo fundamentele aard dat van een eerlijke behandeling

van de zaak niet kan worden gesprochen''. Hiermee gaan die Hoge Raad nie so ver soos die Belgiese Hof van Cassatie nie maar tog aansienlik verder as ons eie howe.

4 Konklusie

Uit bogaande bespreking blyk duidelik dat die onaantasbare posisie van die regsprekende gesag in Nederland besig is om te verkrummel en dat die staat deliktueel (middellike) aanspreeklikheid vir sekere regterlike foute moet aanvaar. Dit is 'n positiewe ontwikkeling wat deel vorm van die geleidelike sosio-emosionele erodering van die heiligheid van die (oer-)vaderfiguur wat die effek het om menslike individualiteit, vryheid en waardigheid te onderdruk (sien Labuschagne ''Die voorrasionele evolusiebasis van die strafreg'' 1992 *TRW* 29–36). Hierdie ontwikkeling sal, omdat dit op die biopsigiese gefundeer is en 'n natuurmatig-universele evolusiebasis het, onvermydelik ook by Suid-Afrika uitkom (sien in dié verband Ruse ''Sociobiology moves along'' 1986 *Philosophy of the Social Sciences* 140; Lampe ''Rechtsanthropologie heute'' 1991 *Archiv für Rechts-und Sozialphilosophie* 222). Die Belgiese Hof van Cassatie het reeds hierdie ontwikkelingslyn, ten minste teoreties, deurgetrek.

JMT LABUSCHAGNE
Universiteit van Pretoria

BOEKE

STRAFREG

by CR SNYMAN

Third edition; Butterworths Durban 1992; x and 626 pp

Price R151,80 (soft cover)

Professor Snyman's *Strafreg* is now firmly established as an essential textbook for the student, the lecturer and the practitioner in criminal law. His earlier editions have been reviewed elsewhere. The first edition appeared in 1981 (with a new impression in 1983), while the second edition appeared in 1986 (with new impressions in 1987, 1988, 1989 and 1991). The need for a third edition is evidenced by the gloss that the Appellate Division has placed on important aspects of the criminal law in the past decade, which has been phenomenal. One only needs to think of cases like *Williams* 1980 1 SA 60 (A), *Khoza* 1982 3 SA 1019 (A), *Safatsa* 1988 1 SA 868 (A), *Mgedezi* 1989 1 SA 687 (A), *Nzo* 1990 3 SA 1 (A) and *Motaung* 1990 4 SA 485 (A) (all dealing with the "mededader" and the "medepligtige" – Afrikaans words that are now as familiar to the English-speaking criminal lawyer as the words "veld" and "braaivleis") to appreciate this fact.

In the latest edition of his work, Snyman takes adequate note of these developments and this has resulted in a substantial re-writing of his contributions on the general principles concerning mistake in respect of the chain of causation (as a result of the decision in *Goosen* 1989 4 SA 1013 (A) (which he, correctly in my view, does not hesitate to criticise)); *aberratio ictus*, common purpose and the criminal liability of the joiner-in.

As before, Snyman has continued the tradition established by De Wet and Swanepoel in their *Strafreg* in 1949 (the 4th and last edition appearing in 1985) of being influenced by Continental legal developments, especially by German legal theory.

Criticism of this approach has been voiced by Du Plessis in 1984 *SALJ* 301. (For Snyman's vigorous defence of this approach see 1985 *SALJ* 120.) But whether one likes it or not, it was inevitable that the weight of the persistent and persuasive submissions of De Wet and Swanepoel, and now Snyman, would influence the supreme court. Thus, for example, in *Goosen* 1989 4 SA 1013 (A) the influence of the German writers on criminal law was not lost on Van Heerden JA. Interestingly, Snyman does not support the approach of the Appellate Division in *Goosen* (see *Strafreg* 202 *et seq*) and he is critical, correctly in my view, that no clear guidelines were given on the precise meaning of the phrase "wesenlike afwyking".

The only problem that the reviewer has with the references to the German writers on criminal law is that German is not one of the official languages of our country and is not spoken or understood by the vast majority of South Africans. This means that the reader has perforce to rely on the gloss of the author. It would, therefore, be more helpful and meaningful if the author were to provide a translation of the German extracts cited (of which there are many in the footnotes), more especially as the German works from which these extracts are cited are not readily available to students and practitioners.

It is suggested that this would make *Strafreg* even more user-friendly. Indeed, this was obviously behind the decision to make *Strafreg* available in the English language.

Snyman's critical style and method of presentation have made *Strafreg* an easy work of reference to follow. No student, lecturer or practitioner can afford to be without this book and the author is to be congratulated on the maintenance of the high standard of research one has come to associate with *Strafreg*. As a teacher of criminal law, I find I dare not embark on the teaching of any aspect of the subject without also consulting Snyman and weighing up whatever he has to say.

I SCHÄFER
Rhodes University

LAW OF SUCCESSION, STUDENTS' HANDBOOK
by MJ DE WAAL, MC SCHOEMAN and NJ WIECHERS
Juta Cape Town Wetton Johannesburg 1993; 217 pp
Price R69,00

Upon reading the preface to this book one feels sympathy for the dilemma in which the authors found themselves. After all their efforts and with the book at an advanced stage of production, the Law of Succession Amendment Act 43 of 1992 came into operation on 1 October 1992. The authors must, however, be congratulated on the way in which they incorporated the new act into the book, explaining the effect of the new provisions where applicable. They even found it possible to include an example (50) of the certificate required in terms of section 2(1)(a)(v) as supplied in schedule 1 of the act. This example, as well as the excellent diagrams explaining the law of intestate succession, adds to the visual effectiveness of this book, aiding it to succeed in its goal – namely to be a handbook for undergraduate students.

In chapter 1 ("Introduction") the authors give clear definitions of the law of succession as well as of an estate. However, a definition sorely missed is that of the "residue" of an estate – a term often found in wills and other reading matter dealing with succession and one which is bound to cause problems to students.

Also missing from the book is an explanation to the student of how the law of succession fits into the legal system. It must be remembered that students view each subject individually and it may have been helpful to explain certain points where the law of persons and family law may have an influence on succession. The law relating to maintenance especially may serve as an example. Although the Maintenance of Surviving Spouses Act 27 of 1990 is referred to on page 2 and again on page 86, it is not explained when the maintenance is subtracted from the estate and how this can affect benefits left in the will of the testator. In this regard a brief illustration of the links between the two subjects normally taught in the first and second year of legal studies, may have been warranted.

Also in chapter one, the authors refer to the position of the *nasciturus* (5), but unfortunately do not include a reference to section 2D(1)(c) of Act 43 of 1992. This section provides that in the interpretation of a will

> "any benefit allocated to the children of a person, or to the members of a class of persons, mentioned in the will shall vest in the children of that person or those members

of the class of persons who are alive at the time of the devolution of the benefit, or who have already been conceived at that time and who are later born alive".

As this section is the embodiment of the *nasciturus* fiction with which all law students have struggled in their first year of study (since the decision in *Pinchin v Santam Insurance Co Ltd* 1963 2 SA 254 (W), although it may seem to have been so since the beginning of time!), it deserves more than a mere mention in a footnote (73 fn 420). A more detailed discussion of this section could also have been a valuable link between the law of succession and the law of persons and family law.

In chapter two, the law of intestate succession is explained with clear illustrations and various examples. Each particular section number is referred to in a footnote, thus facilitating studying but perhaps placing obstacles in the way of someone other than a student wanting to use the book for quick reference.

Chapter three deals very effectively with the formalities governing the execution, alteration and revocation of wills as well as with testamentary capacity and capacity to benefit under a will. The amendments brought about by the new act are discussed together with the old problem cases in our positive law and should give the student a fair amount of insight into the problems which will, it is hoped, be solved by the new act.

Chapter four deals with the content of wills by giving definitions of relevant terminology. These definitions are accompanied by a few general examples, but virtually no cases have been discussed as illustrations of the various legal concepts. Although this method limits the amount of study material for the student, a few practical examples from our case law may contribute towards a better understanding of the subject. On the other hand, when a case like *Du Plessis v Strauss* 1988 2 SA 105 (A) is discussed (101), the authors take care to mention a minute detail that students often disregard when reading this case: they make special mention of the emphasis placed in the *Du Plessis* case on the fact that the *fideicommissum tacitum* also applies where a *si sine liberis decesserit* clause is implicitly included (see *Galliers v Rycroft* (1900) 17 SC 569).

Chapter five gives a concise but clear explanation of adiation, repudiation, joint wills and massing. This approach to these topics at undergraduate level is refreshing, since students often find it difficult to grasp these concepts while trying to cope with intestate succession and the formalities governing the execution of wills.

The approach to accrual in chapter six which is along the same lines as those followed in chapter five, should also facilitate the studying of this concept.

Chapter seven deals briefly with collation. One cannot help but wonder how relevant these principles still are to undergraduate students. Most cases quoted regarding collation were decided before 1916, while the most recent was decided in 1979 (*Dison v Hoffmann* 1979 4 SA 1004 (A)). Perhaps it is time to give collation a rest. Perhaps it can now be left to practitioners to read up on the subject if and when they do come across it?

Chapters eight and nine deal with succession by contract and interpretation and rectification of wills respectively. One can only hope that both students and lecturers in the law of succession will regard rectification with the attention it deserves, despite the fact that it appears on the last pages of this book as well as of many other books on succession.

In general this book succeeds very well in its primary objective. The language is clear and explanatory and although Latin terms are used quite frequently, it does not make the book difficult to read. Students should find this book enlightening, concise and easy to study.

J JAMNECK
University of South Africa

MAATSKAPPYWET 61 VAN 1973 EN WET OP BESLOTE KORPORASIES 69 VAN 1984
(met regulasies, vonnisregisters en bladwysers)
deur JT PRETORIUS (samesteller en redigeerder)
Tweede uitgawe; Juta Kaapstad Wetton Johannesburg 1993; 634 bl
Prys R68,00 + BTW (sagteband)

Met die eerste verskyning van hierdie boek in 1991 het die samesteller en redigeerder, professor JT Pretorius, verklaar dat dit sy oogmerk is om die volledige en gewysigde teks van die Maatskappywet 61 van 1973 en die Wet op Beslote Korporasies 69 van 1984 in 'n gerieflike, toeganklike en relatief goedkoop formaat weer te gee. Die feit dat die boek so pas sy tweede uitgawe beleef het, is getuienis van die hoë mate waarin daar in hierdie doel geslaag is.

Die boek bevat die volledige teks en bylaes van die betrokke wette, soos gewysig. Alle wetswysigings wat tot en met Oktober 1992 gepubliseer is, is in die tweede uitgawe vervat. Dit beteken dat die Maatskappywysigingswet 82 van 1992 en die Wysigingswet op Beslote Korporasies 81 van 1992 ook bygewerk is. Die werk vervat voorts die nuwe Bylae 4 tot die Maatskappywet, wat op 1 April 1993 van krag geword het.

Die publikasie bevat egter nie net die wetgewing nie. Die regulasies en die vorms ingevolge die twee wette is ook ingesluit. Die Sekuriteitereguleringskode vir Oornames en Samesmeltings is ook vervat in die Maatskappywet-afdeling van die boek.

Die praktiese nut van die boek word verhoog deur 'n handige bladwyser en 'n sakeregister. Die sakeregister volg die artikels van die wette numeries en gee die verwysings van die belangrikste gerapporteerde uitsprake waarin die betrokke artikel ter sprake gekom het. Die Maatskappywet-afdeling word voorts aangevul deur 'n tabel wat die opsporing van gelykluidende artikels in die 1926- en 1973-Maatskappywet vergemaklik.

In teenstelling met die meeste soortgelyke werke wat tans beskikbaar is, is hierdie publikasie nie 'n losbladuitgawe nie. Die boek is daarom by uitstek geskik vir persone wat primêr geïnteresseerd is in die teks van die betrokke wette soos op datum van publikasie. Die publikasie behoort veral gewild te wees onder ondernemingsregstudente en praktisyns wat 'n behoefte het aan 'n handige, enkeltalige weergawe van die twee wette.

Die publikasie het 'n Engelstalige eweknie, te wete *Companies Act 61 of 1973 and Close Corporations Act 69 of 1984 (with regulations, tables of cases and indexes)*.

LOUIS DE KOKER
Universiteit van die Oranje-Vrystaat
Sentrum vir Ondernemingsreg

BASIESE BEGINSELS VAN DIE SUID-AFRIKAANSE BESIGHEIDSREG

deur CJ NAGEL (redakteur)

Lex Patria Doornfontein 1993; 421 bl

Prys R88,00 + BTW (sagteband)

In die voorwoord van *Basiese beginsels van die Suid-Afrikaanse besigheidsreg* wys professor Nagel, redakteur van die werk, daarop dat dit vir nie-regstudente geskryf is; dit is 'n minder omvangryke en bekostigbare studentehandboek wat ten doel het om al die regsonderwerpe aan te raak wat vir beginners en oningewydes in die Suid-Afrikaanse reg van belang is.

Die werk bestaan uit 'n voorwoord, inhoudsopgawe, 16 dele en 40 hoofstukke. Deel 16 bevat 'n lys trefwoorde of woordregister.

Deel I ("Algemene inleiding") bevat inligting oor die geskiedenis en sistematiek van die Suid-Afrikaanse reg. 'n Duidelike verduideliking of omskrywing van die begrip "reg" en die onderskeid tussen regsreëls en reëls van sedes en moraliteit ontbreek egter. Die geskiedenis van die Suid-Afrikaanse regstelsel, die indeling van die Suid-Afrikaanse reg, die bronne van die reg en die onderskeid tussen sowel regsubjek en -objek as privaat- en publiekreg word bevredigend aangebied.

Deel II behandel die belangrikste aspekte van die kontraktereg. Hierdie uiteensetting is volledig, duidelik uiteengesit en maklik verstaanbaar. Dit is ideaal vir die nie-regstudent maar ook die regstudent kan met vrug hierna kyk as vertrekpunt vir 'n meer gedetailleerde studie. Die omskrywing van die begrip "kontrak" kom ietwat lomp voor omdat die vereistes vir 'n geldige kontrak in die omskrywing tussen hakies gegee word, terwyl dit in 'n verdere sin wat steeds deel van die omskrywing vorm, genoem kon word. Deel III bevat die hooftrekke van die verteenwoordigingsreg. Regsterme in hierdie deel word duidelik omskryf (sien bv die omskrywing van basiese begrippe (86), "ratifikasie" (89) en "prinsipaal" (95)) en die nie-regstudent behoort geen probleem hiermee te ondervind nie, selfs al sou dit as selfstudie voorgeskryf word. "Koopreg" word in Deel IV kortliks bespreek en gevolg deur "Huurreg" in Deel V. 'n Goeie uiteensetting van kredietooreenkomste verskyn in Deel VI. Die bruikbaarheid van hierdie deel word verhoog deur die praktiese toepasbaarheid daarvan. Dieselfde geld vir die bespreking van sekerheidstelling (Deel IX).

Deel VII handel oor die versekeringsreg. Verstaanbare voorbeelde word gebruik ter verduideliking van sekere begrippe soos onderversekering, oorversekering en awery. Verder word al die belangrikste aspekte kort en bondig aangespreek. Deel VIII handel oor "Werkaannemingsreg en arbitrasiereg" en in Deel X volg 'n bespreking van die wissel- en tjekreg. Hierdie is weer eens 'n baie nuttige bespreking wat prakties aangewend kan word (sien bv die verduideliking van die soorte kruisings met behulp van illustrasies (259)).

Die ondernemingsreg word in minder as sewentig bladsye behandel: Deel XI ("Vennootskapsreg"), Deel XII ("Maatskappyereg") en Deel XIII ("Beslote Korporasiereg"). Die vennootskapsreg word kortliks behandel en daar word onder andere nagelaat om volledig te wys op die unieke interne verhouding wat spruit uit *delectus personae* en goeie trou. Wat die maatskappyereg betref, is die bespreking volledig maar die vakdosent sal sekere aspekte moet aansuiwer, byvoorbeeld die onderskeid tussen private en publieke maatskappye, statutêre beskerming van minderheidsbelange (bv die reël in *Foss v Harbottle* en die persoonlike en afgeleide aksies) en maatskappygroepe en -filiale.

Enkele resente veranderinge aan die Wet op Beslote Korporasies word nie in die werk weerspieël nie. Die Wysigingswet 81 van 1992 ten opsigte van artikel 15 wat verklaar

dat ook nuwe lede nou by wyse van volmag die stigtingsverklaring kan laat onderteken, ontbreek byvoorbeeld.

Volledigheidshalwe kon 'n kort bespreking van die besigheidstrust ingesluit gewees het.

Die "Insolvensiereg" word in Deel XIV bespreek en die "Arbeidsreg" in Deel XVI. Die vinnig veranderende arbeidsituasie vereis egter van die vakdosent om hierdie gedeelte aan te suiwer, byvoorbeeld die verwikkelinge ten opsigte van die landboubedryf.

Geen voetnote word gebruik nie. Verwysings na regspraak word tot sleutelbeslissings beperk. Hoewel kritiek uitgespreek kan word dat bepaalde hofbeslissings (bv *Robson v Theron* 1978 1 SA 841 (A)) in die teks genoem kon gewees het, is die verwysings wat wel gegee is, tog voldoende in die lig van die omvang van die veld wat gedek word en die doel van die boek.

Daar is voorts geen verwysing na verdere bronne wat geraadpleeg kan word nie. 'n Lys van verdere leeswerk aan die einde van elke deel sou die waarde en bruikbaarheid van die boek vir nie-regstudente, veral die meer yweriges, verhoog het sonder om afbreuk te doen aan die primêre doel van 'n minder omvangryke werk.

Die proefleesgehalte van die werk is goed. Ek het geen spelfoute in die werk opgemerk nie. 'n Paar ander geringe foute kom voor, veral met betrekking tot die gebruik van leestekens: 'n komma ontbreek byvoorbeeld tussen "geykte regsfeite (soos 'n kontrak of onregmatige daad)" en "regte" op 14. Dit is egter so gering dat dit glad nie steurend is of die duidelikheid en struktuur van die sinsnedes beïnvloed nie. Numeriese foute kom voor, byvoorbeeld 2 1 1 in plaas van 2 2 1 (301) en 2 2 in plaas van 2 1 (353).

Die drukwerk en tegniese afwerking van die boek is van goeie gehalte.

Die skryfstyl is vloeiend en die outeurs slaag daarin om die stof op 'n logiese, eenvoudige en maklik verstaanbare wyse uiteen te sit. Die taalgebruik is keurig.

Die werk is op die nie-regstudent gerig en slaag daarin om die vakgebied in 'n mate vir die teikengroep te ontsluit. Sekere aspekte kon weliswaar duideliker en meer konsekwent aangebied gewees het, maar hierdie tekortkominge kan maklik deur die vakdosent aangesuiwer en aangevul word.

Basiese beginsels van die Suid-Afrikaanse besigheidsreg word van harte verwelkom en sterk aanbeveel vir studente wat nog geen of slegs 'n beperkte kennismaking met die reg gehad het.

ELIZABETH SNYMAN
Sentrum vir Ondernemingsreg
Universiteit van die Oranje-Vrystaat

LABOUR LEGISLATION SERVICE

Butterworths Durban 1992; 1752 pp

Price R202,92 (hard cover loose leaf binder)

Labour law is one of the most dynamic fields of law. This can be seen *inter alia* from the fact that labour legislation is constantly being amended, repealed and replaced. Last year alone has, for example, seen amendments to the Basic Conditions of Employment Act 3 of 1983 to incorporate farm workers and the promulgation of the Public Service

Labour Relations Act 102 of 1993, which regulates anew labour relations in the Public Service. In addition, there are proposed amendments to various labour acts such as the Labour Relations Act 28 of 1956 and the Basic Conditions of Employment Act and new legislation such as the Occupational Health and Safety Act 85 of 1993 which will come into operation on a date to be fixed by the State President.

To keep abreast with the changes to labour legislation is difficult and time-consuming. This task will, however, be greatly alleviated by Butterworths' *Labour legislation service*. It provides one with all the relevant acts, namely the Basic Conditions of Employment Act, the Labour Relations Act, the Machinery and Occupational Safety Act 6 of 1983, the Manpower Training Act 56 of 1981, the Unemployment Insurance Act 30 of 1986, the Wage Act 5 of 1957 and the Workmen's Compensation Act 30 of 1941. In addition, it also contains all the relevant regulations and rules pertaining to these acts. The different acts, regulations and rules are compiled in a loose leaf binder which will facilitate updating. Butterworths intend to update these acts as and when necessary and, provided that subscribers receive these updates timeously, the *Labour legislation service* will be of tremendous assistance and value to both academics and practitioners in the labour-law field.

EML STRYDOM
University of South Africa

A LAND TAX FOR THE NEW SOUTH AFRICA

by RCD FRANZSEN and CH HEYNS (eds)

The Centre for Human Rights, University of Pretoria
Pretoria 1992; v and 161 pp

Price R25,00

This publication consists of the papers read at a one-day conference on the feasibility of a tax on rural land in South Africa which was presented by the Centre for Human Rights of the University of Pretoria on 20 March 1992.

The interdisciplinary nature of this topic is reflected both in the papers delivered and in the diverse backgrounds of the approximately 80 delegates who attended the conference.

As is to be expected, the first paper provides the background, with an historical and legal survey of land taxation. The land reform aspect is introduced in papers entitled "Rural land tenure reform and implications for rural development in sub-Saharan Africa", "Land taxes and land reforms in the Third World: experiences and developments" and "Land reform through tax reform". The other papers are entitled "An agricultural economic view on land taxation", "The economics of a land tax" and "Land taxation proposals for Zimbabwe". The brief comments of the seven panelists are included and there is also an annexure entitled "Property tax – a balanced view".

The questions raised by the two central, and related, issues of the conference – land taxes and land reform – are crucial in the current South African context. They need

to be thoroughly debated and resolved. This publication of the conference proceedings should form part of that debate.

Conference proceedings, regardless of whether they be published in the less formal format in which these are presented should, where possible, be disseminated. Thanks should go to the editors for enabling these papers to be published.

JEANNIE VAN WYK
University of South Africa

ERRATUM

In a letter addressed to John Murphy, University of the Western Cape, Professor CH Lewis, University of the Witwatersrand, wrote:

> "On reading your article on 'Property Rights and the New Constitution' in (1993) 56 *THRHR* 623, I noticed that you referred to my paper on the right to private property in a new political dispensation, and particularly to my use of the work of Kevin Gray ('Property in Thin Air' (1991) 50 *Cambridge LJ* 252). Unfortunately you have attributed Kevin Gray's work and ideas to Thomas Grey, whose views are discussed earlier in my paper (and who takes a very different view of property from that of Kevin Gray), and have cited as the reference for Kevin Gray's work the title of the article by Thomas Grey and the citation for that paper in *NOMOS XXII* (see your paper at 629)." (See also Lewis 1992 *SAJHR* 389.)

Notes on the interpretation of the property clause in the new constitution*

AJ van der Walt
BJur Honns (BA) LLM LLD
Professor of Private Law, University of South Africa

OPSOMMING

Aantekeninge oor die interpretasie van die eiendomsklousule in die nuwe grondwet

Die eiendomsklousule in die nuwe grondwet is een van die kontroversieelste aspekte van die nuwe grondwetlike bedeling wat vir Suid-Afrika aanvaar is. In hierdie artikel word problematiese aspekte van die eiendomsklousule wat moontlik tot konstitusionele litigasie aanleiding kan gee aan 'n regsvergelykende en analitiese ondersoek onderwerp. Hierdie ondersoek toon aan dat die paradigma waarbinne die betrokke bepaling van die grondwet deur die howe geïnterpreteer word van die uiterste belang is. Voorbeelde uit onlangse Suid-Afrikaanse regspraak dui daarop dat die belangrikste benaderingsverskille wat in ander regstelsels 'n rol speel ook in die Suid-Afrikaanse konteks aanwesig is. In finale instansie sal die grootste deel van konstitusionele litigasie oor die eiendomsklousule betrekking hê op die konflik wat bestaan tussen die beskerming van individuele belange en die bevordering van 'n nuwe regering se sosio-politieke hervormings- en herstruktureringsprogramme. Die implikasies van die belangrikste interpretasieparadigmas wat in hierdie verband na vore getree het vir die interpretasie van die voorgestelde eiendomsklousule word ondersoek aan die hand van voorbeelde, spesifiek ten aansien van probleme rakende die reikwydte van die konstitusionele waarborg van eiendomsreg, onteiening en vergoeding en die uitoefening van die staat se reguleringsbevoegdhede.

1 INTRODUCTION

It has already become somewhat of a platitude to say that the property clause in the new constitution (and its implications for the solution of the property question) is one of the most important constitutional issues facing the country at the moment. This observation is underlined by the fact that the formulation and functioning of the property clause was one of the last constitutional issues to be solved in the final agreement of the Negotiating Council at Kempton Park. In this regard it is interesting to note that there was hardly any serious political debate about the question whether the constitution should include a property clause – almost all political parties accepted at a very early stage that it was a political necessity that had to be accepted for purposes of the negotiated settlement. Consequently the greatest part of the debate was concentrated on the

* Extended text based on a paper presented as part of a seminar series on the Bill of Rights, hosted by Deneys Reitz Attorneys (Johannesburg) on 1993-11-11. Part of the research for this article was made possible by the generous financial assistance of the Alexander von Humboldt Stiftung (Bonn) and the Centre for Research Development of the Human Sciences Research Council (Pretoria). Opinions expressed by the author are not to be attributed to either of these institutions.

formulation of the property clause, and in the course of the last two years a widely divergent set of proposals was published in this regard.[1] In this article the focus falls mainly on the clause contained in chapter 3[2] of the Constitution of the Republic of South Africa 200 of 1993, as adopted by the Negotiating Council on 18 November 1993, although the versions in the Technical Committee's seventh[3] and tenth reports[4] are referred to by way of comparison.

The main thrust of this article is aimed at the identification and analysis of areas in which future constitutional litigation concerning the property clause may occur. Obviously there are any number of other issues that may prove to be the object of litigation as well, but the purpose here is to identify a number of probable issues for litigation, based on comparative analysis, and then to try and decide what the possible arguments and the possible outcome of litigation on that point might be. The uncertainty which still surrounds an analysis like this is limited to some extent by concentrating on general principles and observations about the function and interpretation of property clauses in other jurisdictions. Usually such an approach would require a detailed analysis of foreign case law, but in this article the focus is on broad perspectives rather than a close analysis of case law, since a number of publications have already dealt with the most important comparative case law. These publications are referred to where appropriate.[5] In addition to the comparative analysis, a number of points arising from the wording of the property clause are raised and analysed to determine whether and how they might affect constitutional litigation with regard to property rights.

2 CONTENT OF THE PROPERTY CLAUSE

2 1 Property clause: section 28

The property clause is contained in chapter 3, section 28 of the transitional constitution:

> "**28.** (1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights.
>
> (2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law.
>
> (3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2) such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, the payment of such compensation and within such a period as may be determined

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1 See Van der Walt "Comparative notes on the constitutional protection of property rights" 1993 *Recht en Kritiek* 263 – 297 and "Impact of a bill of rights on property law" 1993 *SA Public Law* 296 for an analysis of some of the earlier proposals. The entire September 1993 issue of *Recht en Kritiek* was devoted to discussions of the South African constitutional debate, and some of the proposals are reproduced in that volume. In the rest of this paper the article by Van der Walt in 1993 *Recht en Kritiek* 263 – 297 and an article by Chaskalson "The problem with property: thoughts on the constitutional protection of property in the United States and the Commonwealth" 1993 *SAJHR* 388 – 411 are referred to repeatedly. Both articles contain detailed analyses of the relevant constitutional clauses, case law and commentaries, and instead of repeating all the information, the reader is often simply referred to these articles.

2 Which deals with fundamental human rights.

3 Dated 1993-07-29.

4 Dated 1993-10-05.

5 See the sources referred to in fn 1 above.

by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected."

2 2 Restitution of land rights: sections 121 – 123

Apart from the provisions of section 28 as included in chapter 3 of the constitution, section 121 deals with the restitution of land rights. This section provides that any person or community who was dispossessed of a right in land in terms of legislation that would have been inconsistent with the new prohibition of racial discrimination in section 8(2) of the constitution, shall be entitled to claim restitution in respect of such right from the state in a court of law. Such claims are limited to those originating in actions that took place after a date fixed by an act of parliament, which date shall not be earlier than 19 June 1913. Such a claim shall be subject to the conditions, limitations and exclusions prescribed by the said act of parliament, and shall not be justiciable by a court of law unless it is processed in accordance with such act by a commission established for that purpose by the act. The commission envisaged in section 122 of the constitution shall at least be competent to investigate the merits of any claims, to mediate and settle disputes arising from such claims, and to draw up reports on unsettled claims for submission as evidence to a court of law and to present any further evidence to such court.

When an unsettled claim is lodged with a court of law in terms of section 123 of the constitution, and the land in question is in the possession of the state, the court may order the state to restore such right to the claimant if the state certifies that such restoration is feasible. If the land in question is in the possession of a private owner, and the state certifies that acquisition of the land by the state is feasible, the court may order the state to purchase or expropriate the land and to restore the relevant rights to the claimant. The court may not issue an order in terms of the latter procedure unless it is just and equitable to do so, taking into account all relevant factors including the history of the dispossession, the hardship caused, the use to which the property is being put, the history of its acquisition by the owner, the interest of the owner and others affected by any expropriation, and the interests of the dispossessed. Expropriation for this purpose is subject to the payment of compensation calculated in the manner provided for in section 28(3).

If the state certifies that any restoration or acquisition in terms of the above provisions is not feasible, or if the claimant prefers alternative relief instead of restoration, the court may order the state, in lieu of the restoration of a dispossessed right, to grant the claimant an appropriate right in available alternative state-owned land designated by the state to the satisfaction of the court, provided the state certifies that such designation of alternative state-owned land is feasible; or to pay the claimant compensation or to grant the claimant any alternative relief.

The compensation referred to above must be determined by the court as just and equitable, taking into account the circumstances which prevailed at the time of the dispossession and all such other factors as may be prescribed by the act, including compensation paid upon such dispossession. If the court grants relief

contemplated in the cases above, it must take into account and, where appropriate, make an order with regard to, any compensation that was paid upon the dispossession in question.

The provisions contained in sections 121 – 123 do not apply to any rights in land expropriated under the Expropriation Act 63 of 1975 or any other act incorporating this act or its provisions with regard to compensation, if just and equitable compensation as contemplated in this section was paid in respect of such expropriation.

No claims under section 121 may be lodged before the act of parliament contemplated in this section has been promulgated.

This curious section on the restitution of land rights should, for all practical purposes, be regarded as part of the property clause, as it is obvious that neither of the two sections can be interpreted and applied without reference to the other. In what follows, references to "the property clause" should be read as referring to both section 28 and sections 121 – 123 on the restitution of land rights. A more detailed analysis of the restoration clause follows after the analysis of section 28.

2 3 Application, limitation and interpretation

A number of sections in the constitution contain provisions governing its application, limitation and interpretation. These sections have a bearing on litigation.

Section 33(1) provides that the rights entrenched in the constitution may be limited by a law that applies generally, provided that such limitation shall be permissible only to the extent that it is reasonable and justifiable in an open and democratic society based on freedom and equality, and provided further that such limitation shall not negate the essential content of the right in question. Interestingly enough, section 28 is not included among the sections for which it is required that limitations should also be necessary, although one could argue that the "for public purposes" clause in section 28(3) implies that expropriations should be necessary. Section 33(2) also provides that no rule of the common law, customary law or legislation shall limit any right entrenched in chapter 3 of the constitution, save as provided for in the chapter itself. On the other hand, the entrenchment of rights in this chapter does not negate the existence of rights or freedoms recognised and conferred by common law, customary law or legislation to the extent that they are consistent with the provisions of chapter 3.

Section 34 provides for the suspension of rights entrenched in chapter 3 in terms of a state of emergency properly declared in accordance with the constitution.

Section 35 lays down principles for the interpretation of the provisions in chapter 3 of the constitution. Section 35(1) requires that a court of law must interpret the provisions of chapter 3 in such a way as to promote the values which underlie an open and democratic society based on freedom and equality. Such a court must, where applicable, have regard to public international law applicable to the protection of the rights entrenched in chapter 3, and may have regard to comparable foreign case law. In terms of section 35(2), a law the wording of which appears to exceed the limits imposed by chapter 3 in limiting the rights entrenched in chapter 3, shall not be constitutionally invalid, unless it

is impossible to attach a more restricted interpretation to that law. Section 35(3) provides that a court shall have due regard to the spirit, purport and objects [objectives?] of chapter 3 in interpreting any law and the application and development of common law and customary law.

3 INTERPRETIVE AND COMPARATIVE ANALYSIS

3 1 Programmatic paradigm of a constitutional property clause

"Programmatic paradigm" defined

One of the aspects of the property clause that is often neglected, but which is undoubtedly of the utmost importance for its eventual interpretation and application, is its programmatic paradigm. This term refers to two related but distinct processes. First of all, any constitution, and especially a contemporary one formulated and promulgated in the post-World War II era, can and possibly will have a programmatic function in the sense that it is explicitly geared to the promotion or realisation of a certain socio-political programme such as social upliftment, land reform and so on. Secondly, even a constitution which is not aimed at such a socio-political programme may still have a programmatic function in terms of its relationship to and interaction with an external socio-political programme instituted or promoted by the government. Examples are the New Deal programme of the Roosevelt government in the United States of America during the first decades of the twentieth century, the repeated constitutional clashes between Indian governments and the Indian constitutional court during the first three decades after the adoption of the Indian constitution, and the reconstruction of German society after the promulgation of the German Basic Law in the first decades after World War II. The courts and their attitude to the relationship between socio-political programmes and constitutional protection of private property played a large part in all three cases, which gives an indication of the importance of constitutional litigation in a situation where the attainment of socio-political ideals has to be reconciled with the entrenchment and enforcement of constitutional rights.

With reference to the introductory remarks above, it may be said that a constitutional property clause functions against the background of either a direct or an indirect socio-political programme, the former in the case where the constitution contains a direct or overt programmatic element and the latter in the case where the constitution does not contain such a direct programmatic element, but nevertheless has a bearing upon the attainment of such a programme. A constitution with a direct programmatic element may be described as positive in the sense that it is positively involved in striving towards a certain socio-political goal, whereas a constitution with an indirect programmatic element can be either positive (in the sense that the property clause is interpreted and applied in a manner which positively promotes a certain socio-political programme) or negative (in the sense that the property clause is interpreted and applied in such a manner that it frustrates or prevents the attainment of certain socio-political goals).

The German Basic Law contains an example of a constitution and a property clause with a positive or direct programmatic element. The property clause in article 14 of the Basic Law states explicitly that ownership, while it is guaranteed

by the constitution,[6] implies duties for the owner,[7] that its content and limits are determined by the laws,[8] and that its exercise must be in the interests of society.[9] These provisions were obviously supposed to make it possible for the government to promote the social and economic reconstruction of German society after the end of World War II. On the other hand, the constitutional conflicts between the Roosevelt administration and the American Supreme Court[10] and between the Indian government and the Indian courts provide examples of property clauses that were interpreted and applied to frustrate legislative attempts at social reconstruction.[11]

Programmatic paradigm of the property clause

The property clause in section 28 of the new constitution contains a few references to what can be regarded as a direct programmatic element. The clearest indication is contained in the interpretation provision in section 35, which states that chapter 3 of the constitution must be interpreted in such a manner that it will promote the values underlying an open and democratic society based on freedom and equality. The same values are referred to in section 33 as factors which co-determine whether a law which limits the entrenched rights is valid. The factors referred to in section 28(3) as indications that compensation is just and equitable, must probably be seen as more specific allusions to the same underlying values. In the section on the restoration of land rights, these values are once again referred to; in fact the whole section on the restoration of land rights is in itself a clear indication of a socio-political programme of land restoration that is promoted in the constitution. From the constitution itself it is clear that this socio-political programme determines the paradigm within which the constitution, and especially chapter 3, must be interpreted and applied.

It is argued in what follows that what is said about this interpretive paradigm is extremely important for the interpretation and application of the property clause, and that it may in fact decide the future success or failure of the social reconstruction process of which the new constitution forms an important part. From the brief and superficial remarks above one might conclude that the property clause must be read against the background of a *social policy aimed at striking a compromise between providing a simple but powerful constitutional guarantee for (inevitably) existing property rights on the one hand and a purposeful effort at removing some of the historical imbalances with regard to the distribution of land rights on the other.*

---

6 14(1): "Das Eigentum und das Erbrecht werden gewährleistet." Art 14(3) provides that expropriation of property for the benefit of all is allowed. It may be effected only in terms of a law which lays down the nature and extent of compensation. Compensation must be calculated with due regard to the interests of both the affected party and the community. In case of a dispute about the amount of compensation, the normal court may be approached for a ruling.

7 14(2): "Eigentum verpflichtet."

8 14(1): "Inhalt und Schranken werden durch die Gesetze bestimmt."

9 14(2): "Sein Gebrauch soll zugleich dem Wohle der Allgemeinheit dienen."

10 See in this regard Chaskalson 1993 *SAJHR* 395 – 406.

11 See in this regard Murphy "Insulating land reform from constitutional impugnment: an Indian case study" 1992 *SAJHR* 362 – 388; Murphy "Property rights in the new constitution: an analytical framework for constitutional review" 1993 *CILSA* 211 – 233 (1993 *THRHR* 623 – 644); Chaskalson 1993 *SAJHR* 388 389 – 395.

The interpretive paradigm of the courts

It is clear from these preliminary considerations that the *direct* programmatic paradigm of the property clause will have a vital influence on its interpretation and application rights across the board. Moreover, it seems more than likely that the property clause will be the source of constitutional litigation that can influence proposed socio-political programmes of a new government either positively or negatively. The outcome of this *indirect* programmatic function of the property clause will undoubtedly be determined by the *attitude of the judiciary*, as is strikingly illustrated by the recent controversy surrounding the resettlement of the so-called Zevenfontein "squatters".[12] When the Administrator of the Transvaal decided in terms of the Less Formal Township Establishment Act 113 of 1991 to resettle these "squatters" in a so-called less formal township in the Diepsloot area, white homeowners from the area attempted to stop this resettlement by way of an application for an interdict against the Administrator, based on the argument that the establishment of such a settlement in the area would constitute a public nuisance for the applicants.[13] This public nuisance, the applicants argued, would be caused by air and water polution, increased criminality in the area and a decrease in property values.[14]

In granting the temporary interdict De Villiers J approached the matter from the point of view, already established in *East London Western Districts Farmers' Association v Minister of Education and Development Aid,*[15] that South African law recognised the intrinsic right of a landowner to the reasonable enjoyment of his/her property, and that it provided him/her with a remedy against anyone who unjustifiably interferes with that right.[16] This approach corresponds to the currently accepted private-law theory in terms of which ownership is regarded as a fundamentally unlimited right that can be restricted by a competent authority in particular instances, provided that the existence, scope and justifiability of such restrictions be proved in every individual instance, and that private owners be compensated for the resulting deprivation of their property rights. Consequently, the question before the court was whether the interference resulting from the settlement was justified. The respondent relied upon the defence of statutory authority, but this defence was dismissed by the court on the ground that there was no indication in the act that the legislature intended such an interference with private property rights to be justified.[17] It is significant that the court, in coming to this conclusion, relied upon the argument that, if the legislature indeed intended to justify such an interference with private

12 These cases are dealt with more fully in Van der Walt 1993 *SA Public Law* 306ff.

13 Reported as *Diepsloot Residents' and Landowners Association v Administrator, Transvaal* 1993 1 SA 577 (T).

14 It is an interesting exercise to compare the court's treatment of these averments in the *Diepsloot* case with the decision in *Sunningdale Development (Pty) Ltd v Umhlanga Borough Town Council* 1993 3 SA 711 (D), where the court was obliged to find that a provision laid down by the local authority (and arguments supporting the legality of this provision) purporting to force a developer to provide outside toilets for servants was unreasonable, racist and *ultra vires*. The question is whether the introduction of the new constitution is going to render arguments such as those referred to above *prima facie* racist and unreasonable.

15 1989 2 SA 63 (A).

16 578J. A similar approach was followed in *East London Western Districts Farmers' Association v Minister of Education and Development Aid* 1989 2 SA 63 (A) 66I.

17 584C.

property rights, one would expect the act to provide for full compensation of private landowners affected by it.[18] In the absence of such provision for compensation, it was assumed that the interference was not justified, and the temporary interdict was therefore granted.[19]

On the return day of the temporary interdict, a different approach to the matter was taken by McCreath J,[20] who distinguished this case from the *East London* case on the basis of the purpose and intent of the two statutes in question.[21] According to McCreath J, once it is clear that the circumstances are such that the Administrator must take action in terms of the act, the 1991 act necessarily implies that the powers conferred by the act must be exercised, even if that results in interference with private rights. In other words, the point of departure here is not the inviolability of private property rights and the need for compensation should executive action interfere with those rights, but rather that appropriate executive action should be taken once it is clear that the circumstances foreseen in the act are present, even if that should result in interference with private property rights. Given the fact that the act in question was promulgated as part of an intended land reform programme, which in this case is specifically aimed at reducing the housing shortage, the approach followed by McCreath J is extremely interesting and important. Some commentators may argue that this decision rides roughshod over private property rights, but the court accepted that the normal rules governing statutory justification of executive interference with private rights, together with the requirement that such powers be exercised without malice or negligence, provide sufficient and appropriate protection for private rights while simultaneously allowing the executive to exercise its statutory powers in attaining the policy served by the act.

The difference in approach of the two courts as set out above provides a significant illustration of the importance of the interpretive paradigm of any statute which involves some sort of conflict between private property rights and social programmes. It may be possible to rationalise the difference between the approaches followed by the majority of the court in the *East London* case[22] and McCreath J in the *Diepsloot* case by pointing out that the social programme envisaged by the 1936 act, being part of the apartheid system, was a negative one which ought to have been applied restrictively, whereas the social programme promoted by the 1991 act, being part of the abolition of apartheid, was rather more positive and ought therefore to be applied more leniently. However, no such rationalisation is possible with regard to the different approaches followed by the two courts in the *Diepsloot* case, and these differences can ultimately

18 584H.

19 De Villiers J (585E–F) went so far as to state that in his opinion the applicants should obtain final relief at the trial as well.

20 Reported as *Diepsloot Residents and Landowners Association v Administrator, Transvaal* 1993 3 SA 49 (T).

21 The *East London* case was concerned with an action in terms of the Development Trust and Land Act 18 of 1936, whereas the applications in the *Diepsloot* case were based upon the Less Formal Township Establishment Act 113 of 1991. This distinction between the two acts is quite interesting, considering the fact that the former was one of the cornerstones of the apartheid land system, whereas the latter is one of the initial 1991 land reform acts.

22 Per Hoexter JA, with Vivier and MT Steyn JJA concurring. Dissenting judgments were delivered by Viljoen and Nestadt JJA. For a full analysis see Van der Walt 1993 *SA Public Law* 308–310.

only be explained in terms of the interpretive paradigms that inspired the respective judgments.[23] The judgment of De Villiers J was inspired by a securely entrenched[24] social and legal paradigm based upon the supremacy and ultimate inviolability of private property rights against state interference, whereas McCreath J was operating within a wider paradigm which leaves room for the consideration of social interests.

This analysis of the two *Diepsloot* decisions is riddled with irony. It would be ironical if the very courts which in the past were often willing to interpret statutes of the apartheid parliament with due respect for the "colossal social experiment and long term policy" of racial segregation,[25] even if that required them to disregard the hardship it caused for individual citizens,[26] were now to apply post-apartheid legislation aimed at social reconstruction restrictively to frustrate reformative aims because a different approach would cause interference with individual property rights. In this respect the approach followed by McCreath J is surely preferable, reflecting as it does the need to interpret the statute in question in the light of the larger social policy picture and not simply from the rather facile point of view that private individual rights should enjoy supreme protection unless and until it is absolutely inevitable to allow interference with them. There is a note of deep concern underlying this irony, a concern that will not disappear with the introduction of the new constitution, because it seems as if the courts, whatever they do, can only expect criticism, at a time when greater respect for the legal system and its institutions is becoming more possible but also much more essential. The reason for this is perhaps that everybody expects too much from the courts – they cannot function in a situation where they are expected to satisfy everybody's needs and allay everybody's fears. Ultimately the courts can dispense justice, but they cannot create it where it does not exist in the first place.

Paradigmatic function of the constitution

The approach followed by McCreath J in the *Diepsloot* case does not mean that private rights should be ignored or undervalued, or even that they must always give way to social policy or the interests of the majority. It does mean, however, that a constitution which provides constitutional guarantees for private individual rights should be interpreted and applied with due regard for the broader social picture and not simply for the promotion of individual interests.

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23 Of course one must take into account that the first judgment was given with reference to a temporary interdict, but then it is difficult to explain the rather explicit and strongly worded sections of the judgment.

24 The tenor of this kind of paradigm is illustrated perfectly by most textbooks on the law of things and by judgments such as *Gien v Gien* 1979 2 SA 1113 (T) 1120C. In fact, it could be said that the very choice between treating the *Diepsloot* case as a problem of neighbour law rather than of administrative law is indicative of the kind of paradigm within which the judgment is given. In this regard the judgment of McCreath J is somewhat ambiguous in the sense that it describes the problem in neighbour-law terminology (61B), but ultimately decides it with reference to administrative law. See further Van der Walt 1993 *SA Public Law* 311–312.

25 See in this regard, in particular, *Minister of the Interior v Lockhat* 1961 2 SA 587 (A) 602D, and Van der Walt "Developments that may change the institution of private ownership so as to meet the needs of a non-racial society in South Africa" 1990 *Stell LR* 26–48 29ff.

26 See eg *S v Adams, S v Werner* 1981 1 SA 187 (A), and cf Van der Vyver "Qu'ils mangent de la brioche!" 1981 *SALJ* 135–148.

Such an approach is paradigmatic in a very real sense, in that it provides a broad framework for the understanding and evaluation not only of the specific right involved, but of the whole legal system. In a recent article, Nörr[27] made the fascinating observation that German law underwent a fundamental paradigm shift in the course of the twentieth century. When the German private-law system was codified at the beginning of the century, the code[28] and the social philosophy underpinning it ensured that private rights, as they were structured in the civil code, provided the paradigm for the whole of German law, including public law and the law relating to conflicts between private rights and state interference with them.[29] However, after World War II and the promulgation of the German Basic Law in 1949, changing social values and the effect of the constitutional entrenchment of private rights in the Basic Law caused a shift of paradigm towards the current position, where public law, including precedent concerning the interpretation of the entrenched rights in the constitution, now provides the general paradigm even for the interpretation and application of private law as set out in the civil code.

It has been noted[30] that this paradigm shift in German law opens up interesting possibilities for the future development of South African law in terms of the new constitution. It is undeniably true that South African law in general, and private law in particular, at the moment still functions largely within a traditional private-law paradigm similar to the one described by Nörr.[31] A paradigm shift which causes the whole legal system, including private law, to be interpreted in terms of a common paradigm with a strong element of social consciousness, as contained in the new constitution (and especially chapter 3), can contribute to the creation of a unifying force at a time of social strife and uncertainty. At the same time, such a paradigm shift can promote unifying social goals and policies and ensure their infiltration into existing dogma and precedent. Of course it is also possible, especially if there is strong opposition to or disagreement about the constitution or the social values embodied in it, that political strife about social policy might destroy the whole constitution, as exemplified by the experience with the property clause in the Indian constitution.[32] The promotion of common values by way of constitutionally entrenched private rights is a two-edged sword which can complicate rather than simplify the situation. However, it cannot be denied that the constitution, once promulgated, will have to be interpreted within a certain context or paradigm,

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27 "From codification to constitution: on the changes of paradigm in German legal history of the twentieth century" 1993 (1) *Codicillus* 29–39. See Van der Walt 1993 *SA Public Law* 300–303 for a full discussion.

28 The *Bürgerliches Gesetzbuch* 1900.

29 An interesting historical explanation for this phenomenon, which was characteristic of nineteenth century thinking in general, is provided by Haakonssen "Hugo Grotius and the history of political thought" 1985 *Political Theory* 239–265 259, with reference to Grotius, Ferguson and Adam Smith. The main idea was that the justification or rationale for public law in general was to ensure and promote the defense and effectivity of private law. See further in this regard Van der Walt "Ownership and personal freedom: subjectivism in Bernhard Windscheid's theory of ownership" 1993 *THRHR* 569–589.

30 See Van der Walt 1993 *SA Public Law* 304–305.

31 See Van der Walt 1993 *THRHR* 569–589.

32 See in this regard Chaskalson 1993 *SAJHR* 389–395. In this perspective the idea of a transitional constitution is perhaps a good one, leaving room for amendments that can save the constitution and the ideal of constitutionalism rather than sacrificing them on the altar of specific individual rights.

something which may prove to be more important than the actual formulation of the property clause itself. In this respect the indications of the interpretive context of the constitution are extremely important.

3 2 Scope and application of the property clause

Formulation

One of the aspects of the property clause that will no doubt affect not only the rights entrenched in it but the whole of property law and even the larger part of private law as such, is the scope and application of this clause. Interestingly enough, section 28(1) guarantees *rights in property* rather than *ownership* (as in the German example) or just *property* (as in the American example). Innocent and fairly neutral as it may appear, this formulation opted for by the Negotiating Council is very important, and it could prove to be one of the major battlegrounds on which the constitutional war about property rights will be fought. Undoubtedly one of the most vital questions that will present itself once the constitution is in place, is how widely the term *rights in property* must be interpreted. A number of examples from a comparative perspective illustrate the point.

American law

Property rights are guaranteed by the fifth and fourteenth amendments to the American constitution. These amendments provide (with regard to federal and state law respectively) that no person shall be deprived of *life, liberty, or property* without *due process of law*, and that private property shall not be taken for public use without *just compensation*.[33] Given the simplicity of this formulation it was perhaps to be expected that this property clause would be interpreted very widely. In a well-known article Reich[34] explained the extensive interpretation of the property clause in terms of the inadequacy of traditional perceptions of property. In his view the creation and development of the modern welfare state caused a shift in the nature of individual or private property rights from the sphere of thing-ownership to the sphere of "state largesse", where property interests with regard to social security benefits, housing rights, contracts, licences and so forth are much more valuable and important to an individual than actual old-fashioned ownership of objects. As a result of this socio-economic shift a comparable conceptual or dogmatic shift was required to ensure that these forms of *new property* enjoyed the same constitutional protection as their more physical[35] antecedents. Chaskalson[36] has shown that the

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33 See in this regard Van der Walt 1993 *Recht en Kritiek* 267 – 270; Chaskalson 1993 *SAJHR* 396.

34 "The new property" 1964 *Yale LJ* 733 – 786; see further in this regard Van der Walt "The fragmentation of land rights" 1992 *SAJHR* 431 – 450; Lewis "The right to private property in a new political dispensation in South Africa" 1992 *SAJHR* 389 – 430; Chaskalson 1993 *SAJHR* 404 – 408.

35 This shift to new property has been described as the *dephysicalisation* of property: see Vandevelde "The new property of the nineteenth century: the development of the modern concept of property" 1980 *Buffalo LR* 325 – 367 333; Horwitz "The transformation in the conception of property in American law, 1780 – 1860" 1973 *Univ of Chicago LR* 248 – 290.

36 1993 *SAJHR* 404 – 406.

full range of "new" property rights had been accorded constitutional protection in terms of the due process clause by the early 1980s, including claims based on unfair employment practices, the right to a driver's licence, an expectation of tenure at a university, and many more. The jurisprudence of the American Supreme Court that dealt with the question of *due process of law* during the first decades of the twentieth century has been characterised as a period of extreme conservatism, also known as *Lochnerism*,[37] which precipitated a constitutional crisis over the validity of industrial and social welfare legislation during the New Deal era. Although this era of conservatism was halted and to some extent reversed after 1937,[38] it is interesting that several authors[39] note that recent decisions display a tendency to revive Lochnerism in curbing state interference with private property rights. Chaskalson[40] has shown that the extended concept of "new" property in constitutional jurisprudence is also established firmly in Commonwealth countries such as Trinidad and Tobago, Jamaica and Guyana.

German law

Article 14 of the German Basic Law provides a constitutional guarantee of *ownership* rather than *property*, which seems to point towards a rather narrower protection than is the case in American law. However, German constitutional jurisprudence maintains a strict distinction between the private-law and the public-law meaning of ownership, and it is recognised that the public-law concept of ownership, for purposes of the interpretation of article 14, is of wider ambit than the private-law concept, which is restricted to corporeal things.[41] Even then the extension of the concept of property for constitutional purposes is more limited than in American law, and generally the German constitutional court has refused to protect patrimonial rights and interests not acquired through personal effort.[42]

Implications for the South African situation

The extension of the concept of property for constitutional guarantee purposes has been mooted for South African law,[43] and practical considerations concerning the availability and understandability of comparative material such as case reports and commentaries will probably ensure that the American rather

37 With reference to the classic decision in this regard, *Lochner v New York* 198 US 45 (1905), which dealt with the imposition of a restriction on the maximum working week in the baking industry. The court decided that this restriction amounted to interference with liberty and property without due process of law, and found it unconstitutional. See Chaskalson 1993 *SAJHR* 401 – 404.

38 In line with the decision in *West Coast Hotel Co v Parrish* 300 US 379 (1937). Chaskalson 1993 *SAJHR* 395 – 404 provides a clear and concise summary of the most important case law. For a more comprehensive survey see Nedelsky *Private property and the limits of American constitutionalism* (1990) and sources cited there.

39 See cases and literature cited by Chaskalson 1993 *SAJHR* 402 – 403, as well as sources cited by Van der Walt 1993 *Recht en Kritiek* 268 – 269.

40 1993 *SAJHR* 406 – 408.

41 See Van der Walt 1993 *Recht en Kritiek* 271 – 272 and sources cited there.

42 *Ibid.*

43 See in particular Verloren van Themaat "Property rights, workers' rights and economic regulation – constitutional protection for property rights in the United States of America and the Federal Republic of Germany: possible lessons for South Africa" 1990 *CILSA* 53 – 69; Lewis 1992 *SAJHR* 389 – 430.

than German precedent is followed in South African constitutional litigation.[44] Moreover, the formulation *rights in property* opted for by the Negotiating Council virtually guarantees that the protective umbrella of the property clause will cover not only real rights, but all patrimonial rights, including personal rights in property. In the South African context it cannot be argued that *rights in property* include only real rights (or rights *in rem*), since the traditional Roman-based term refers to rights in *things*, which is a narrower concept. It seems, therefore, that section 28(1) refers to both real and personal rights in property, which means that this formulation, applied to an extended concept of *property*, will ensure that the South African property clause goes even further than the American example.

It has been pointed out[45] that such an extensive interpretation of the property clause will inevitably extend the protection of the constitution to a very wide group of existing property rights. It needs little imagination to see how the American and Commonwealth examples cited by Chaskalson can provide authority for the constitutional guarantee of the inviolability of not only existing land rights, but also existing corporate interests, state licences and grants, social benefits and state jobs. It is virtually inevitable that constitutional litigation on the scope of the property clause will occur as soon as the constitution is in place, and the main question to be decided in such litigation will most probably not be whether the concept *rights in property* should be interpreted extensively, but rather how far the court should go in extending the guarantee of rights in property to non-real rights in incorporeals. If the American example were followed, it is entirely possible that workers may find themselves confronted by indirect amendments to workers' rights based upon an extensive interpretation of the property clause so as to include the rights of companies and shareholders in the guarantee. Other similar interpretations may frustrate affirmative action programmes aimed at normalising employment practices in the public sector or geared towards land redistribution. The point is that the term "rights in property" is not an acknowledged or entrenched technical term with a clear meaning, and it will consequently be interpreted widely rather than restrictively. On the other hand, such a wide interpretation could result in an extremely wide entrenchment of existing rights in property that was never foreseen by the negotiating parties.

One further aspect relating to the scope and application of the property clause deserves attention. A comparison of the American and German examples referred to indicates that a property clause may be framed either positively or negatively. The American example is negative in the sense that it does not provide a formal or positive guarantee of property, but merely a negative prohibition against deprivations of private property that are not effected in accordance with the due process of law on the one hand, and appropriation of private property for public purposes that is not subject to just compensation on the other. In the German example, however, the usual clause providing for expropriation in accordance with due process and subject to just compensation, is complemented by a positive guarantee of ownership, alongside two further provisions

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44 Cf Chaskalson's remark 1993 *SAJHR* 388. In view of the provision in s 35(1) of the constitution to the effect that a court may have regard to comparable foreign case law, it is an open question whether American or German case law should be regarded as "comparable".

45 See *idem* 407–408; Van der Walt 1993 *Recht en Kritiek* 290–292.

to the effect that the contents and limits of ownership are determined by statute, and that ownership entails duties for the owner and should be exercised in the public interest.[46] In order to make sense of this apparently duplicated property guarantee, the German constitutional court[47] has decided that the first positive guarantee should be seen as a guarantee not of individual ownership but of the *institution of private ownership* as such, thereby interpreting a certain socio-economic programme into the constitution.[48] While the positive element in section 28(1) of the South African property clause does not really compare to the German article 14 in any substantial aspect, it is noteworthy that this section does constitute such a positive guarantee, and it may well be argued that this clause will prevent the legislature from making laws that do not deprive individuals of their property rights as such, but that undermine or prevent the existence of the kind of socio-economic structure which allows for individuals to acquire, hold and dispose of private rights in property.[49] Such an interpretation of section 28(1) may well provide the spark that can ignite a huge constitutional conflagration concerning the socio-economic nature and structure of South African society, especially if a head-on collision between a reform-oriented government and a reactionary justiciary is allowed to take place. The only consideration that seems to make such a development unlikely is the relative inaccessability of German sources and the fact that the concept *rights in property*, although it is perfectly understandable, does not have a clearly worked out positive content that can be protected in the way ownership is protected in German law.[50]

Vertical versus horizontal enforcement

One of the most important questions concerning the scope and application of a constitutional property clause is whether it can be enforced horizontally. Generally speaking, in terms of classical liberalist constitutional theory a bill of rights and its entrenched rights are guaranteed against improper state interference, and the enforcement of these rights usually takes place on the vertical level against state action rather than on the horizontal level amongst individuals. However, the tenth report of the Technical Committee at Kempton Park already made reference to "horizontal seepage" of the entrenched rights, and it can be argued that section 35(3) will ensure that such seepage takes place. Although section 7(1) refers only to the enforcement of rights entrenched in chapter 3 against state organs, section 35(3) provides that "the spirit, purport and objects" of chapter 3 should be taken into account when interpreting "any law" and in the "application and development of the common law and customary law", which seems to mean that a court must take the entrenched rights and freedoms in chapter 3 into account when applying principles of common law.

Such horizontal "seepage" could result in the creation and enforcement of extra restrictions and limitations on common-law or customary-law rights. The

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46 See Van der Walt 1993 *Recht en Kritiek* 270–271.

47 See *idem* 270–275 for references.

48 Originally the idea was that the German Basic Law, and particularly the property clause in article 14, should be "neutral" with regard to economic systems, but in fact this interpretation provides a guarantee for the continued existence of a market economy based on private ownership of property. See Van der Walt 1993 *Recht en Kritiek* 47–50.

49 Once again the question here is whether or not German case law is "comparable".

50 See Van der Walt 1993 *SA Public Law* 304–305.

following example illustrates the problem with which the courts might be faced in this regard: A landowner who grants a short term lease with regard to his/her property may argue that section 28 provides a constitutional guarantee of his/her rights in the property, and that the common-law rights and freedoms inherent in his/her ownership are protected in terms of section 33(3). Generally speaking, a common-law landowner has the right to lease his/her property to anybody s/he choses. However, should the same landowner subject his/her willingness to grant a lease to a proviso regarding the race, sex or religious beliefs of the prospective lessee, the lessee could argue that common-law rights in property are retained in terms of section 33(3) only to the extent that they are not inconsistent with chapter 3 of the constitution, which includes a strict prohibition against discrimination on the basis of race, sex or religious beliefs. It is also of no avail to argue that the entrenched rights in chapter 3 operate only as between state and citizen, because section 35(3) states unequivocally that "the application . . . of the common law" should also be done with due regard for "the spirit, purport and objects" of chapter 3. The landowner could, therefore, find his/her "common law right to discriminate" (or, rather, to dispose of the thing freely) on the basis of race, sex or religious beliefs (or any other basis) when disposing of his/her entitlements effectively curtailed by the new constitution.

This raises a further question: is this curtailment of the landowner's common-law "right to discriminate" or to dispose of the thing freely a "deprivation of rights in property" in terms of section 28(2)? And, if it is, does it amount to a deprivation which is also an expropriation? In view of the recent argument about a curtailment of the landowner's *ius disponendi* in *Pearly Beach Trust v Registrar of Deeds*,[51] one could argue that such a restriction of the landowner's common-law right to dispose freely of the object or of his/her entitlements to it does indeed amount to a fundamental "taking" of, at least, *rights in* property.[52] Once again the courts will be faced with a very difficult problem that could have been avoided through more careful formulation.

The possible effects of this kind of argument with regard to the free exercise of customary land rights are potentially even more drastic, especially with regard to the rights of women.

3 3 Expropriation and compensation versus regulatory police powers

The distinction between expropriation and police power

One of the aspects of the property clause which will undoubtedly cause litigation is the expropriation clause. Chaskalson[53] has shown that the American property clause is interpreted in such a way that it provides protection for property in two ways, first on the basis of due process of law, and secondly on the basis

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51 1990 4 SA 614 (C). See in this regard 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.

52 The importance of this specific formulation is once again highlighted in this case. It is possible to argue that the restriction in question does not amount to a taking of *property*, but it is much more difficult to argue that it does not amount to a taking of *rights in* property.

53 1993 *SAJHR* 395–401; see further Van der Walt 1993 *Recht en Kritiek* 269–270.

of just compensation for takings or expropriations. The distinction between the two relates to a distinction between two powers of the state, namely the power of eminent domain (expropriation of property for public use against just compensation) and that of police power (the regulation of property use and exploitation, for which no compensation is payable). Compensation is paid only in the former case, when property is taken for public use, but the due process clause governs both taking and non-compensated interference with private property in the form of exercise of police power. This power of the state is concerned with legislation and other state actions concerned with state duties, such as land-use planning and control, town planning and zoning, environmental conservation, health regulations and so forth, which may well amount to restrictions and limitations of owners' freedom to use and exploit their property, but not to actual takings or expropriations of that property.

The first problem with regard to expropriation and compensation that will probably result in litigation, is the distinction between expropriation and police power itself. Because of the fact that compensation is paid for expropriation but not for interference in terms of the police power, it stands to reason that the main question to be answered in any particular instance is whether the state action in question amounts to a taking. A conservative or reactionary interpretation of the property clause (as exemplified by the *Lochner* period in the United States) will probably tend to provide extensive protection for private property interests by extending the scope of what is regarded as compensatable taking and restricting the scope of what is regarded as non-compensatable exercise of the state's regulatory powers. The problems involved in making this decision are illustrated very well by the respective decisions of De Villiers J and McCreath J in the *Diepsloot* case: in effect (in American terminology) De Villiers J found that the state action in question amounted to an unconstitutional taking (unconstitutional because compensation was not provided for), whereas McCreath J regarded it as a justified exercise of the state's police power.

Inverse condemnation

In American constitutional jurisprudence the distinction between taking and exercise of the state's police power was complicated further by the concept of inverse condemnation (constructive expropriation), which was developed to deal with cases where the state action ostensibly amounted to nothing more than an exercise of police power, but in fact resulted in the affected individual effectively losing his/her property or an aspect of its use and enjoyment. Important cases dealing with this distinction resulted in a number of state actions being classified as takings, and accordingly a number of statutes were found to be unconstitutional: an act prohibiting the mining of coal in a manner which causes subsidence of soil was found to make the mining of coal unprofitable and effectively destroyed the right to mine the coal; environment legislation which prohibited or prevented certain uses or exploitation of private property; planning legislation and others.[54]

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54 Chaskalson 1993 *SAJHR* 395 – 401 provides a summary and discussion of the most important cases. See further Michelman "Property as a constitutional right" 1981 *Washington and Lee LR* 1097 – 1114; Sax "The constitution, property rights and the future of water law" 1991 *Public Land and Resources Law Digest* 53 – 78; and further sources cited by Van der Walt 1993 *Recht en Kritiek* 269 – 270.

At first blush this trend in American constitutional jurisprudence seems fair and just, protecting as it does the rights of private property owners against undue state interference. However, this particular coin has a flipside, which means that the state is often prevented from exercising important and even vital regulatory powers, or is allowed to exercise them only at great cost. The important point here is that every government has to take certain regulatory steps in order to promote public health, environmental conservation, land-use planning and control, sensible and sustainable exploitation of resources and control ensuring that the exercise of property rights does not harm others. In a period of social and economic reform and reconstruction, an overly zealous judiciary can effectively put paid to the government's efforts to promote social and economic reform by employing the concept of inverse condemnation. This is illustrated clearly by the American New Deal crisis during the early decades of this century and German efforts at reconstruction just after World War II. It is obvious that a new South African government will have to take legislative and executive steps not only with regard to normal governmental duties relating to health, conservation and planning, but also to promote, encourage and accelerate the process of social and economic reform and reconstruction aimed at eradicating and reversing the legacy of apartheid. Should the American example be followed in this regard, and the concept of inverse condemnation be applied to frustrate socio-economic reform legislation, it is inevitable that the ensuing constitutional crisis will detrimentally affect both the process of reform and the establishment of constitutionalism.

The German approach

Interestingly enough, the initial theory regarding the property guarantee in German constitutional law was similar to the American one, in the sense that it was argued (in accordance with nineteenth-century private-law theory) that private ownership was unlimited in principle, thereby characterising all restrictions and limitations as exceptions that had to be proved, justified and compensated – more or less the same approach used by De Villiers J in the *Diepsloot* case.[55] However, subsequent developments led to the dismissal of this theory in favour of a new one that was more properly suited to the constitution. In terms of currently accepted German constitutional theory article 14 is concerned with the static abstract *essence* of ownership, whereas the actual temporal appearance, content and limits of ownership were determined by the law as it stands at a particular point in time. Article 14 provides that the content and limits of ownership are determined by law, that ownership implies duties for the owner, and that its exercise has to serve the public interest. These provisions have been interpreted in such a manner that they imply a constitutional duty resting upon the legislature to make laws which determine the content and limits of ownership, outline the duties that ownership entails for the owner, and ensure that the exercise of ownership benefits the public interest. It is consequently much harder to argue that a law which, in the public interest, prevents an owner from using or exploiting his/her property in a certain way amounts to a taking, since the law itself determines the content and limits of ownership, and obviously nothing can be taken away that was not given in the first place. The guarantee of ownership as an institution, on the other hand, ensures that the exercise of

55 See Van der Walt 1993 *Recht en Kritiek* 273 – 274 and sources cited there.

this constitutional legislative duty does not amount to the abolition or undermining of ownership as such. Simultaneously the expropriation clause in article 14 ensures that expropriation of private property for public use takes place subject to just compensation.[56]

Implications for the South African situation

The expropriation clause of the proposed bill of rights is contained in clause 28(3), which provides that expropriation of private property by the state shall be permissible in the public interest, subject to compensation. In the absence of agreed compensation, a court of law must determine just and equitable compensation while taking into account all relevant factors, including the socially relevant ones mentioned above. A number of problems are raised by this provision.

First of all, the question whether a particular state action amounts to an exercise of the state's police power or an expropriation of property will no doubt occur regularly in future, and the absence of a clear due process clause in the South African proposal will definitely make it more difficult to find and justify a proper choice between these alternatives than in American law. In American law, as was illustrated above, the distinction between police power and takings is based upon the distinction between the *due process* and the *takings* elements of the property clause, on the basis of which it is inferred that certain state actions that interfere with private property can nevertheless be justifiable, even in the absence of compensation, because they do not amount to a taking of property. The absence of a due process clause in the South African proposal can make it more difficult to make and apply this distinction, with the result that the legality and justifiability of regulatory state actions could become a massive headache for the courts confronted with claims that these actions amount to expropriations.

The South African version of the property clause provides for expropriation in the public interest and against compensation in section 28(3). This subsection is complicated enough as it is, having regard to the detailed provisions regarding payment of compensation, but it is complicated even further by the late inclusion of subsection 28(2).[57] On the surface it seems that this provision was meant to act as a due process clause, but its phrasing leaves much to be desired. On the one hand its inclusion as a due process clause should be welcomed, because that should make it easier for the courts (following the American example) to formulate a clear distinction between the exercise of the state's expropriation power and regulatory or police power respectively. However, the use of the term "deprivation" in this provision can create the impression that this clause refers to expropriation only, thereby leaving the uncomfortable question whether the exercise of the state's police powers does not have to comply with the due process requirement as well. If it does, which surely must be the preferable option, it follows that such exercise of police power must also be regarded as "deprivation". Obviously such an interpretation will require very delicate footwork by the courts in order to construe a distinction between "expropriation" and "deprivation" of rights in property in order to avoid the

56 See in general *idem* 272 and sources cited there.

57 This subsection was not contained in either the seventh or the tenth reports of the Technical Committee.

conclusion that compensation may be claimed for exercise of police power. Furthermore, it will have the very unfortunate effect that such regulatory state action would be construed as deprivation of private property, which confirms the outdated but still firmly entrenched perception that ownership (or property) is basically an unlimited right which is restricted by the state. In this regard the German example is to be preferred, since article 14 makes it clear that the content and limits of ownership are determined by law – in other words, regulatory legislation does not "deprive" the owner of what should ideally be an unlimited right, but rather determines what the content and limits of that right are.

In all probability, the Negotiating Council wanted this subsection to apply to expropriation and exercise of the state's regulatory powers alike, in which case the proper formulation should have been something like "[n]o expropriation or statutory restriction of rights in property shall be permitted otherwise than [unless it is?] in accordance with a law".

A further problem is presented by the choice of approach in making the distinction between taking or expropriation and exercise of police power. In this regard the difference between the American and the German approaches to the question of expropriation is a fundamental one, since conflicts between the protection of individual property rights and the promotion of social interests are going to arise whenever a property rights case comes before the constitutional court (or any other court competent to hear the matter) for decision. The nature and complexity of this choice is illustrated by the discussion of the *Diepsloot* example above. It is possible to argue in favour of the socially responsible approach followed by McCreath J on the basis of the interpretive paradigm of the property clause as set out above, but it remains to be seen whether this approach will find favour with the courts.

The internal structure and logic of clause 23 also raise a number of questions. The question whether a particular expropriation has been done *for public purposes* as required by the clause could cause a difference of opinion. In addition, the question may be asked what *agreed compensation* entails, because on the basis of the clause the agreed compensation need not be *just and equitable* – the latter phrase seems to apply only to compensation determined by the court in the absence of agreement. In fact, all the social factors to be taken into account by a court when determining just and equitable compensation apply in the absence of agreement only, which seems to suggest that agreement on compensation can be reached without taking these factors into account. Moreover, as the clause stands social factors such as the manner of acquisition might not be raised in the determination of whether an expropriation is justified, although they have to be considered when determining what just and equitable compensation for such an expropriation would be.

3 4 Restitution of land rights

The separate section on the restitution of land rights (sections 121 – 123) that was included in the constitution during the last session of the Negotiation Council creates a whole new set of problems. The first problem is posed by the fact that this section is included in the constitution, but not with the fundamental human rights in chapter 3. The question is how the relationship between chapter 3 and section 121 must be seen. Obviously this section and section 28 are closely related, as is pointed out several times in the course of the section, but

at the same time the important interpretive principles contained in section 35 do not seem to apply to the section on restitution, which makes it very difficult to interpret. In its tenth progress report[58] the Technical Committee included a shorter subsection (4) on restitution of land rights in section 28, which made it much easier to interpret. The formulation of the tenth progress report made it clear that the section on the restitution of land rights was included in section 28 for two reasons, namely to provide those who have been dispossessed of land rights with a claim to restitution and to ensure that expropriations for restitution will qualify as expropriations for public purposes. That made it much easier to appreciate the relationship between the various subsections of article 28 than is the case with the present system.

Despite the problems mentioned in the previous paragraph, the section on restitution of land rights is detailed enough to give the courts some assistance with interpretation. Of course, one can also argue that the inclusion of such a detailed provision in the constitution will create more problems than it can solve, and that it would have been better to lay down the basic principle in the constitution, coupled with a command for the legislature to enact a law in which the details are taken care of (as was the case in the tenth progress report). However, despite this criticism, it is nevertheless true that the detailed section as it stands can help the court that has to interpret it, and since the section can only come into effect once a law has been promulgated to set up a land commission and procedures, one can assume that the act in question will eventually assist the court to an even greater degree.

The one problem with this section that cannot be argued away so easily is concerned with the provisions regarding the ownership of land. Section 123(1) provides that unsettled claims that reach the court are treated differently depending upon the question whether the land in question is *in the possession of the state* or *in the possession of a private owner*. From the section it seems clear enough that the Negotiating Council actually meant these provisions to refer to *state ownership* and *private ownership* of land, but the clumsy wording that was eventually used will no doubt create problems for the courts unless the section is amended. If it remains as it is the question will be how the term *possession* must be interpreted. The narrow, technical meaning of possession *animo domini* is clearly not acceptable, since that refers to the rather exceptional case where someone is in actual physical control of the land as if s/he were the owner (with the intention of an owner), while in fact s/he is not. This category includes thieves (*mala fide* possessors) and those who mistakenly believe that they are the lawful owners (*bona fide* possessors), and neither of these categories looks like the kind of relationship the Council had in mind. If the term *possession* is interpreted in this way, it will lead to absurd results, as it would mean in practice that very few, if any, claimants would ever succeed with a claim for restitution.[59] Moreover, it would lead to the absurd result that the second case to which the section refers, would apply to *private owners* who are simultaneously *possessors*, that is, non-owners. It seems safe to assume that this narrow technical meaning is not the correct one to apply to this section.

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58 Dated 1993-10-05.

59 Because very few pieces of land would qualify as being in the possession (in this narrow sense) of either the state or a private owner.

A second possibility is to interpret *possession* according to its wider meaning, which still distinguishes it from ownership, but is wider in the sense that it refers to all non-owners who exercise control over the property for their own benefit.[60] This seems to be a more acceptable alternative, since it is not restricted to possessors *animo domini*, which means that it would include lessees, usufructuaries and so on. However, it does not solve the problem, since it is still too restrictive. On the one hand, it would lead to the absurd result that it would apply only to "state land" which is held by the state as a lessee or a similar sort of holder, but not as owner. On the other hand, it would restrict "private land" in the same way, and still leave the problem that it refers to private owners who are not owners.[61]

A third possibility is to interpret *possession* very widely so as to include owners as well as possessors in the narrow and in the wider sense. This seems to be a reasonable way in which to account for the fact that the word "possession" has been used – after all, the court must attach a meaning to the fact that a certain term is used. On the other hand, this interpretation does not seem to be quite acceptable either, since one may ask whether it could really have been the intention to include non-owners in the scope of this section. It is especially in the context of "state land" that any interpretation that is restricted to or even includes non-owners seems unlikely.

The only reasonable interpretation seems to be that "possession" simply means "ownership". In a sense such an interpretation seems rather free, especially since the technical distinction between ownership and possession is one of the most basic and fundamental characteristics of the law of property, but on the other hand, no other interpretation is acceptable either, and in most cases the problems with other interpretations are more serious. It would seem, then, that the court will be forced to read "ownership" for "possession" when interpreting this section.

A further problem is created by the fact that section 121 refers to the restitution of "rights in land". Whereas section 28(1) refers to "rights in *property*", which cannot be read as real rights (rights *in rem*) only, section 121 can be restricted to real rights in *land* (which are rights *in rem*). The result is that the restoration of rights in terms of section 121 is more limited than the guarantee of rights in terms of section 28 – a result that was probably not intended.

4 SUMMARY AND CONCLUSIONS

In this article the interpretation of a property clause in the new constitution for South Africa is discussed with reference to areas of conflict that could arise in eventual constitutional litigation regarding the property clause. As may perhaps be expected, these areas of conflict are essentially related to the fundamental conflict between individual property interests as entrenched in the property clause and social interests that will probably be promoted in a new government's socio-economic restructuring programme. It was pointed out that this kind of conflict is not at all unique, and that it has characterised the development of constitutional jurisprudence in various other countries such as the

60 This is more or less the meaning attached to the term in the context of the *mandament van spolie*.

61 Since it refers to land "in the possession of a private owner".

United States, Germany and India. It was also pointed out that the conflict in question is already present in contemporary South African jurisprudence concerned with land rights, as illustrated with reference to recent cases dealing with a related problem, albeit in the absence of constitutional provisions in that regard. The cases in question prove, furthermore, that both present and future jurisprudence in this regard is determined very fundamentally by the interpretive approach of the court confronted by this conflict, and that the approach of the court is in its turn determined by the broad interpretive paradigm within which the decision is taken. This paradigm can either favour the vigorous protection of private property rights or allow for the promotion of social values and interests. The constitution can influence or determine the interpretive paradigm to the extent that it includes or mentions these values and interests and their effect explicitly.

Analysis of the property clause indicates that certain programmatic elements that will probably represent some of the goals striven for by a new government have been included in the constitution, albeit in a rather inconclusive fashion. It may be argued that the interpretation and application of the proposed property clause should be inspired by the values referred to in the constitution, and it seems likely that such an approach will steer the interpretation of the property clause away from the old-fashioned individual paradigm and towards the social paradigm, as illustrated by post-World War II German and American jurisprudence. At the same time, experience in other jurisdictions seems to suggest that a too-heavy reliance on the activism of the courts may not be the ideal way in which to ensure the promotion of socio-political ideals or programmes.

Chaskalson[62] has indicated that the American jurisprudence on the scope of the property clause, the distinction between expropriation and police power and the payment of compensation for taking is arbitrary in the sense that the American Supreme Court approaches property rights cases in an *ad hoc* fashion. This is borne out by the way in which conservative or reactionary and more socially-minded tendencies in the interpretation of the American property clause have fluctuated since the first decade of the twentieth century: initially against the New Deal legislation during the *Lochner* era, then towards a more neutral position following threats to restructure the Supreme Court, and once again towards greater conservatism since the 1980s. In India repeated constitutional clashes between the government and the judiciary resulted in the property clause being removed from the constitution altogether. This illustrates that judicial activism is too arbitrary in itself to provide a predictable and dependable guide for the development of guidelines for the solution of this fundamental conflict between individual and social interests. In the final analysis this general conclusion demands a renewed and perhaps radical re-evaluation of the nature and function of the whole concept and practice of fundamental human rights. Such a venture must necessarily fall outside the scope of this article, but suffice it to say that it requires a thorough reconsideration of the liberal tradition itself and of the relation between individuals and the state, individual rights and the interests of the state community, and private and public law.

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62 1993 *SAJHR* 395 403 409–411; cf Van der Walt 1993 *Recht en Kritiek* 287–297.

In particular, the conclusion reached above suggests a fundamental re-evaluation of existing ideas about various categories of human rights. In an interesting article, Haakonssen[63] points out that a very important theoretical distinction between so-called *perfect* and *imperfect* rights, which also seems to underlie the public-law distinction between so-called *first-generation* or *blue rights* on the one hand and *second-* and *third-generation* or *red* and *green rights* on the other,[64] is closely related to the sets of distinctions between *individual* and *social rights*, *legal* and *moral rights* and *legally enforceable* and *unenforceable rights*. In brief, this would mean that our perceptions of individual rights, such as the right to property, would tend to coincide with our perceptions of so-called perfect first-generation rights that are properly at home in a constitution and legally enforceable. In terms of this same perception, however, social rights would be regarded as imperfect second- or third-generation rights that are of a moral rather than a truly legal nature and, therefore, not really legally enforceable or at home in a constitution. However, in an excellent analysis of the right to housing, which is traditionally regarded as a second-generation right, Budlender[65] has argued rather convincingly that the object of this right should be regarded not from the (traditional) point of view in terms of which all fundamental rights must provide an individual with a subjective right against the state, but rather from the (more social or public law-oriented) point of view that certain rights (such as the right to housing) prevent the state from acting in a certain manner. In this case, Budlender argues, the true objective and effect of a constitutional right to housing would have been to prevent the state from enacting the Prevention of Illegal Squatting Act 51 of 1952.[66]

In the light of this perspective, it seems possible to argue that a number of human or fundamental rights differ from the traditional perception of human rights both in their nature and enforcement, and that these differences should be taken into account when drafting or interpreting a bill of rights or a charter of fundamental rights. Historically, the "different" rights might have been neglected or underestimated simply because their proper purpose and manner of enforcement have been misconceived or ignored, but in the proper perspective these rights are supposed to – and should – serve the common or social interest, thereby producing a proper balance between individual and social rights and interests and, ultimately, alleviating the burden now placed on the courts. In this way it seems possible to produce a more radical (in the sense of going to the roots of the issue) and perhaps less arbitrary way of dealing with the conflict between individual and social rights and interests. However, a much more detailed analysis of the relevant sources[67] and a more cohesive development of the argument than is possible here is required. In the meantime, it seems that mundane considerations such as lawyers' ability to read English better than German may have a greater influence on the development of South African property law than will considerations of justice or common sense.

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63 1985 *Political Theory* 255.

64 *Idem* 255 – 260.

65 "Towards a right to housing" in Van der Walt (ed) *Land reform and the future of land-ownership in South Africa* (1991) 45 – 52.

66 47.

67 Such as Roman law, medieval law, the writings of authors who influenced the development of natural-law thinking such as Grotius, Pufendorff and Thomasius and the influential nineteenth-century German pandectists.

Die herkoms en ontwikkeling van *domicilium* as verbindingsfaktor in internasionale privaatreg

E Schoeman
BLC LLB
Senior Lektrise in die Internasionale Privaatreg, Universiteit van Suid-Afrika

SUMMARY

The origin and development of *domicilium* as connecting factor in private international law

This article explores the utilisation of domicile as a connecting factor in private international law from the time of the Roman Empire up until the present day. Although it is highly debatable whether a system of private international law existed in the Roman Empire, questions concerning the conflict of different legal systems certainly arose and concepts such as *domicilium* and *origo* were employed to link an individual to a certain community and its legal system. The definition of domicile found in the *Corpus iuris civilis* (*C* 10 39 7), constitutes to this day the starting point of a discussion on the meaning of the concept *domicilium*. It is also in their commentaries on this definition in the *Code* that the views of the old authorities are expounded and that the concept *domicilium* is adapted to changed circumstances. During the era of codification in Europe in the eighteenth century most European legal systems opted for *nationality* as a connecting factor. English law, remaining uncodified, retained domicile as connecting factor and the influence of English law, especially in regard to the moulding of the concept to meet the specific needs of the Empire, can clearly be seen in South African case law. The article concludes with a brief discussion of the recently promulgated South African Domicile Act 3 of 1992.

1 INLEIDING

Wanneer die geskiedenis van internasionale privaatreg in werklikheid begin het, is moeilik om te bepaal. Daar bestaan nie eers eenstemmigheid oor die vraag of daar van 'n Romeinse internasionale privaatreg gepraat kan word nie.[1] Wat wel van belang is, is dat *origo* (vry vertaal: burgerskap)[2] en *domicilium* (domisilie), twee regsbegrippe wat hedendaags 'n belangrike rol by die aanwysing van die

1 Lipstein *Principles of the conflict of laws, national and international* (1981) 3. Juenger "General course on private international law (1983)" 193 *Hague Recueil* 1985 IV 123 136–139. Yntema "The historic basis of private international law" in Culp (red) *Selected readings on conflict of laws* (1956) 30 33. Jolowicz en Nicholas *Historical introduction to the study of Roman law* (1972) 103. Phillipson *The international law and custom of ancient Greece and Rome* vol II (1911) 34 verwys na 'n verdrag tussen Romeinse en Latynse stede (*foedus Cassianum*) uit 493 vC waarin bepaal is dat dispute wat uit private kontrakte ontstaan deur die hof van die plek waar die onderneming aangegaan is, besleg moet word. Kyk ook in hierdie verband Plescia "Conflict of laws in the Roman Empire" 1992 1 *Labeo* 30 32 ev.

2 Hedendaags word *nasionaliteit* op die Vasteland as verbindingsfaktor gebruik maar in die Romeinse tyd was Romeinse *burgerskap* deurslaggewend.

gepaste regstelsel (*lex causae*) in internasionaal-privaatregtelike aangeleenthede speel, reeds baie duidelik in die Romeinse reg geïdentifiseer is.[3] Die doel met hierdie bydrae is om die ontwikkeling van hierdie twee begrippe (met die klem op *domicilium*) en die aanpassing daarvan by veranderde omstandighede te ondersoek.

2 DIE TYDPERK VAN DIE WES-ROMEINSE RYK (750 vC – 476 nC)

Beide *origo* en domisilie het in die Romeinse reg ten doel gehad om 'n persoon met 'n spesifieke gemeenskap te verbind: dit het die persoon onderworpe gestel aan die betrokke *municipium* (stadsgemeenskap)[4] se laste (*munera*) asook aan die jurisdiksie van die betrokke *municipium* se howe en die spesiale reg (afgesien van die Romeinse reg waaraan alle Romeinse burgers onderworpe was) van die *municipium*.[5]

Die term *origo* het op 'n spesifieke wyse van verkryging van Romeinse burgerskap gedui, naamlik deur geboorte binne 'n wettige huwelik waar die vader self 'n Romeinse burger was.[6] Aangesien hierdie wyse van verkryging van burgerskap die algemeenste voorgekom het, is die term *origo* weldra gebruik om burgerskap self aan te dui, ongeag die wyse waarop dit verkry is.[7] Deur geboorte binne 'n wettige huwelik het 'n kind die burgerskap van sy vader verkry terwyl 'n buite-egtelike kind die burgerskap van sy moeder verkry het.[8] Burgerskap kon ook verkry word deur aanneming, emansipasie en *allectio*.[9] Dit was heeltemal moontlik om burgerskap van meer as een gemeenskap te hê, byvoorbeeld waar 'n seun (wat reeds deur afkoms by geboorte burgerskap verkry het) later deur 'n ander persoon aangeneem is, het hy die burgerskap behou wat hy deur *origo* verkry het en die burgerskap van sy aannemende vader bygekry.[10] Net soos dit moontlik was om burgerskap van meer as een gemeenskap te hê,

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3 Von Savigny *Private international law: a treatise on the conflict of laws* (Guthrie se vertaling) (1880) 80; Nygh "The reception of domicil into English private international law" 1961 *Tas Univ LR* 555; De Winter "Nationality or domicile?" 128 *Hague Recueil* 1969 III 349.

4 *Municipia* verwys na die groot aantal stedelike gemeenskappe wat naas die stad Rome op die oorblywende grondgebied van Italië ontstaan het. Elke sodanige gemeenskap het sy eie amptenare met jurisdiksie en ook eie wetgewing gehad. Alhoewel die grondwetlike struktuur van die provinsies aanvanklik sowel van mekaar as van dié van Italië verskil het, het die provinsies geleidelik dieselfde struktuur as dié van Italië aangeneem. Die gevolg was dat bykans die hele Romeinse ryk gedurende die 2de en 3de eeue nC uit sulke stadsgemeenskappe (*civitates* of *respublicae*) bestaan het en die inwoners van die ryk óf aan Rome óf aan een van die stadsgemeenskappe verbonde was. (Vir meer besonderhede kyk Von Savigny 89 94 – 95; Voet *Commentarius ad Pandectas* 50 1 1.)

5 Von Savigny 88 110 ev.

6 *Idem* 90; Phillipson vol I 250 wat van die "nationality of origin" praat.

7 Von Savigny 90. Kyk ook Nygh 555: "So long as Rome distinguished between the law applicable only to its citizens and the law applicable to foreigners, *origo* must have remained a concept of primary importance. In essence it denoted the claim to citizenship by descent primarily through blood relationship and later through those legal relationships such as manumission and adoption which create a situation akin to it."

8 Phillipson vol I 250.

9 Vir 'n volledige uiteensetting van die wyses waarop burgerskap verkry kon word, kyk Von Savigny 90 ev.

10 *Idem* 92. Pluraliteit van burgerskap dui nie hier op burgerskap van verskillende soewereine state nie, maar op burgerskap van verskillende stadsgemeenskappe binne die Romeinse ryk (vgl ook Phillipson vol I 211). Nadat Romeinse burgerskap deur die *lex Julia* aan al die inwoners van Italië en in 212 nC deur Caracalla aan al die inwoners van die provinsies van die ryk verleen is, het die grootste gedeelte van die bevolking burgerskap van Rome asook van een of ander stadsgemeenskap gehad (Von Savigny 95).

was dit ook moontlik dat 'n persoon glad nie burgerskap van enige gemeenskap kon hê nie, byvoorbeeld 'n vreemdeling wat nie deur *allectio* 'n burger van enige Romeinse gemeenskap geword het nie.[11]

Domisilie word soos volg in die *Corpus iuris civilis* omskryf:

> "There is no doubt that individuals have their domicile where they have placed their household goods[12] and the greater part of their property and fortunes, and no one shall depart from thence unless something requires him to do so, and whenever he does leave the place, he is considered to be on a journey, and when he returns, to have completed it."[13]

Domisilie is hoofsaaklik deur vrye keuse verkry hoewel daar in sekere gevalle 'n domisilie van afhanklikheid was, byvoorbeeld die domisilie wat 'n kind by geboorte verkry het: dié van sy vader indien hy binne 'n wettige huwelik gebore is en dié van sy moeder indien hy nie binne 'n wettige huwelik gebore is nie. Nog 'n voorbeeld van so 'n domisilie van afhanklikheid is dié van 'n getroude vrou wat die domisilie van haar man gevolg het.[14] 'n Domisilie van keuse is gevestig deur aan twee vereistes te voldoen, naamlik werklike fisiese teenwoordigheid op 'n bepaalde plek (die *factum*-vereiste) en die bedoeling om permanent (of ten minste onbepaald) daar te bly (die *animus*-vereiste).[15] Net soos in die geval van burgerskap, kon 'n persoon in beginsel meer as een domisilie hê, byvoorbeeld waar 'n sakeman besighede in verskeie sentra gehad het en ook sy verblyf daarvolgens versprei het. Pluraliteit van domisilies was egter nie so 'n algemene verskynsel nie. Dit was ook moontlik dat 'n persoon sonder 'n domisilie kon wees, byvoorbeeld waar 'n persoon sy domisilie van keuse verlaat het en nog nie 'n ander domisilie gevestig het nie, asook in die geval van die *vagabundus*.[16]

Hoewel beide *origo* en *domicilium* 'n persoon aan een of meerdere stadsgemeenskappe verbind het, was daar tog, regswetenskaplik gesproke, 'n verskil tussen dié twee verbindingsfaktore:

> "Birth, manumission, a call to public office, or adoption renders a man a citizen (*civis*), but his domicile makes him a resident (*incola*), as the Divine Hadrian clearly stated in his Edict."[17]

Wat jurisdiksie aanbetref, kon 'n verweerder, teoreties gesproke, voor die hof van elke plek waaraan hy deur middel van *origo* en/of *domicilium* verbonde

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11 Kyk Von Savigny 92 vir verdere vbe in dié verband.

12 Oor die vertaling van *larem* bestaan daar nie eenstemmigheid nie. Scott vertaal dit met "household goods" en dit is ook die betekenis wat in die Engelse saak *Lord v Colvin* (1859) 62 ER 141 144 aan *larem* gegee word: " '*Larem*', which even to a Roman was a figurative expression, may be properly translated 'household', meaning by that term the united body, consisting of a man and his wife and children and domestics dwelling together in one abode." In 'n ou Suid-Afrikaanse saak, *Rosenblum v Marcus* 1884 5 NLR 82 84, word *larem* egter met "household gods" vertaal. As 'n mens na Voet (*Commentarius ad Pandectas* 5 1 92) se omskrywing van domisilie kyk, wil dit voorkom of ons hier met die vestiging van 'n huishouding te doen het: "Everyone can also be sued by virtue of domicile, in the place, that is to say, in which he has set up his home and the main body of his property and fortunes, from which he is not likely to depart if nothing calls him away, and which when he has left he appears to be travelling abroad" (Gane se vertaling). Dit is ook die betekenis wat Story *Commentaries on the conflict of laws* (1883) 50–51 daaraan gee.

13 *C* 10 39 7 (Scott se vertaling).

14 Von Savigny 100; Phillipson vol I 246–247.

15 Phillipson vol I 246.

16 Von Savigny 107; Phillipson vol I 247–249.

17 *C* 10 39 7 (Scott se vertaling).

was, gedaag word. Dit blyk egter dat die *forum domicilii* van die verweerder bó sy *forum originis* verkies is vir doeleindes van jurisdiksie aangesien dít die plek was waar die verweerder in werklikheid gewoon het.[18] Met betrekking tot die plaaslike persoonlike reg van toepassing op 'n bepaalde individu was *origo* die beslissende faktor. Indien 'n persoon deur *origo* en *domicilium* onderskeidelik aan twee verskillende stadsgemeenskappe verbonde was, was sy persoonlike reg dié van die gemeenskap waaraan hy deur middel van *origo* verbonde was.[19] Waar 'n persoon meer as een *origo* gehad het, het die een wat eerste verkry is, gegeld.[20] Indien 'n persoon glad geen burgerskap gehad het nie maar wel 'n *domicilium*, het laasgenoemde sy persoonlike reg bepaal.[21] Wat die posisie sou wees indien 'n persoon nie in enige stadsgemeenskap burgerskap of domisilie gehad het nie, is moeilik om te verklaar. Von Savigny is van mening dat "it was certainly the regular and most usual case that a person had citizenship in one city only, where he had also his domicile".[22]

Die begrippe *origo* en *domicilium* het in die Romeinse reg hoofsaaklik 'n administratiewe karakter gehad, naamlik om 'n individu aan 'n bepaalde stadsgemeenskap se laste, jurisdiksie en reg onderworpe te stel, en het nie as internasionaal-privaatregtelike verbindingsfaktore wat vir 'n bepaalde probleem 'n *lex causae* aanwys, soos wat ons dit vandag ken, gefunksioneer nie.[23] Dat daar wel probleme van 'n internasionaal-privaatregtelike aard, veral vóór 212 nC (toe Romeinse burgerskap aan al die inwoners van die Romeinse ryk verleen is), moes ontstaan het, is nie te betwyfel nie.[24] Reeds ongeveer 242 vC is die amp van die *praetor peregrinus* ingestel om geskille tussen vreemdelinge (*peregrini*) onderling en tussen vreemdelinge en Romeinse burgers binne die Romeinse ryk te besleg, aangesien die *ius civile* net op Romeinse burgers van toepassing was.[25] Die *praetor peregrinus* het ruimskoots uit die *ius gentium* geput.[26] Daar is egter nie 'n stelsel van regskeusereëls, soos ons dit vandag ken, ontwikkel nie. Internasionale privaatreg (of liewer, oplossings vir probleme van 'n internasionaal-privaatregtelike aard) is eerder as deel van die *ius gentium*, wat vir alle volke gegeld het, beskou. Alhoewel Romeinse burgerskap in 212 nC aan al die inwoners van die ryk verleen is, kan nie aanvaar word dat die diversiteit van plaaslike munisipale regstelsels, en daarmee saam konflikte tussen verskillende persoonlike regstelsels, eensklaps verdwyn het nie.[27] Daar was egter, soos Jolowicz dit stel,

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18 Von Savigny 112 ev; Nygh 557.
19 Kyk Von Savigny 120 vir 'n bespreking van die redes hiervoor, oa omdat *origo* 'n vroeër en meer superieure band as domisilie was.
20 Von Savigny 121.
21 *Ibid.*
22 109.
23 Nygh 557.
24 Hoewel internasionaal-privaatregtelike probleme bestaan het, kan daar nie sonder meer aanvaar word dat daar wel 'n Romeinse internasionale privaatregstelsel ontwikkel het nie, ten minste nie soos ons moderne stelsels nie. Oor die debat tav die bestaan al dan nie van 'n Romeinse internasionale privaatreg, kyk bronne in vn 1 *supra*. Kyk ook Phillipson vol I 275 ev.
25 Muirhead *Roman law* (1916) 218 ev. Vir 'n breedvoeriger bespreking van die *praetor peregrinus*, kyk Phillipson vol I 267 ev.
26 Juenger 138; Jolowicz en Nicholas 102 ev; Maine *Ancient law* (1920) 52 ev.
27 Kyk Phillipson vol I 281 ev vir 'n bespreking van en kritiek op die teenstrydige standpunte van Von Savigny (wat van mening is dat die verlening van Romeinse burgerskap nie die bestaande persoonlike reg van 'n individu verander het nie) en Von Bar (wat die teenoorgestelde standpunt huldig).

"a gradual levelling, partly through the assimilation of Roman ideas, and partly by the reception into the official system of Greek or oriental conceptions, so that one system applied throughout the Empire to all its subjects. Foreigners, in the sense of persons not subject to the Empire, can seldom have come into contact with the courts and we know almost nothing of their legal treatment".[28]

3 DIE TYDPERK NÁ DIE VAL VAN DIE WES-ROMEINSE RYK TOT ONGEVEER 1100 nC

Ná die Germaanse verowering van die Wes-Romeinse ryk het *origo* en *domicilium*, as begrippe om 'n individu aan 'n spesifieke stadsgemeenskap te verbind, grootliks in onbruik verval. Die beginsel van personaliteit het gegeld: hiervolgens was elke individu onderworpe aan die reg van sy stam.[29] Die verbindingsfaktor was egter *ras* en nie *origo* of *domicilium* nie.[30] Aanvanklik was dit eenvoudig om 'n persoon op grond van ras aan 'n spesifieke regstelsel te verbind[31] maar namate die Germaanse en Romeinse bevolkings begin vermeng het, het dit al hoe moeiliker geword. Ten einde dié probleem te oorkom, het die praktyk van *professio iuris* in die agste eeu ontwikkel. Hiervolgens is van die partye tot 'n transaksie vereis om 'n verklaring van ras (wat die toepaslike regstelsel sou aanwys) te maak. Die *professio iuris* het mettertyd in 'n subjektiewe keuse van 'n persoonlike regstelsel ontwikkel en was streng gesproke nie meer 'n suiwer verklaring van ras nie.[32]

Die personaliteitsbeginsel het algaande vervaag om met die opkoms van feodalisme in die tiende eeu plek te maak vir die territorialiteitsbeginsel waarvolgens 'n persoon onderworpe was aan die reg van die gebied waarin hy hom bevind het.[33] Gedurende dié tydperk moes nuwe verbindingsfaktore gevind word om 'n persoon met 'n spesifieke gebied (en daarmee saam sy regstelsel) te verbind. Dit het by wyse van jurisdiksiereëls geskied: 'n hof in 'n feodale gemeenskap sou altyd sy eie reg toepas (met ander woorde die *lex fori*), maar die hof sou net die saak aanhoor indien hy jurisdiksie het. Jurisdiksie is net uitgeoefen indien die gebied waarin die hof geleë was 'n verband met die saak gehad het, soos dat die verweerder binne die hof se gebied woonagtig was of dat 'n kontrak binne die hof se gebied gesluit is.[34] Hierdie verskeidenheid van en konflikte tussen territoriale regstelsels sou, saam met die opkoms van die handel, die teelaarde van internasionaal-privaatregtelike probleme en die oplossings daarvoor word.

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28 Jolowicz *Roman foundations of modern law* (1957) 39.

29 Oor die personaliteitsbeginsel kyk Guterman "The first age of European law: the origin and character of the conflict of laws in the early middle ages" 1961 *New York Law Forum* 131.

30 Nygh 557.

31 Romeinse reg en die verskillende stamregte het aanvanklik naas mekaar in waterdigte kompartemente bestaan en as sodanig was die Romeinse reg en die Germaanse stamregte nie in konflik met mekaar nie (Nygh 557; Lipstein 3 ev).

32 Vitta "The conflict of personal laws" 1970 *Israel LR* 172.

33 Hahlo en Kahn *The South African legal system and its background* (1973) 439 ev. De Winter 362 is van mening dat die personaliteitsbeginsel teen ongeveer die 11de eeu deur die beginsel van territorialiteit (met die gepaardgaande *lex fori*-benadering) vervang is, terwyl Nygh 557 sê dat die personaliteitsbeginsel tot ongeveer die 12de eeu gegeld het. Hoe dit ook al sy, die ontstaan en groei van feodalisme moes noodwendig 'n afwatering van die personaliteitsbeginsel tot gevolg gehad het, hoewel die invloed van feodalisme in sommige streke (soos Frankryk) sterker was as in ander (soos Italië).

34 Lipstein 4 ev.

4 DIE TYDPERK VANAF DIE 12de EEU TOT KODIFIKASIE OP DIE VASTELAND

Alhoewel die Romeinse juriste nie 'n internasionale privaatregstelsel, soos wat ons dit vandag ken, ontwikkel het nie, was dit, vreemd genoeg, die herontdekking en bestudering van Justinianus se *Corpus iuris civilis* deur die glossatore en veral die kommentatore wat die ontwikkeling van internasionale privaatreg as stelsel ten grondslag gelê het. Met die opkoms van die handel en die gevolglike toename in interaksie tussen veral die feitlik onafhanklike Italiaanse stadstate, het al hoe meer botsings tussen die reg van verskillende stadstate voorgekom. Nie alleen het elke stadstaat sy eie statute en gewoontereg (wat van dié van 'n ander stadstaat verskil het) gehad nie, maar hierdie plaaslike reg was ook soms in konflik met die nuutontdekte gemenereg van die Heilige Romeinse Ryk, naamlik die Romeinse reg.[35] Juriste het besef dat die blindelingse toepassing van die *lex fori* ongeregtigheid in die hand werk en uit 'n glos van Accursius is dit duidelik dat 'n tempering van hierdie streng territorialiteitsbeginsel moes plaasvind:

> "If a citizen of Bologna is called to justice in Modena, he must not be judged according to the statutes of Modena, to which he is not subject, but according to the statutes of Bologna."[36]

Die glossatore het, by gebrek aan uitdruklike tekste oor internasionale privaatreg in die *Corpus iuris civilis*, hul glosse aan die *lex De Summa Trinitate* (die bekende *lex cunctos populos*) gekoppel wat die volgende bepaal:

> "We desire that all peoples subject to Our benign Empire shall live under the same religion that the Divine Peter, the Apostle, gave to the Romans, and which the said religion declares was introduced by himself, and which it is well known that the Pontiff Damascus, and Peter, Bishop of Alexandria, a man of apostolic sanctity, embraced."[37]

Hiervolgens was slegs diegene wat onderdane (*subditi*) van die keiser was, onderworpe aan sy mag en kon die keiser derhalwe nie ander persone as sy onderdane bind nie.[38] Alhoewel hierdie bepaling meer spesifiek daaroor gegaan het dat al die keiser se onderdane die Christelike geloof moes aanhang, het hierdie beperking van die keiserlike mag tot sy onderdane alleen tot die gevolgtrekking gelei dat, na analogie van hierdie beperking, die stadstate ook net hulle eie onderdane kon bind. Dit het juriste genoop om te bepaal *wie* dan inderdaad hierdie onderdane was. Die oplossing vir hierdie vraagstuk moes logieserwys uit die *Corpus iuris civilis* verkry word en die oplossing is gevind in die gedeeltes van die *Digesta* wat oor munisipale administrasie handel.[39] Uit hierdie tekste blyk dit dat die onderdane van 'n stadsgemeenskap die persone was wat deur *origo* of *domicilium* aan 'n spesifieke stadsgemeenskap verbonde was. Langs hierdie

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35 *Idem* 5.

36 Soos aangehaal deur Nygh 558. Kyk ook Smith "Bartolo on the conflict of laws" 1970 *Am J of Legal History* 157 247 (dl I) 174 (dl II). Lg bron bevat vertalings deur Smith van Bartolus se kommentare op *D* 1 3 32 (*de quibus*) en *C* 1 1 1 *pr* (*lex cunctos populos*). Die nommering van die paragrawe deur Smith en dié in die Basel-uitgawe (1592), wat as aanhangsel in Von Savigny (Guthrie se vertaling) *supra* verskyn, stem nie presies ooreen nie. Verwysings in hierdie bydrae volg die nommering van Smith se vertaling.

37 *C* 1 1 1 pr (Scott se vertaling).

38 Stein "Bartolus, the conflict of laws and Roman law" in *Multum non multa Festschrift für Kurt Lipstein* (1980) 253 ev; De Winter 363; Lipstein 6; De Nova 445 ev; Nygh 558 ev; Juenger 140.

39 *D* 50 1 2; *D* 50 1 3; *D* 5 1 91–102 (wat oor jurisdiksie handel).

weg het *origo* en *domicilium* herleef maar daar was aanpassings nodig. Waar dié twee begrippe in die Romeinse tyd hoofsaaklik gebruik is om 'n persoon aan 'n spesifieke stadsgemeenskap vir doeleindes van die doeltreffende administrasie van die Romeinse ryk te verbind, sou dit nou aangewend word om 'n individu aan 'n feitlik onafhanklike stadstaat (met sy eie gewoontereg en statute) te verbind. Die herlewing van hierdie twee begrippe het nie 'n ongekwalifiseerde terugkeer tot die personaliteitsbeginsel verteenwoordig nie; daarvoor was die oorblyfsels van die feodalisme te sterk: die stadstate was gesteld op hul territoriale soewereiniteit.[40] Die juriste het begin worstel met die probleem van *of* en, indien wel, *wanneer* 'n vreemde stadstaat se reg (byvoorbeeld die reg van Bologna) in 'n gegewe forum (byvoorbeeld 'n hof in Modena) toegepas kon word.[41]

Hierdie pogings om die afbakening van die middeleeuse statute op 'n wetenskaplike grondslag te plaas, het uitgeloop op die ontwikkeling van die statuteteorie. Hoewel Franse skrywers soos Jean de Revigny, Pierre de Belleperche en Guillaume de Cun gedurende die twaalfde en dertiende eeue baanbrekerswerk op dié gebied verrig het, was dit Bartolus wat aan die statute-teorie sy finale beslag gegee het.[42] Kortliks het die statute-teorie daarop neergekom dat statute in aanvanklik twee, en later drie, kategorieë ingedeel is, naamlik *statuta personalia, statuta realia* en *statuta mixta*. Dié indeling was gegrond op die *werking* van die verskillende statute: *statuta personalia* het die individu gevolg waar hy ook al gaan en het op sowel persone- en familieregtelike aangeleenthede, as roerende goed (*mobilia sequuntur personam*) betrekking gehad; *statuta realia* se geldingsfeer was beperk tot die gebied waar dit van krag was en het op onroerende goed betrekking gehad; *statuta mixta* het op regshandelinge, soos kontraksluiting, betrekking gehad en was van toepassing op regshandelinge wat binne die gebied van die betrokke wetgewer aangegaan is, al het dit tot litigasie in 'n ander gebied aanleiding gegee.[43]

Vir doeleindes van die ontwikkeling van die *domicilium*-begrip is die *statuta personalia* van belang aangesien dit die statute was wat die persoon gevolg het; met ander woorde 'n persoon moes deur middel van *origo* of *domicilium* aan 'n spesifieke gebied verbonde wees alvorens daardie gebied se statute op hom van toepassing kon wees, waar hy ook al gaan. Dit wil voorkom of afstamming, met ander woorde *origo*, aanvanklik, wat Italië betref, voorrang geniet het.[44] Bartolus openbaar 'n definitiewe voorkeur vir *origo*.[45]

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40 Nygh 558 ev.

41 In sy kommentaar op die *lex cunctos populos* (C 1 1 1 *pr*) skryf Bartolus: "This is a good place to consider two matters, first whether local legislation extends to non-subjects; and secondly whether the effect of such legislation extends beyond the legislators' territory" (Smith se vertaling 174 par 13).

42 Kyk in die algemeen Lipstein 8 ev; Yntema "Historic basis" 35 ev; Juenger 139 ev.

43 North en Fawcett *Cheshire and North's private international law* (1992) 18 ev. Oor die geldingsfeer van statute, kyk Bartolus se kommentaar op *D* I 3 32 (*de quibus*) par 31 (Smith se vertaling 173 ev); en op *D* 1 1 1 *pr* (*lex cunctos populos*) par 26 32 – 34 (Smith se vertaling 179 – 183 247).

44 De Winter 363.

45 Kyk die volgende par van Bartolus se kommentare (bladsynommers tussen hakies verwys na die vertaling deur Smith): *D* 1 3 32 par 29 (170); *C* 1 1 1 *pr* par 33 (181 ev), 41 (253 ev), 45 (258 ev), 46 (260 ev), 47 (261 ev). Vir 'n interpretasie van Bartolus se begrip van burgerskap, kyk Kirshner "*Civitas sibi faciat civem*: Bartolus of Sassoferrato's doctrine on the making of a citizen" 1973 *Speculum* 694.

In Frankryk, waar die invloed van feodalisme baie sterker as in Italië was, was 'n verbindingsfaktor soos *origo*, wat grootliks van afkoms afhanklik was, onvanpas. Veel eerder het 'n individu tot 'n bepaalde gebied behoort indien hy daar gebore is[46] of indien hy hom daar gevestig het.[47] Die domisilie-begrip het hom veel beter tot die realiteit van die omstandighede geleen en sodoende is *origo* deur *domicilium* vervang. Ten einde dit moontlik te maak om 'n persoon te alle tye met 'n spesifieke gebied te verbind, moes die *domicilium*-begrip 'n ontwikkelingsproses deurgaan. Daar moes voorsiening gemaak word vir gevalle waar 'n persoon byvoorbeeld sy vorige domisilie verlaat het maar nog nie 'n nuwe domisilie gevestig het nie.[48] Mettertyd het daar 'n onderskeid ontwikkel tussen *domicilium originis* en *domicilium habitationis* en teen die 16de eeu was die onderskeid goed gevestig.[49] *Domicilium originis* het gedui op die domisilie wat 'n persoon by geboorte verkry het terwyl *domicilium habitationis* op die domisilie gedui het wat deur vrye keuse verkry is (met ander woorde die plek waar 'n persoon inderdaad woonagtig was). Alhoewel *domicilium originis* reeds in die Romeinse reg bekend was,[50] het dit met die verdwyning van *origo* meer prominensie verkry aangesien daar 'n stabiele verbindingsfaktor moes wees om op terug te val in gevalle waar 'n persoon se domisilie (van keuse) nie vasgestel kon word nie.[51]

Hoewel dit volgens die statute-teorie teoreties moontlik was om te bepaal *of* 'n spesifieke statuut ekstraterritoriaal geld (soos die persoonlike statuut), het dié teorie nie 'n verklaring gebied vir die vraagstuk *waarom* 'n persoonlike statuut 'n persoon tot binne die soewereine gebied van 'n ander staat volg nie. Kortom, die tergende vraag was nog steeds: om welke rede(s) vind die toepassing van "vreemde" (buitelandse) reg binne 'n soewereine staat plaas? Die gesteldheid van die Nederlandse provinsies op hul soewereiniteit (na hul onafhanklikverklaring van Spanje) het hierdie oënskynlike onversoenbaarheid tussen soewereiniteit en die toepassing van vreemde reg binne so 'n soewereine staat weer sterk na vore laat kom. Hoewel die meeste sewentiende-eeuse skrywers nog die statute-teorie aangehang het,[52] het die tekortkominge van hierdie teorie

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46 *Origo* het natuurlik nie op 'n spesifieke *plek* van geboorte gedui nie, maar is bepaal deur die burgerskap van die vader (indien die kind uit 'n wettige huwelik gebore is) ten tyde van geboorte.

47 Nygh 560.

48 Vgl die situasie in die Romeinse tyd (*supra* par 2) waar dit heeltemal moontlik was dat 'n persoon sonder 'n domisilie kon wees. Dit was egter hoogs onwaarskynlik dat 'n individu nóg domisilie nóg burgerskap gehad het.

49 Molinaeus verwys deurgaans na domisilie in sy *Conclusiones de statutis et consuetudinibus localibus* (ingesluit as bylaag tot Guthrie se vertaling van Von Savigny se *Treatise* (*supra*) en meer spesifiek na *domicilium originis* en *domicilium habitationis*, bv: "Hinc infertur . . . et intelligitur non de domicilio originis, sed de domicilio habitationis ipsius viri" (455 van bylaag).

50 Kyk bespreking onder Romeinse tydperk *supra* par 2.

51 Nygh 561.

52 Skrywers soos Burgundus, Vinnius en Rodenburg was ware statutiste. P en J Voet verwys nog na die statute-teorie terwyl Huber die statute-teorie verwerp (kyk Scholten *Comitas in het internationaal privaatrecht van de Hollandse juristenschool der zeventiende eeuw* (1952) 65). Burgundus en Vinnius het, in ooreenstemming met die beginsel van absolute territorialiteit, statute as saaklik (met intra-territoriale werking) eerder as persoonlik (met ekstra-territoriale werking) in gevalle van twyfel geklassifiseer. By Rodenburg vind 'n mens moontlik die ontkieming van die *comitas*-leerstuk (kyk Kollewijn *Geschiedenis van de Nederlandse wetenschap van het internationaal privaatrecht tot 1880* (1937) 52 ev; Scholten 55 ev; Kosters en Dubbink *Algemeen deel van het Nederlandse internationaal privaatrecht* (1962) 36 ev).

aanleiding gegee tot die ontstaan en ontwikkeling van die *comitas*-leerstuk. Die bekendste eksponente van die *comitas*-leerstuk was vader en seun Voet en Ulrik Huber.[53] In die lig daarvan dat feitlik elke skrywer sy eie individualistiese begrip van *comitas* gehad het, is dit moeilik om presies te verduidelik wat die leerstuk behels het. In breë trekke het die leerstuk op twee bene gestaan: elke staat was soewerein binne sy gebied en die toepassing van vreemde reg het net kragtens *comitas* (wat moontlik met *welwillendheid* vertaal kan word) geskied.[54] Skrywers het egter verskil oor die grense van sodanige welwillendheid en die gesagsbron waaruit dit ontstaan het.[55]

By die sewentiende-eeuse Nederlandse skrywers vind ons 'n voortsetting van die gebruik van domisilie as verbindingsfaktor, veral wat status[56] aanbetref maar natuurlik ook met betrekking tot roerende goed (ingevolge die spreuk *mobilia sequuntur personam*). Johannes Voet omskryf 'n subjek of onderdaan soos volg:

> "We must however remember this, that a person is called a 'subject' either in virtue of property, when he has certain property situated in that territory, though he may have founded his domicile elsewhere; or in virtue of person, when he either cherishes a domicile in that place, though the great portion of his estate may be found to be situated elsewhere, or makes up his mind to tarry there only for a time or to pass through like a traveller in foreign parts. Hence some have not badly called such a person a 'temporary subject'."[57]

In sy kommentaar op die vyfde boek van die *Digesta* (wat oor gedingvoering en die forum handel) is dit duidelik dat domisilie voorrang geniet en word dit soos volg omskryf:

> "Everyone can also be sued by virtue of domicile, in the place, that is to say, in which he has set up his home and the main body of his property and fortunes, from which he is not likely to depart if nothing calls him away, and which when he has left he appears to be travelling abroad."[58]

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53 Oor die *comitas*-leerstuk, kyk bronne in vorige vn, asook Kahn "The 'territorial and comity school' of the conflict of laws of the Roman-Dutch era" in *Huldigingsbundel Daniel Pont* (1970) 219; Yntema "The comity doctrine" 1966–1967 *Mich LR* 9.

54 Scholten 55.

55 Volgens P Voet word die toepassing van buitelandse reg geregverdig deur die regsbehoeftes van die internasionale maatskaplike verkeer (Kollewijn 85). As sinonieme vir *comitas* gebruik P Voet *aequitas* en *humanitas*. (*De statutis eorumque concursu* 4 2 17: "Statutum loci extra territorium, ex comitate et aequitate"; en 4 3 17: "Malim tamen, id ita obtinere, non tam de jure, quam quidem de humanitate, dum populus vicini decreta populi comiter observat, ut multorum evitetur confusio.") Daar het egter nie 'n *regsplig* op een staat gerus om 'n ander staat se reg toe te pas nie. J Voet was dieselfde mening toegedaan (*Commentarius ad Pandectas* 1 4 Deel 2 (aanhangsel) 2 5 8 12 17 (Gane se vertaling)). Volgens Huber het die toepassing van vreemde reg op oorwegings van *aequitas*, *utilitas* en gerief berus, maar daar was 'n regsplig uit hoofde van die *ius gentium* op 'n staat om op voormelde oorwegings buitelandse reg toe te pas (*De conflictu legum in diversis imperiis* 2: "ex commodis et tacito populorum consensu"; kyk ook Kosters en Dubbink 39 ev).

56 Een van die groot verdienstes van Huber is die onderskeid wat hy tussen *status* en *bevoegdheid* maak (*De conflictu legum* 12 13). Dit kom daarop neer dat 'n individu se minderjarigheid (sy status) hom bv volg, maar dat hy as minderjarige dieselfde bevoegdhede sal hê as ander minderjariges in die regskring waarin hy hom bevind; maw terwyl sy status konstant bly, kan sy bevoegdhede van regskring tot regskring verskil. Dit blyk verder uit *De conflictu legum* (3 en 15) dat status deur die *lex domicilii* beheers word.

57 *Commentarus ad Pandectas* 1 4 Deel 2 5 (Gane se vertaling).

58 *Idem* 5 1 92.

Verder stel Voet dit baie duidelik dat die *domicilium originis* (domisilie van oorsprong) beslissend sal wees in gevalle waar daar twyfel bestaan.[59] Wat die vestiging van 'n domisilie van keuse betref, stel Voet dit onomwonde dat

> "domicile is not established by the mere intention and design of the head of a household, nor by mere formal declaration without fact or deed; nor by mere getting ready of a house in some country; nor by mere residence without the purpose to stay there permanently".[60]

Hy sê voorts dat 'n verandering in domisilie nie ligtelik veronderstel sal word nie maar dat dit as 'n feit bewys moet word, bykans op dieselfde wyse as wat die geval by die vestiging van domisilie is.[61] Hieruit is dit duidelik dat die vestiging van 'n domisilie van keuse afhanklik was van twee faktore: 'n duidelike bedoeling om met 'n redelike graad van permanentheid[62] op 'n bepaalde plek te vestig (die *animus*-vereiste) en aanwesigheid op daardie plek (die *factum*-vereiste). 'n Domisilie van keuse is nie verbeur deur tydelike afwesigheid nie.[63]

Met die grootskaalse kodifikasie op die Vasteland gedurende die 18de eeu het die meeste Europese regstelsels domisilie as verbindingsfaktor deur nasionaliteit vervang.[64] Die Engelse reg het egter domisilie as verbindingsfaktor behou en 'n definitiewe invloed op die Suid-Afrikaanse ontwikkeling van dié begrip uitgeoefen.

5 DIE ENGELSE REG

Die hantering van die domisilie-begrip gedurende die 19de en vroeë 20ste eeu in die Engelse howe is insiggewend vir die Suid-Afrikaanse juris, veral in die lig van die invloed wat sake soos *Winans v Attorney-General*[65] op ons regspraak se interpretasie van domisilie uitgeoefen het.[66]

In vroeër sake van die 19de eeu soos *Potinger v Wightman*[67] word grotendeels staatgemaak op gemeenregtelike skrywers soos Johannes Voet, Bynkershoek en Pothier:

> "On the subject of domicile, there is so little to be found in our law that we are obliged to resort to the writings of foreign jurists."[68]

Dit word algaande duidelik dat veral twee probleme met betrekking tot domisilie in die Engelse reg begin opduik, naamlik die probleem oor die verlies

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59 *Ibid*; asook 98. Kyk ook *Mason v Mason* (1885) 4 EDC 330 347 ev vir 'n uiteensetting van gemeenregtelike gesag op hierdie punt.
60 *Commentarius ad Pandectas* 5 1 98.
61 *Idem* 99.
62 Kyk ook Van Leeuwen *RHR* 3 12 10; *Hollandsche Consultatien* Dl 2: 21 (43 – 44).
63 Kyk bv *Hollandsche Consultatien* Dl 3(2): 3 4 6(11).
64 Kyk in die algemeen Rabel *The conflict of laws: a comparative study* (1958) 109 ev.
65 [1904] AC 287.
66 Kyk bv De Villiers HR se opmerking in *Johnson v Johnson* 1931 AD 391 398: "[I]t is sufficient for our purposes to adopt the question framed by Lord Macnaghten in *Winans v Attorney-General* . . .: 'The question which your lordships have to consider must, I think, be this: Has it been proved with perfect clearness and satisfaction to yourselves that Mr Winnans had at the time of his death formed a fixed and settled purpose, a determination, a final and deliberate intention, to abandon his American domicile and settle in England?' " Vgl ook *Eilon* v *Eilon* 1965 1 SA 703 (D) 707.
67 (1817) 3 Mer 67; 36 ER 26.
68 (1817) 3 Mer 67 79; 36 ER 26 30. Kyk ook *Munro v Munro* (1840) 7 Cl & Fin 842 (HL); 7 ER 1288 en veral die betoë van die regsverteenwoordigers ((1840) 7 Cl & Fin 842 (HL) 846 – 855 866; 7 ER 1288 1290 – 1293 1297) wat grootliks op gemeenregtelike gesag (Pothier, Voet ens) berus.

van 'n domisilie van oorsprong en die probleem (wat in baie gevalle direk verband hou met eersgenoemde probleem) oor die vestiging van 'n nuwe domisilie van keuse, veral waar dit gaan oor die vestiging van 'n domisilie in 'n vreemde land, met ander woorde 'n "foreign domicile".[69] In *Forbes v Forbes*[70] is beslis dat 'n persoon wie se domisilie van oorsprong Skotland was, 'n Anglo-Indiese domisilie (van keuse) verkry het deurdat hy in Indië militêre diens verrig het. Die feit dat hy deurentyd eiendom in Skotland besit het, het geen afbreuk aan die verlies van sy domisilie van oorsprong gedoen nie, klaarblyklik omdat daar nie 'n woonhuis op die eiendom in Skotland was nie. Die *propositus* se domisilie van oorsprong het ook nie herleef toe hy Indië verlaat het met die bedoeling om nie weer terug te keer nie en hy om die beurt in Skotland (in 'n huis wat hy op die eiendom gebou het) en in Londen gewoon het. Daar is beslis dat hy sy Anglo-Indiese domisilie verloor en 'n nuwe domisilie van keuse in Engeland[71] gevestig het, aangesien sy huishouding (sy eggenote en bediendes) in 'n (gehuurde) huis in Londen gewoon het. Met verwysing na die Romeins-regtelike omskrywing van domisilie is groot gewag gemaak van waar die *huishouding* in werklikheid is:

> "If, in applying to our own times the definition of the code 'ubi quis larem ac fortunarum suarum summam constituit', an equivalent be sought to '*larem*', the wife would, I think, without impropriety, be regarded as the tutelary genius of our homes."[72]

Alhoewel daar in hierdie saak nie minder nie as twee keer van domisilie verander is, kan die Anglo-Indiese domisilie nie werklik as 'n "foreign domicile" beskou word nie. As 'n mens na 'n latere saak, *Hodgson v Beauchesne*[73] kyk, is dit duidelik dat dit baie moeiliker is om 'n "foreign domicile" te verkry. *Forbes v Forbes*[74] word juis op grond hiervan van die saak onder bespreking onderskei:

> "[T]he question in *Forbes v Forbes* being, whether the Testator was domiciled in England or in Scotland, not whether a person so circumstanced was domiciled in a foreign State."

En verder:

> "We think in all these questions there is a most essential difference between the acquisition of a Scotch or English domicile, and the acquisition of a foreign domicile, the presumption against the latter being infinitely stronger."[75]

In die *Hodgson*-saak het dit ook oor 'n persoon gehandel wat in Indië militêre diens verrig het, maar die laaste twintig jaar van sy lewe in Parys (waar sy vrou en huishouding was), met gereelde besoeke aan Engeland en Skotland, deurgebring het. Daar het egter 'n vae en onwaarskynlike moontlikheid bestaan dat die *propositus* teruggeroep kon word na Indië vir militêre diens en op grond hiervan is die argument geopper dat hy byvoorbeeld nie vir die Franse in sulke

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69 Met "foreign domicile" word hier bedoel 'n domisilie buite die Britse ryk.

70 (1854) Kay 341; 69 ER 145.

71 V-C Sir William P Wood dui aan ((1854) Kay 341 357 361 – 362; 69 ER 145 151 153 – 154) dat daar wel moontlik 'n verskil kan wees tussen 'n Engelse en 'n Anglo-Indiese domisilie; die saak is in elk geval op hierdie basis beslis. *Contra* egter *Hodgson v De Beauchesne* (1858) 12 Moo PCC 285 314; 14 ER 920 931: "An Anglo-Indian domicile being, in this case, in its legal effects, the same as an English domicile."

72 (1854) Kay 341 364; 69 ER 145 155. Ter ondersteuning word ook Pothier, Grotius en Story aangehaal.

73 (1858) 12 Moo PCC 285; 14 ER 920.

74 (1854) Kay 341; 69 ER 145.

75 *Hodgson v Beauchesne* (1858) 12 Moo PCC 285 317; 14 ER 920 932.

omstandighede militêre diens sou kon verrig nie.[76] In dié saak is beslis dat die *propositus* nie 'n domisilie van keuse in Frankryk verwerf het nie, maar sy domisilie van oorsprong (synde Engeland)[77] behou het:

> "[T]he presumption of law is against an intentional change of domicile, and, ordinarily so, for a change of domicile supposes a severence, to a great degree at least, of all those mutual ties which bind mankind together, and which we all desire to retain, the dissolution of which is repugnant to all our feelings."[78]

Alhoewel daar toegegee word dat lengte van verblyf in 'n bepaalde plek wel aanleiding kan gee tot 'n vermoede ten aansien van die bedoeling om afstand te doen van 'n vorige domisilie,[79] kon 'n verblyf van ongeveer twintig jaar in Frankryk sonder enige permanente verblyf in Engeland nie 'n verskil aan die uitslag van dié saak maak nie.

In twee latere sake kry ons weer met die probleem van 'n "foreign domicile" en die gepaardgaande verlies van 'n domisilie van keuse of van oorsprong te kampe. In *Wicker v Hume*[80] het die *propositus* sy domisilie van oorsprong in Skotland gehad. Hy het twintig jaar in Oos-Indië deurgebring waarna hy weer na Skotland teruggekeer het. Vanweë een of ander ongelukkigheid het hy na Londen verhuis (en verklaar dat hy nooit weer sou teruggaan Skotland toe nie) en later na Frankryk waar hy oorlede is. Volgens die uitspraak het hy wel 'n Anglo-Indiese domisilie (van keuse) verkry, maar sy domisilie van oorsprong het herleef toe hy weer terug is Skotland toe. Hierdie (Skotse) domisilie van oorsprong het hy verloor toe hy Londen toe is waar hy 'n Engelse domisilie van keuse gevestig het. Die vraag was egter of hy hierdie Engelse domisilie prysgegee en teen sy dood 'n domisilie van keuse in Frankryk gevestig het. Weer eens veroorsaak die "foreign domicile" 'n probleem:

> "I think that all Courts ought to look with the greatest suspicion and jealousy at any of these questions as to change of domicile into a foreign country."[81]

Die hof beslis dat hy nie 'n (buitelandse) domisilie van keuse in Frankryk gevestig het nie. In hierdie saak gee lord Cranworth dan ook sy omskrywing van domisilie wat so dikwels aangehaal word:

> "By domicile we mean home, the permanent home; and if you do not understand your permanent home, I am afraid that no illustration drawn from foreign writers or foreign languages will very much help you to it."[82]

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76 Daar kan egter gevra word of trou aan 'n land en gepaardgaande militêre diens nie eerder 'n verband met burgerskap as met domisilie het nie. Vgl die uitlatings van lord Hatherly in *Udny v Udny* (1869) LR 1 Sc & Div 441 452: "I think some of the expressions used in former cases as to the intent 'exuere patriam,' or to become 'a Frenchman instead of an Englishman,' go beyond the question of domicil. The question of naturalization and of allegiance is distinct from that of domicile. A man may continue to be an Englishman, and yet his contacts and the succession to his estate may have to be determined by the law of the country in which he has chosen to settle himself." Kyk ook Lord Westbury in dieselfde saak (460): "These words are likely to mislead, if they were intended to signify that for a change of domicil there must be a change of nationality, that is, of national allegiance. That would be to confound the political and civil states of an individual, and to destroy the difference between patria and domicilium."

77 In hierdie saak is 'n Engelse domisilie gelykgestel aan 'n Anglo-Indiese domisilie (kyk *supra* vn 70); derhalwe is daar nie op die vraag ingegaan of die *propositus* sy Anglo-Indiese domisilie verloor het en sy (Engelse) domisilie van oorsprong herleef het nie. Vir doeleindes van die saak is aanvaar dat hy 'n Engelse domisilie gehad het toe hy Frankryk toe is.

78 (1858) 12 Moo PCC 285 314–315; 14 ER 920 931.

79 (1858) 12 Moo PCC 285 329; 14 ER 920 936.

80 (1858) 7 HLC 124; 11 ER 50.

81 (1858) 7 HLC 124 159; 11 ER 50 64.

82 (1858) 7 HLC 124 160; 11 ER 50 64.

Hierdie omskrywing van domisilie word gegee na aanleiding van die Romeins-regtelike definisies van die begrip in 'n poging om die presiese betekenis daarvan te verduidelik. Lord Cranworth verkies om die bekende *C* 10 39 7 as die beste *illustrasie* (eerder as *definisie*) van domisilie te beskou. Die probleem met hierdie omskrywing is egter die klem wat op "permanent home" gelê word. In latere Engelse sake, byvoorbeeld *Winans v Attorney-General*,[83] het die howe onrealisties op hierdie vereiste van *permanentheid* voortgebou. In *Lord v Colvin*[84] het 'n mens weer te doen met 'n persoon wie se (Skotse) domisilie van oorsprong herleef het nadat hy van diens in Indië teruggekeer het. Hy het hom daarna egter in Frankryk gevestig en die vraag was of hy 'n domisilie van keuse in Frankryk gevestig het. Met verwysing na *Wicker v Hume*[85] sê V-C Sir Richard T Kindersley die volgende:

> "[I]t requires stronger and more conclusive evidence to justify the Court in deciding that a man has acquired a new domicile in a foreign country, than would suffice to warrant the conclusion that he has acquired a new domicile in a country where he is not a foreigner."[86]

Wat die omskrywing van domisilie self egter betref, stem hy saam met lord Cranworth dat daar eerder van *illustrasies* as *definisies* gepraat kan word. Hy verwys na die definisie van Vattel wat domisilie omskryf as "a fixed residence in any place, with an intention of *always* staying there" en met goedkeuring na regter Story se kritiek daarop:

> "It would be more correct to say that that place is properly the domicile of a person in which his habitation is fixed without any present intention of removing therefrom . . ."[87]

Die definisie wat Sir Richard T Kindersley uiteindelik gee, openbaar 'n tempering van die vereiste van permanentheid:

> "That place is properly the domicile of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected, or the happening of which is uncertain) shall occur to induce him to adopt some other permanent home."[88]

Die houding van die Engelse howe ten aansien van die verkryging van 'n "foreign domicile" het onder meer daartoe aanleiding gegee dat die domisilie van oorsprong nie alleen in gevalle van twyfel herleef het nie, maar ook dat die bewyslas ten aansien van die verlies van 'n domisilie van oorsprong swaarder geraak het as die bewyslas ten aansien van die verlies van 'n domisilie van keuse. In die Engelse reg word van die "tenacity of the domicile of origin"[89] gepraat. In die woorde van lord Macnaghten:

> "Domicil of origin . . . differs from domicil of choice mainly in this – that its character is more enduring, its hold stronger, and less easily shaken off."[90]

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83 [1904] AC 287: kyk aanhaling in vn 66.
84 (1859) 4 Drew 366; 62 ER 141.
85 (1858) 7 HLC 124; 11 ER 50.
86 (1859) 4 Drew 366 422–423; 62 ER 141 163.
87 (1859) 4 Drew 366 375; 62 ER 141 145. Vgl ook Story 50 waar hy die volgende sê: "[I]f a person has actually removed to another place, with an intention of remaining there for an indefinite time, and as a place of fixed present domicile, it is to be deemed his place of domicil, notwithstanding he may entertain a floating intention to return at some future period."
88 (1859) 4 Drew 366 376; 62 ER 141 145.
89 North en Fawcett 155.
90 *Winans v Attorney-General* [1904] AC 287 290.

Dit is duidelik dat hierdie verkleefdheid van die Engelse reg aan die domisilie van oorsprong (veral as dit 'n Skotse of Engelse domisilie was) 'n breuk met die suiwer gemeenregtelike ("civil law") beginsels verteenwoordig. Waar daar in vroeëre sake feitlik sonder uitsondering op gemeenregtelike bronne gesteun is, word die verwysings na sodanige bronne vanaf om en by 1860 al hoe minder. In die belangrike saak *Udny v Udny*,[91] wat oor die herlewing van die domisilie van oorsprong[92] gehandel het, word daar glad nie op gemeenregtelike ("civil law") gesag gesteun ten aansien van die herlewing van sodanige domisilie nie. Daar word hoofsaaklik op Story gesteun[93] en dit is insiggewend om daarop te let dat Story ook nie op gemeenregtelike gesag staatmaak ter ondersteuning van sy standpunt dat die domisilie van oorsprong herleef nie.[94] Verder word daar in die *Udny*-saak na 'n gedeelte uit *Munro v Munro*[95] verwys wat nie deur enige (gemeenregtelike) gesag ondersteun word nie:

> "Lord Cottenham in *Munro v Munro* says: 'So firmly indeed did the civil law[96] consider the domicil of origin to adhere that it holds that if it be actually abandoned and a domicil acquired, but that again abandoned, and no new domicil acquired in its place, the domicil of origin revives.' No authority is cited by his Lorship for this."[97]

Hieruit blyk dit duidelik dat die domisilie van oorsprong, en dan veral die herlewing asook die bewys van die verlies daarvan, in die Engelse beslissings vanaf ongeveer 1860 in 'n eie rigting begin ontwikkel het. Dit is ongetwyfeld die gevolg van eiesoortige omstandighede en behoeftes. Volgens die Engelsregtelike opvatting

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91 (1869) LR 1 Sc & Div 441.

92 "When another domicile is put on, the domicil of origin is for that purpose relinquished, and remains in abeyance during the continuance of the domicil of choice . . . It revives and exists whenever there is no other domicil" (457 – 458).

93 *Commentaries* par 47 en 48. Par 47 het egter probleme opgelewer aangesien dit sê dat "if a man has acquired a new domicile different from that of his birth, and he removes from it *with an intention to resume his native domicil*, the latter is reacquired, even while he is on his way, in itinere, for it reverts from the moment the other is given up" (eie kursivering). Par 48 bepaal egter: "The moment a foreign domicil is abandoned, the native domicil is reacquired." In die *Udny*-saak *supra* 451 sê lord Chancellor Hatherley: "The qualification that he must abandon the new domicile with the special intent to resume that of origin [soos in par 47 gestel] is not, I think, a reasonable deduction from the rules already laid down by decision, because intent not followed by a definitive act is not sufficient. The more consistent theory is, that the abandonement of the new domicil is complete *animo et facto*, because the *factum* is the abandonement, the *animus* is that of never returning." Vgl ook lord Chelmsford se uitlatings oor par 47 tot dieselfde effek (454): "The true doctrine appears to me to be expressed in the last words of the passage: 'It [the domicil of origin] reverts from the moment the other is given up.' "

94 Hy steun oa op twee vroeë sake van die 19de eeu: *The Indian Chief* (1801) 3 C Rob 12; 165 ER 367 en *La Virginie* (1804) 5 C Rob 98; 165 ER 711. In beide sake word melding gemaak van 'n "original character" of 'n "native character" wat herleef: "[T]he national character of Mr Johnson as a British merchant was founded in residence only, . . . it was acquired by residence, and rested on that circumstance alone; . . . from the moment he turns his back on the country where he has resided, on his way to his own country, he was in the act of resuming his original character, and is to be considered as an American" (*The Indian Chief* (1801) 3 C Rob 12 20; 165 ER 367 371); "[I]t is always to be remembered, that the native character easily reverts, and that it requires fewer circumstances to constitute domicil in the case of a native subject, than to impress the national character on one who is originally of another country" (*La Virginie* (1804) 5 C Rob 98 99; 165 ER 711).

95 (1840) 7 Cl & F 842 (HL); 7 ER 1288.

96 Daar word egter na geen bronne in dié verband verwys nie: (1840) 7 Cl & Fin 842 (HL) 876; 7 ER 1288 1301.

97 (1869) LR 1 Sc & Div 441 450.

moet elke persoon op 'n gegewe tydstip 'n domisilie gehad het,[98] terwyl dit in die Romeinse reg heeltemal moontlik was om geen of selfs meerdere domisilies te kon hê.[99] Die domisilie van oorsprong is derhalwe in die Engelse reg aangewend om nie net leemtes te vul waar 'n persoon se domisilie onseker of onbekend was nie, maar ook in 'n groot mate om Britse onderdane aan die Britse ryk gebonde te hou. Dit is interessant om daarop te let dat daar in baie van die bronne oor die Engelse reg van die tweede helfte van die 19de eeu by 'n bespreking van domisilie ook aandag gewy word aan nasionaliteit. Story se hoofstuk oor domisilie heet byvoorbeeld "National domicil".[100] Die byhaal van nasionaliteit deur Story in verband met domisilie word juis deur lord Westbury in *Udny v Udny*[101] gekritiseer:

> "In adverting to Mr. Justice *Story's* work, I am obliged to dissent from a conclusion stated . . . and which is thus expressed: 'The result of the more recent English cases seems to be, that for a change of national domicil there must be a definite and effectual change of nationality.'"[102]

In ag genome die invloed wat bronne soos Story uitgeoefen het, tesame met die feit dat daar te alle tye 'n domisilie aan iemand toegeskryf moet kon word, kan moontlik verklaar word waarom toevlug tot so 'n rotsvaste verbindingsfaktor soos domisilie van oorsprong geneem is.

By die lees van die onderstaande gedeelte oor die Suid-Afrikaanse regspraak sal dit duidelik word dat die Suid-Afrikaanse reg grootliks deur die Engelse reg op hierdie gebied beïnvloed is.[103] Tans bestaan daar 'n wetsontwerp vir die hervorming van domisilie in die Engelse reg.[104] Volgens hierdie voorstelle word die domisilie van oorsprong afgeskaf en sal 'n domisilie wat by geboorte verkry is nie sonder meer herleef nie, maar die laaste domisilie sal bly bestaan totdat 'n nuwe domisilie van keuse gevestig is. Die bewyslas vir die verlies van 'n domisilie van oorsprong sal ook nie meer swaarder wees as die bewyslas vir die verlies van 'n domisilie van keuse nie.

6 DIE SUID-AFRIKAANSE REG

Domisilie speel 'n belangrike rol as verbindingsfaktor in die Suid-Afrikaanse internasionale privaatreg, veral ten opsigte van persone-, familie- en erfregtelike aangeleenthede.[105] Wanneer domisilie as verbindingsfaktor in 'n Suid-Afrikaanse *forum* ter sprake kom, word die begrip volgens die Suid-Afrikaanse

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98 Vgl *Udny supra* 448: "It is clear by our law a man must have some domicil, and must have a single domicil."

99 Vgl bespreking *supra*.

100 *Commentaries* hfst 3.

101 (1869) LR 1 Sc & Div 441.

102 459.

103 Vgl veral *Johnson v Johnson* 1931 AD 391 *infra*; kyk ook Kahn *South African law of domicile of natural persons* (1972) 27.

104 *Law Commission No 168*; *Scottish Law Commission No 107* (1987). Vir 'n kort opsomming van die voorstelle, kyk North en Fawcett 150 – 151 158 – 159 162 175.

105 Die regskeusereël tav die vermoënsregtelike gevolge van die huwelik bevat die *huweliksdomisilie* as verbindingsfaktor. Tav erfregtelike aangeleenthede word die posisie tov roerende goed in die meeste gevalle deur die *lex domicilii* beheers – vgl die regskeusereëls mbt testamentêre bevoegdheid. Die status van 'n individu word natuurlik ook deur die *lex domicilli* bepaal. Domisilie speel voorts 'n belangrike rol by die bepaling van jurisdiksie. Dié aangeleentheid word egter nie in hierdie bydrae behandel nie aangesien dit hier meer spesifiek oor domisilie binne regskeuse-verband gaan.

reg (die *lex fori*) uitgelê.[106] Om hierdie rede is die vertolking en ontwikkeling van die domisilie-begrip in die Suid-Afrikaanse reg van kardinale belang vir internasionale privaatreg.

Die pre-kodifikasie begrip van domisilie is in die Suid-Afrikaanse reg ontvang; ons howe moes hierdie begrip interpreteer. Waar die ou gemeenregtelike bronne onduidelik, teenstrydig of dubbelsinnig was, is merendeels na die Engelse reg vir leiding gekyk.[107] Gedurende die laat tagtigerjare het die Suid-Afrikaanse Regskommissie 'n ondersoek na domisilie geloods wat op die aanvaarding van die nuwe Wet op Domisilie[108] uitgeloop het.[109]

In die lig daarvan dat domisilie as 'n verbindingsfaktor in internasionale privaatreg aangewend word, is dit noodsaaklik dat elke individu te alle tye op 'n spesifieke plek gedomisilieer sal wees; met ander woorde, geeneen mag sonder 'n domisilie wees nie. Die grootste probleme in hierdie verband ontstaan natuurlik by die wisseling van domisilie, byvoorbeeld waar beweer word dat 'n domisilie van oorsprong of 'n domisilie van keuse prysgegee is en 'n nuwe domisilie van keuse gevestig is. Die twee vereistes vir die vestiging van 'n domisilie van keuse is welbekend: die *factum*-vereiste (wat volgens Kahn op "habitual lawful physical presence"[110] neerkom) en die vereiste van *animus manendi* (die bedoeling om met 'n sekere graad van permanentheid op die bepaalde plek te bly).[111] Die maatstawwe vir die verlies van 'n domisilie van oorsprong of 'n domisilie van keuse is die omgekeerde van dié vir die verkryging van 'n nuwe domisilie, naamlik die prysgawe van die woonplek en daarmee saam die *animus non revertendi* (die bedoeling om nie weer na die woonplek wat prysgegee word, terug te keer nie).[112] In die meeste gevalle hang die bewys van die verlies van 'n vorige domisilie saam met die bewys van die vestiging van 'n nuwe domisilie. Indien 'n mens probleemareas vir internasionale privaatreg op hierdie gebied moet uitsonder, sou dit onteenseglik die bewys van die vereiste *animus* (hetsy *manendi* hetsy *non revertendi*) wees, asook die geval waar die verlies van 'n vorige domisilie wel bewys kan word maar nie die vestiging van 'n nuwe domisilie van keuse nie. Saam met laasgenoemde probleem hang die vraagstuk oor die herlewing van die domisilie van oorsprong.

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106 Dit is 'n geykte beginsel van internasionale privaatreg dat, met die uitsondering van nasionaliteit, verbindingsfaktore volgens die *lex fori* vertolk word (Kahn-Freund *General problems of private international law* (1976) 242 ev).

107 Kahn *Domicile* 3 ev.

108 3 van 1992.

109 'n Verslag (werkstuk 20 – projek 60) het in November 1987 verskyn waarop kommentaar gelewer kon word. 'n Wetsontwerp (W7 – 92) het gedurende 1992 verskyn en die nuwe Wet op Domisilie is op 1992-03-03 goedgekeur.

110 *Domicile* 39.

111 Volgens Pollak "Domicile" 1933 *SALJ* 465 kon 'n persoon die volgende bedoelings tov sy verblyf in 'n land hê: "(1) An intention to reside in the country for a definite period, eg, for the next six months, and then to leave. (2) An intention to reside in the country until a definite purpose is achieved, eg, until a particular piece of work is completed, and then to leave. (3) An intention to reside in the country for an indefinite period, ie, until and unless something, the happening of which is uncertain, occurs to induce the person to leave. (4) An intention to reside in the country for ever." Hy vervolg: "It is perfectly clear that neither the first nor the second type of intention is sufficient to constitute the *animus manendi*. The fourth type of intention obviously is sufficient. It is in regard to the third type that differences of opinion exist."

112 Kahn *Domicile* 28.

Die *animus*-vereiste het in sommige gevalle in so 'n streng kriterium ontaard dat dit feitlik onmoontlik sou wees om van 'n vorige domisilie ontslae te raak. 'n Voorbeeld hiervan is *Johnson v Johnson*[113] waar 'n persoon met 'n Sweedse domisilie van oorsprong hom, nadat hy op verskeie skepe werksaam was, in Amerika gevestig het, daar besigheid bedryf het en selfs suksesvol om naturalisasie as Amerikaanse burger aansoek gedoen het. Daarna was hy 'n ruk in Natal waar hy deur naturalisasie 'n Britse burger geword het; uiteindelik is hy terug na Swede waar hy weer 'n Sweedse burger geword het. Die kritieke tydstip vir die bepaling van sy domisilie in dié saak was ten tyde van huweliksluiting (toe hy reeds in Amerika werksaam was). Die hof het by monde van hoofregter De Villiers[114] beslis dat hy nie sy domisilie van oorsprong prysgegee het nie:

> "And it is not disputed that the *onus* is upon him to prove that at the date of the marriage he had 'a fixed and settled purpose' to make the State of New Jersey his fixed and permanent home . . . nor is it disputed that if there is any doubt the answer must be in favour of the *domicilium originis*."[115]

Hoofregter De Villiers haal vir Westlake[116] met goedkeuring aan waar hy na aanleiding van die Engelse reg die volgende sê:

> "[T]he intention necessary for acquiring a domicile of choice excludes all contemplation of any event on the occurrence of which the residence would cease."

Die kwessie wat uitgemaak moes word, word soos volg deur hoofregter De Villiers geformuleer:

> "Has it been proved with perfect clearness and satisfaction to myself that Johnson at the date of the marriage had formed a fixed and settled purpose, a determination, a final and deliberate intention to abandon his Swedish domicile and settle in the State of New Jersey?"[117]

Die invloed van die Engelse reg blyk duidelik uit die laaste twee aanhalings. Met die agtergrond oor die Engelse reg[118] in gedagte, blyk dit dat die streng vereistes wat vir die vestiging van 'n nuwe domisilie van keuse in 'n saak soos *Johnson* gestel word, direk verband hou met die sogenaamde "tenacity of the domicile of origin".

Dit behoef geen betoog dat die vereistes wat in die *Johnson*-saak vir die vestiging van 'n domisilie van keuse gestel word, bykans onmenslik is nie. Ten einde "all contemplation of any event" uit te skakel, sou 'n bomenslike toekomsvisie vereis. Daar kan tereg ook gevra word of enige persoon ooit so 'n "final and deliberate intention" kan vorm soos wat hier vereis word. Die hof het dan ook by monde van hoofregter Centlivres in *Ley v Ley's Executors*[119] na aanleiding van die beslissing in *Johnson*[120] die vraag geopper of die

> "standard of proof required in *Johnson's* case to establish a domicile of choice (assuming that it is higher than the standard required in other civil cases) is not too high".[121]

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113 1931 AD 391.
114 De Villiers HR het die meerderheidsuitspraak (waarin hy deur Curlewis en Roos ARR gesteun is) gelewer. Stratford AR het 'n afwykende uitspraak gelewer.
115 397 – 398.
116 *Private international law* par 264; 398.
117 399. Hierdie toets kom feitlik woordeliks uit *Winans v Attorney-General* [1904] AC 287 (vgl die aanhaling in vn 66 *supra*).
118 Kyk bespreking van Engelse reg *supra*.
119 1951 3 SA 186 (A).
120 1931 AD 391.
121 192.

In die *Ley*-saak verwys hoofregter Centlivres met goedkeuring na die volgende *dictum* uit *Attorney-General v Pottinger*:[122]

> "But is it to be said that a contingent intention of that kind defeats the intention which is necessary to accompany the *factum* in order to establish a domicile? Most assuredly not. There is not a man who has not contingent intentions to do something that would be very much to his benefit if the occasion arises. But if every such intention or expression of opinion prevented a man having a fixed domicile, no man would ever have a domicile at all except his domicile of origin."[123]

In die meerderheidsuitspraak in *Eilon v Eilon*[124] (gelewer deur waarnemende appèlregter Potgieter) word weer eens van 'n baie streng vereiste gebruik gemaak:

> "A contemplation of any certain or foreseeable future event on the occurrence of which residence in that country would cease, excludes such an intention. If he entertains any doubt as to whether he will remain or not, intention to settle permanently is likewise excluded."[125]

Die benadering in die minderheidsuitsprake van appèlregters Rumpff en Williamson openbaar meer buigsaamheid en stem ooreen met die realiteite van ons wêreld waarin individue vryelik tussen verskillende regskringe kan beweeg. Appèlregter Rumpff sê byvoorbeeld:

> "An intention to live in a new country indefinitely need not be accompanied by a desire to turn one's back on the country of origin or to sever all connections with that country or a desire never to return there. It is a well-known fact that thousands of first-generation emigrants from so-called old countries maintain family and cultural relationships with their domicile of origin, having at the same time the intention to live indefinitely in their new country."[126]

Die bepaling in die nuwe Wet op Domisilie ten opsigte van die vereistes vir die verkryging van 'n domisilie van keuse openbaar 'n beweging in die regte rigting in die sin dat daar nou nie meer sprake kan wees van 'n bedoeling om *permanent* op 'n plek te vestig nie. Die betrokke artikel bepaal:

> "'n Domisilie van keuse word deur 'n persoon verkry wanneer hy wettig op 'n bepaalde plek aanwesig is en die bedoeling het om hom vir 'n onbepaalde tydperk daar te vestig."[127]

Die begrip *onbepaalde tydperk* hou egter weer sy eie probleme in. In die werkstuk[128] word aangedui dat daar minder vereis word as 'n bedoeling om permanent op 'n bepaalde plek te bly; wat sou egter gebeur indien 'n persoon byvoorbeeld sou besluit om ingevolge 'n dienskontrak tien jaar in Pretoria te werk en dan in Kaapstad te gaan aftree? Die blote *bepaaldheid* van die tydperk behoort tog seker nie te verhinder dat so 'n persoon tydens die bestaan van sy dienskontrak 'n domisilie in Pretoria verkry nie?

Nog 'n knelpunt wat deur die wet aangespreek word, is die sogenaamde "tenacity of the domicile of origin".[129] As gevolg van die invloed van die Engelse reg op die Suid-Afrikaanse regspraak wil dit voorkom of daar 'n swaarder las op die *propositus* rus om die verlies van 'n domisilie van oorsprong as van 'n domisilie van keuse te bewys.

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122 30 LJ Excl 284 292.
123 194–195.
124 1965 1 SA 703 (D).
125 721.
126 704–705.
127 A 1(2).
128 3.44 op 52.
129 Werkstuk 3.12 op 43 ev.

In *Lewis v Lewis*[130] word die volgende gesê:

> "Stronger evidence is generally required to establish a change from a domicile of origin than from a domicile of choice."[131]

Die wet bepaal nou uitdruklik:

> "Die verkryging of verlies van 'n persoon se domisilie word deur 'n hof op 'n oorwig van waarskynlikhede bepaal."[132]

Die hof sal egter steeds moet besluit wat 'n *oorwig van waarskynlikhede* is; derhalwe lê die tempering van die streng bewyslas ten aansien van die verlies van 'n domisilie van oorsprong myns insiens by die howe self.

Nog 'n manifestasie van die probleem van die "tenacity of the domicile of origin" is die leerstuk waarvolgens 'n persoon se domisilie van oorsprong herleef indien hy byvoorbeeld sy vorige plek van domisilie verlaat het en nog nie 'n nuwe domisilie van keuse gevestig het nie. Hierdie herlewing van die domisilie van oorsprong is 'n Engelsregtelike skepping wat ook in ons regspraak in *Ex parte Donelly*[133] weerklank gevind het:

> "I have come upon a consideration of the authorities to the conclusion that whilst the tendency of Roman-Dutch and allied authorities is against the doctrine of the automatic revival of the domicile of origin upon complete abandonment of the domicile of choice, the question remains open for decision."[134]

Die meningsverskil wat bestaan het oor die vraag of dié leerstuk inderdaad deel van die Suid-Afrikaanse reg vorm,[135] is nou uit die weg geruim deurdat die wet die herlewing van die domisilie van oorsprong afskaf:

> "Ondanks enige wet of die gemene reg herleef niemand se domisilie van oorsprong nie, behalwe ooreenkomstig die bedoeling van artikel 1 of 2."[136]

Die vorige domisilie, hetsy van oorsprong, hetsy van keuse, bly van krag totdat 'n nuwe domisilie van keuse gevestig is. Die wet skaf egter nie *domisilie van oorsprong* as sodanig af nie; dus wil dit voorkom of ons nog steeds 'n domisilie van oorsprong sal hê maar dat dit volgens artikel 2 bepaal sal word.[137]

Die hervormings wat deur die nuwe wet aangebring is, is globaal beskou, positief.[138] Myns insiens bly die grootste probleem in verband met die begrip *domisilie* egter steeds die ingeboude subjektiewe *animus*-vereiste. Die bewys van die vereiste bedoeling word gekompliseer deurdat die hof in der waarheid op grond van die omringende omstandighede (in baie gevalle nadat die *propositus*

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130 1939 WLD 140.
131 143. Vgl egter die aanhaling uit die *Ley*-saak *supra*; kyk verder Kahn *Domicile* 26 ev.
132 A 5.
133 1915 WLD 29.
134 33.
135 Vgl Kahn "Reform of the law of domicile: time for some history" 1987 *TR* 116 ev wat die afleiding maak dat dié leerstuk wel deel van ons reg vorm. Met verwysing na *Ex parte Donelly* 1915 WLD 29, waarin die herlewing van die domisilie van oorsprong aanvaar is, sê Kahn: "Nevertheless, if a decision has gone unchallenged for over seventy years it must have been taken as correct by lawyers in innumerable instances; and it seems unlikely that at this late stage the Appellate Division would regard it as other than inveterate and part of our law." *Contra* Spiro *Conflict of laws* (1973) 75 ev.
136 A 3(2).
137 Vgl egter die voorstel van die Engelse en Skotse regskommissies (*supra* vn 104) dat die domisilie van oorsprong afgeskaf word en 'n domisilie by geboorte in die plek daarvan gestel word.
138 Kyk ook veral a 1(1) waarvolgens 'n getroude vrou nou haar eie domisilie kan vestig, asook die bepalings in a 2 mbt die domisilie van kinders.

reeds dood is) 'n subjektiewe bedoeling aan 'n persoon moet toeskryf. Die voordeel van retrospeksie kan natuurlik meebring dat die bedoeling wat die hof aan die *propositus* toedig, verskil van die werklike bedoeling wat hy gehad het. Per slot van sake is daar min mense (indien enige) wat hul bedoelings uitdruklik bekend maak; aan die ander kant is dit natuurlik moontlik dat 'n persoon nie eintlik enige werklike bedoeling ten aansien van "onbepaalde verblyf" gehad het nie.[139] Die volgende *dicta* uit die minderheidsuitspraak van appèlregter Stratford in die *Johnson*-saak[140] is insiggewend:

> "To ascertain what a man's intention was nearly forty years ago in relation to matters which, at that time, were of no great importance to him must necessarily be exceedingly difficult . . .[141] [en verder]: The subsequent conduct of the respondent and his subsequent somewhat remarkable wordly success is used retrospectively to emphasise the indecision of his choice of residence in New Jersey. The argument . . . can be thus expressed: 'Look at the kind of man he was and his achievements, he could never have intended to remain in a place that offered him so small a wage.' This *ex post facto* ascertainment of a man's intention in the light of what subsequently happens to him, I cannot but regard as unsound."[142]

7 SLOTOPMERKINGS

Vir doeleindes van internasionale privaatreg vervul domisilie die funksie van 'n verbindingsfaktor met 'n spesifieke regskring. Gesien uit hierdie oogpunt, vereis die internasionale privaatreg dat 'n individu met daardie gemeenskap verbind word waartoe hy inderdaad behoort; of anders gestel, daardie regskring wat ten aansien van sekere aangeleenthede die "sê" oor daardie individu het. Die *ratio* onderliggend aan domisilie as verbindingsfaktor behoort dus te wees dat 'n individu se *locus domicilii* dié plek is waar hy sy swaartepunt op 'n gegewe tydstip het. Twee belangrike oorwegings vloei hieruit voort:

(a) 'n Tempering van die permanente, of volgens die nuwe wet "onbepaalde", karakter van domisilie sal moet plaasvind. In ons moderne samelewing, met die beweeglikheid van mense oor landsgrense heen, moet dit noodwendig makliker word om van domisilie te verander. 'n Ander moontlikheid is om ander verbindingsfaktore (soos gewoonlik woonagtig) alternatief as verbindingsfaktore te stel.[143]

(b) Die moontlikheid moet oorweeg word om die domisilie van 'n persoon met verwysing na die plek waar so 'n persoon vir regsdoeleindes sy swaartepunt het, te bepaal. Ten einde dit te doen, kan natuurlik van alle omringende omstandighede en relevante faktore, asook die bedoeling van die betrokke persoon (indien dit vasstelbaar is), gebruik gemaak word.*

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139 Kyk Kahn *Domicile* 41 waar uitdruklik gesê word dat die bedoeling nie is om 'n *domisilie* van keuse te vestig nie, maar dat die bedoeling tov die permanentheid van verblyf is.

140 1931 AD 391.

141 408.

142 410–411.

143 Vgl in hierdie opsig a 3 *bis* van die Wet op Testamente 7 van 1953 (soos gewysig) waar *domisilie*, *nasionaliteit* en *gewoonlik woonagtig* as alternatiewe verbindingsfaktore tav die formele geldigheid van testamente gestel word. Vir 'n regsvergelykende perspektief kyk Thomashausen "Reflections on 'domicile' as a connecting factor" in *Huldigingsbundel vir WA Joubert* (1988) 164.

* My dank aan prof AB Edwards wat die artikel in konsepvorm deurgelees en waardevolle voorstelle aan die hand gedoen het. Ek waardeer sy belangstelling.

Suid-Afrikaanse deeleiendom en Belgiese *appartementseigendom* (*vervolg*)*

CG van der Merwe
BA Hons BCL LLD
Professor in die Privaatreg, Universiteit van Stellenbosch

5 VERGELYKING TUSSEN SEKERE ASPEKTE VAN DIE BELGIESE EN DIE SUID-AFRIKAANSE WETGEWING (*vervolg*)

5 6 Genots- en gebruiksbevoegdhede ten opsigte van 'n deel

Ingevolge die Wet op Deeltitels verkry 'n deeleienaar afsonderlike eiendomsreg ten opsigte van sy deel.[133] Dieselfde geld in België waar 'n deeleienaar in navolging van die dualistiese struktuur van *appartementseigendom* in beginsel gemeenregtelike eiendomsreg ten aansien van sy afsonderlike deel verkry.[134] 'n Deeleienaar kan dus binne die grense deur die wet en die reëls gestel, sowel volle gebruiks- en genotsbevoegdhede ten opsigte van sy deel as volle beskikkingsbevoegdhede ten opsigte van sy eenheid (sy deel plus die onverdeelde aandeel in die gemeenskaplike eiendom) uitoefen.[135] Alle regsmiddels ter beskerming van eiendomsreg is tot beskikking van die deeleienaar.[136]

Wat gebruiks- en genotsbevoegdhede ten opsigte van sy deel betref, kan 'n deeleienaar in beginsel na goeddunke met sy deel handel. Hy kan tapyte lê, muurpapier plak, nuwe plafonne installeer, die binnemure van sy woonstel uitbreek, nuwe geriewe in sy woonstel inbou, musiek maak en partytjies hou. In die praktyk word hierdie wye gebruiksbevoegdhede ingeperk deur 'n verskerpte toepassing van bureregsreëls en beperkings opgelê deur die wet, die gedragsreëls of die reglement van mede-eiendom.[137] Die Belgiese wetgewing verbied veranderings aan die individuele dele wat afbreuk doen aan die bestemming van gemeenskaplike eiendom of die regte van ander deeleienaars.[138] Die Suid-Afrikaanse wetgewing bereik dieselfde resultaat deur wederkerige stilswyende serwitute van

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133 A 2(b).
134 Derine *et al Zakenrecht* nr 786.
135 Sien Van der Merwe en Butler 143.
136 Derine *et al Zakenrecht* nr 786 en vn 182. Sien ook die wetsvoorstel van Pede-Pierson a 577 *quinquies* § 7 en Mundeleer-Gol a 577 – 9.
137 Sien wat Suid-Afrika betref, Van der Merwe en Butler 144 – 150; Van der Merwe "Is sectional ownership true ownership?" 1992 *Stell LR* 131 – 136. Wat België betref, sien Derine *et al Zakenrecht* nr 786; Aeby *et al Propriété* nr 198; Derine en Haemelinck "Overzicht van rechtspraak" 1981 *Tijdschrift voor Privaatrecht* 160.
138 A 577*bis* § 10. Sien Derine *et al Zakenrecht* nr 785 wat meen dat afbreek van die gebou, uitbreiding van die gebou deur verdere bouwerk op die boonste verdieping en die verlening van 'n serwituut deur 'n woonsteleienaar problematies is.

ondersteuning en sydelingse steun tussen dele onderling en dele en die gemeenskaplike eiendom te erken. Daarbenewens skep die Suid-Afrikaanse wetgewer wederkerige stilswyende serwitute van deurgang van kabels, pype en drade ter voorsiening van water, riolering, elektrisiteit en telefoondienste.[139]

Weens die konsentrasie van huisbewoners in 'n deeltitelskema, lê die Suid-Afrikaanse wet benewens die verpligtinge vervat in die bestuurs-[140] en gedragsreëls,[141] verskeie eiesoortige algemene verpligtinge op deeleienaars. 'n Deeleienaar word verplig om ambagslede toe te laat om pype, kabels en geleibuise in sy deel te ondersoek en indien nodig, te herstel; hy moet sy deel herstel en in 'n goeie toestand van herstel hou; hy mag nie oorlasstigtende aktiwiteite in sy deel toelaat nie en hy mag nie sy deel in stryd met die bestemming daarvan gebruik nie tensy al die ander deeleienaars skriftelik daartoe toestem.[142] Wat België betref, bevat die modelreglement van Aeby verskeie bepalings wat daarop gemik is om die eie karakter van die gebou te behou, die goeie sedes te beskerm en die veiligheid en rus van die bewoners te verseker. Dié reglement bevat onder andere reëls dat 'n bedryf slegs op die grondverdieping van 'n woonstelblok uitgeoefen mag word en dat huisdiere slegs toegelaat word indien hulle nie vir ander huisbewoners hinderlik is nie.[143]

5 7 Beskikkingsbevoegdhede ten opsigte van 'n eenheid

Wat beskikkingsbevoegdhede betref, geld die algemene beginsel dat 'n deel en sy onverdeelde aandeel in die gemeenskaplike eiendom 'n onlosmaaklike eenheid vorm en dat daaroor gevolglik slegs as entiteit beskik kan word.[144] 'n Deeleienaar mag egter, onderworpe aan die beperkings deur die reëls of die reglement gestel, sy eenheid vervreem, verhuur of met 'n verband of ander saaklike reg beswaar.[145] Hoewel 'n absolute verbod op vervreemding en verhuring van 'n eenheid *ultra vires* sal wees,[146] sal sekere beperkings op hierdie handelinge in die reëls of modelreglement aanvaarbaar wees.[147] Die Belgiese regsliteratuur aanvaar byvoorbeeld die beperking dat 'n *appartement* slegs met die toestemming van die algemene vergadering vervreem mag word asook verskeie beperkings op die verhuur van *appartemente*.[148]

Ingevolge sowel die Suid-Afrikaanse as die Belgiese reg mag 'n deeleienaar sy eenheid verder onderverdeel.[149] Die Wet op Deeltitels laat ook konsolidasie van dele toe.[150] Onderverdeling en konsolidasie vereis slegs die toestemming

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139 A 28(2).
140 Aanhangsel 8 r 68.
141 Aanhangsel 9 r 1 – 11.
142 A 44(1)(a) – (g).
143 Sien modelreglement van Aeby a 3.07; sien verder in die algemeen a 3.01 – 3.10.
144 Sien die Belgiese *BW* a 577*bis* § 9 en die Wet op Deeltitels 95 van 1986 a 16(3).
145 Wet op Deeltitels 95 van 1986 a 15B; Belgiese *BW* a 577*bis* § 9 en Hypoteek Wet van 1851-12-10 a 45, 45*bis* (met 'n verband beswaar).
146 Sien Derine *et al Zakenrecht* nr 785; Aeby *et al Propriété* nr 144; Mertens *Appartementsrecht* 205.
147 Sien modelreglement van Aeby a 3.06.
148 Sien in die algemeen Mertens *Appartementsrecht* 205 – 210.
149 Wet op Deeltitels 95 van 1986 a 20. Wat België betref, sien Mertens *Appartementsrecht* 200.
150 A 20(1).

van die trustees. Die modelreglement van Aeby verbied die verdere onderverdeling van *appartementen*.[151]

Vanselfsprekend moet elke deeleienaar die koste verbonde aan die onderhoud en herstel van sy deel, versekering van sy deel en so meer dra.[152] Die Wet op Deeltitels sorg daarvoor dat geen oordrag van 'n eenheid mag geskied nie alvorens die verkoper alle geldelike verpligtinge teenoor die regspersoon en die plaaslike owerheid nagekom het.[153] Ingevolge die Belgiese reg word daarenteen aanvaar dat alle laste van 'n deeleienaar by vervreemding van 'n eenheid weens die saaklike karakter (*propter rem*) daarvan op die verkryger oorgaan.[154] Die Mundeleer-Gol wetsvoorstel enumereer die laste wat die verkryger, nieteenstaande afwykende ooreenkomste, moet dra.[155] Beide wetgewende maatreëls verseker dus dat agterstallige skulde van die vervreemder nie as gemeenskaplike skulde aan die deeleiendomsgemeenskap toebedeel word nie.

5 8 Gebruiks- en genotsbevoegdhede ten opsigte van die gemeenskaplike eiendom

Ingevolge die Wet op Deeltitels mag elke deeleienaar die gemeenskaplike eiendom in ooreenstemming met sy deelnemingskwota gebruik en geniet.[156] Omdat hierdie toets onprakties is, geld die algemene beginsel dat geen deeleienaar die gemeenskaplike eiendom op so 'n wyse mag gebruik dat hy die gebruik daarvan deur ander eienaars of persone wat wettig op die perseel is, onredelik belemmer nie.[157] Op grond hiervan mag geen deeleienaar 'n ander deeleienaar verbied om 'n gedeelte van die gemeenskaplike eiendom te gebruik of vir homself toe te eien, selfstandige administratiewe besluite ten opsigte van die gemeenskaplike eiendom neem of die gemeenskaplike eiendom op 'n abnormale manier gebruik nie.[158]

Bovermelde beginsel vind ook neerslag in die Belgiese wet wat die *appartementseigenaar* toelaat om die gemeenskaplike eiendom ooreenkomstig die bestemming van die skema en met inagneming van die regte van ander *appartementseigenaars* te gebruik.[159] Indien die bestemming van die skema nie uit die reglement blyk nie, word dit deur die aard, funksionele eise en oorspronklike status van die skema bepaal.[160] 'n Deeleienaar word byvoorbeeld toegelaat om vir beter televisie-ontvangs op eie koste 'n antenna op die dak te plaas. Daarenteen mag geen deeleienaar voorwerpe soos tuinstoele of tente op die gemeenskaplike eiendom laat opslaan nie.[161] Die feit dat gelyke regte van ander deeleienaars eerbiedig moet word, beteken net soos in die Suid-Afrikaanse reg dat individuele toe-eiening van gedeeltes van die gemeenskaplike eiendom en

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151 A 3.02.
152 Sien wat België betref Derine *et al Zakenrecht* nr 786; Aeby *et al Propriété* nr 251; Timmermans *Praktische handleiding voor bestuurders en bewoners van appartementsgebouwen* (1986) 38–40.
153 A 15B(3)(a)(i)(aa); sien verder Van der Merwe en Butler 165.
154 Derine *et al Zakenrecht* nr 785; Aeby *et al Propriété* nr 167.
155 A 577–11.
156 A 2(c) en 16(1).
157 A 44(1)(d).
158 Sien Van der Merwe en Butler 150–151; sien verder Aanhangsel 9 r 1–8.
159 A 577*bis* § 5; sien ook die wetsvoorstel van Pede-Pierson a 577*quinquies* § 2.
160 Derine *et al Zakenrecht* nr 790.
161 Sien verder Mertens *Appartementsrecht* 203.

abnormale gebruik daarvan ontoelaatbaar is. Desnieteenstaande word die aanbring van naamplaatjies aan die buitekant van die woonstel gewoonlik deur die reglement veroorloof. Aan die ander kant vervat die reglement gewoonlik 'n verbod op die aanbring van *affiches* aan die buitekant van die gebou vir reklame- en ander doeleindes. Desnieteenstaande het die regbank van Brussels beslis dat die aanbring van 'n *mezouza* aan die buitedeur van 'n Joodse familie toelaatbaar is op grond van die feit dat die Belgiese grondwet geloofsvryheid waarborg.[162] 'n Deeleienaar mag wel die gemeenskaplike eiendom soos die hyser of die gemeenskaplike swembad meer intensief gebruik as wat sy kwota hom toelaat, solank dit nie soortgelyke gebruik deur ander deeleienaars verhinder nie.[163]

Die Belgiese wetgewer laat 'n deeleienaar toe om op eie inisiatief dade tot behoud en voorlopige beheer van die gemeenskaplike eiendom uit te voer.[164] Voorbeelde van dade van behoud is die herstel van 'n dak wat deur 'n storm beskadig is en die hernuwing van die inskrywing van 'n verband by die *hypotheekkantoor*. Indien hy die hof van die noodsaaklikheid van dié dade kan oortuig, kan die hof ander eienaars verplig om daaraan deel te neem. Deur bepaalde wetsbepalings te kombineer, huldig sommige skrywers die opvatting dat elke eienaar in bepaalde omstandighede ook bevoeg is om werke ter behoud, herstel en selfs vernuwing van die gemeenskaplike eiendom te onderneem. Eensydige optrede van deeleienaars word egter meestal in die reglement aan bande gelê en regsleer en regspraak laat eensydige optrede slegs binne streng grense toe.[165]

5 9 Sanksies

Nóg die Suid-Afrikaanse, nóg die Belgiese wetgewing bevat enige doeltreffende sanksies indien 'n deeleienaar versuim om sy finansiële of ander verpligtinge ingevolge die wet en die reëls na te kom. Die sanksies wat daar wel is, word in die modelreëls vervat. Dienooreenkomstig bepaal die Suid-Afrikaanse bestuursreëls dat 'n deeleienaar wat agterstallig raak met die betaling van sy bydraes tot die gemeenskaplike fonds aanspreeklik is vir die regs- en ander koste wat die regspersoon in verband met die verhaal daarvan aangaan;[166] hierbenewens word hy nie toegelaat om vir gewone besluite op die algemene vergadering te stem nie.[167] Indien hy na skriftelike kennisgewing deur die trustees versuim om sy deel in stand te hou, sy uitsluitlike gebruiksgebied behoorlik te versorg of 'n bepaalde reël na te kom, mag die regspersoon die wantoestand herstel of die regsreël afdwing en alle kostes in die verband aangegaan van die deeleienaar verhaal.[168] Volharding in dié nie-nakoming van reëls het ook opskorting van die stemreg van die deeleienaar tot gevolg.[169] Indien die regspersoon nie teen 'n oortreder optree nie, is enige deeleienaar geregtig om 'n

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162 Sien Mertens *Appartementsrecht* 201 wat die beslissing van Rechtbank Brussel van 1961-02-11, JT 1961 686 bespreek.
163 Aeby *et al Propriété* nr 287; Cabanac en Morand "L'abus de jouissance des parties communes de l' immeuble en copropriété et sa repression" 1970 *Gazette du Palais* 2 D 128.
164 A 577*bis* § 5.
165 Sien in die algemeen Mertens *Appartementsrecht* 196.
166 Aanhangsel 8 r 31(5).
167 *Idem* r 64(a).
168 *Idem* r 31(5) en 70.
169 *Idem* r 64(b).

regsgeding namens die regspersoon te voer.[170] Hoewel agterstallige bydraes in 'n landdroshof geëis mag word, moet 'n geding betreffende die verbreking van reëls in die hooggeregshof aanhangig gemaak word. Sodanige prosedure is tydsaam en duur en dra nie noodwendig tot harmonie in die deeleiendomsgemeenskap by nie.[171]

Ingevolge die Belgiese reg kan agterstallige betalings van 'n deeleienaar slegs deur gesamentlike optrede van die ander deeleienaars in die bevoegde hof verhaal word.[172] Ten einde 'n regsgeding te vermy, bepaal die modelreglement van Aeby dat die bestuurder (*syndicus*) die gas, water en elektrisiteit van sodanige *appartementseigenaar* mag afsny.[173] In gevalle waar deeleienaars 'n oorlas van hulleself maak of reëls van die reglement oortree (byvoorbeeld deur die beroep van 'n gigolo te beoefen of 'n houtsaagonderneming in 'n winkeleenheid te bedryf), val die Belgiese reg soos die Suid-Afrikaanse reg terug op 'n duur en tydsame hofgeding.[174] Die vraag of aan die algemene vergadering die bevoegdheid verleen behoort te word om 'n deeleienaar te straf wat aanhoudend agterstallig is met die betaling van bydraes en hom so wangedra dat dit nie van die ander deeleienaars verwag kan word om langer saam met hom in dieselfde gemeenskap te woon nie, word dus in beide regstelsels oorweeg.[175] Indien huurders nie die reëls nakom nie, kan die verhuurder-eienaar ingevolge die Belgiese praktyk gedwing word om sy huurooreenkoms sonder vrees van 'n skadevergoedingeis te verbreek.[176]

5 10 Beskikkingsbevoegdhede ten opsigte van die gemeenskaplike eiendom

Omdat die gemeenskaplike eiendom in onverdeelde aandele aan al die deeleienaars behoort en die onverdeelde aandeel van 'n deeleienaar onlosmaaklik aan die *appartement* verbonde is, kan beskikkingshandelinge ten opsigte van die gemeenskaplike eiendom in die Belgiese reg slegs op grond van 'n eenparige besluit van die deeleienaars geskied, indien die reglement van 'n bepaalde skema nie 'n verslapping in hierdie verband bewerkstellig het nie.[177] Omrede hierdie toedrag van sake as te star ervaar word, maak die wetsvoorstel van Pede-Pierson voorsiening dat die algemene vergadering met 'n meerderheid van driekwart kan besluit oor werke of aankope waarmee beoog word om die waarde van die gebou of grond te verhoog en die opbrengs en bruikbaarheid daarvan te verbeter dog sonder om die bestemming van die gemeenskaplike saak te wysig.[178] Vir alle ander beskikkingshandelinge, byvoorbeeld die verkoop van 'n gedeelte van die gemeenskaplike eiendom, word eenparigheid vereis. Nogtans kan deur ooreenkoms besluit word om bepaalde beskikkingshandelinge op grond van 'n

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170 Wet op Deeltitels 95 van 1986 a 41.
171 Sien Van der Merwe en Butler 154.
172 Sien Mertens *Appartementsrecht* 202.
173 A 4.09 § 2.
174 Sien Mertens *Appartementsrecht* 213.
175 Sien vir België Mertens *Appartementsrecht* 214 wat die teenoorgestelde standpunte van Aeby *et al Propriété* 236 en Derine *et al Zakenrecht* 156 hieromtrent met mekaar vergelyk. Wat Suid-Afrika betref, sien Van der Merwe "Sanctions in terms of the South African Sectional Titles Act and the German *Wohnungseigentumsgesetz:* Should the South African statute be given equally sharp teeth?" 1993 *CILSA* 85.
176 Modelreglement van Aeby a 3.06 § 7; sien verder Mertens *Appartementsrecht* 215 – 216.
177 A 577*bis* § 9.
178 A 577*quinquies* § 3.

meerderheid van minstens vier-vyfdes toe te laat.[179] Die wetsvoorstel van Mundeleer-Gol vereis 'n meerderheidsbesluit van driekwart vir 'n besluit oor alle werke betreffende die gemeenskaplike eiendom met uitsondering van die werke waaroor die bestuurder kan beslis en 'n vier-vyfde meerderheid vir alle besluite omtrent die vervreemding van die gemeenskaplike saak.[180]

Die Wet op Deeltitels magtig verskeie beskikkingshandelinge ten opsigte van die gemeenskaplike gedeeltes ten spyte van die reël dat geen afsonderlike beskikkingshandeling ten opsigte van 'n deel of die gemeenskaplike eiendom aangegaan mag word nie.[181]

(a) Die deeleienaars kan die regspersoon by eenparige besluit gelas om die geheel van die gemeenskaplike eiendom of 'n gedeelte daarvan namens hulle te vervreem of kragtens 'n huurkontrak te verhuur.[182]

(b) 'n Deeleienaar kan, gerugsteun deur 'n eenparige besluit van die regspersoon, sy deel sydelings of boontoe uitbrei.[183] Die rede vir eenparigheid is waarskynlik omdat sodanige uitbreiding die buite-aansig van die gebou sal verander en noodwendig 'n verandering van die gemeenskaplike eiendom tot gevolg sal hê.[184]

(c) Die wetgewer laat die regspersoon toe om die skema met die skriftelike magtiging van al die deeleienaars uit te brei deur die aankoop van aangrensende of nie-aangrensende grond.[185] Die bykomende grond mag nie vir die oprigting van verdere deeltiteleenhede of vir eiendomspekulasie gebruik word nie, maar slegs vir die skep van verdere fasiliteite, soos parkeerruimtes, 'n speelpark vir kinders, 'n klubhuis of 'n tennisbaan.[186]

(d) Verder laat die wetgewer die regspersoon toe om uitsluitlike gebruiksgebiede op die gemeenskaplike eiendom af te sonder en dit dan aan individuele deeleienaars deur middel van die registrasie van 'n notariële akte te sedeer.[187]

(e) Die deeleienaars kan die regspersoon by spesiale besluit gelas om namens hulle 'n serwituut of beperkende voorwaarde te verly of te aanvaar wat die gemeenskaplike grond wat op die deelplan getoon word, beswaar of bevoordeel.[188]

(f) Die Wet op Deeltitels magtig die regspersoon om met die skriftelike toestemming van al die eienaars die deeltitelskema in fases uit te brei deur die oprigting van verdere deeltitelgeboue op dieselfde grondstuk.[189]

5 11 Verbeterings op die gemeenskaplike eiendom

Aangesien die Belgiese reg individuele optrede ter verbetering van die gemeenskaplike eiendom slegs binne streng grense toelaat, maak die wetsvoorstel van

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179 Pede-Pierson a 577*quinquies* § 6.
180 A 577–7 § 1.
181 A 16(3).
182 A 17(1). 'n Eenparige besluit ingevolge a 17(5) om die geheel van die gemeenskaplike eiendom te vervreem, is een van die maniere waarop 'n deeltitelskema beëindig kan word. Sien Van der Merwe en Butler 292.
183 A 24(1).
184 Sien Van der Merwe *Sakereg* 439 vn 404.
185 A 26(1).
186 A 26(1) gelees met a 4(2).
187 A 27(2), (3).
188 A 29(1).
189 A 25(6).

Pede-Pierson voorsiening dat die algemene vergadering deur 'n meerderheidsbesluit van driekwart van die stemme kan besluit oor werke wat daarop gemik is om die waarde van die gebou of die skema te verhoog en die opbrengs of bruikbaarheid daarvan te verbeter dog sonder om die bestemming van die gemeenskaplike eiendom te wysig.[190] Indien die proporsionele bydrae tot die koste van 'n verbetering in 'n bepaalde geval buite verhouding tot die waarde van 'n eenheid of *kavel* is, mag die verbetering slegs sonder die toestemming van die eienaar van dié *kavel* uitgevoer word indien die ander eienaars sy aandeel in die koste oorneem in die mate wat sy aandeel die bedrag oortref wat van hom gevorder mag word.[191] Indien die koste verbonde aan die verbeterings driekeer soveel as die kadastrale inkomste van die skema is,[192] word die eienaars wat geen voordeel daaruit trek nie, vrygestel van alle bydraes tot die koste en die toekomstige uitgawes. Indien die verbeterings nie afsonderlik benut sal word deur die eienaars wat dit voorstel nie, word die werke alleen uitgevoer op voorwaarde dat net daardie eienaars die koste en toekomstige uitgawes verbonde aan die verbetering dra.[193] In bogenoemde gevalle moet skadevergoeding betaal word aan 'n eienaar wat hom op die vergadering teen die bepaalde besluit verset het en skade gely het selfs al was dit slegs tydelik. Die eienaar wat nie teen die besluit gestem het nie maar abnormale skade in vergelyking met die ander eienaars ly, is ook op skadevergoeding geregtig.[194]

Die modelreëls wat by regulasie ingevolge die Wet op Deeltitels afgekondig is, bevat uitvoerige bepalings omtrent verbeterings aan die gemeenskaplike eiendom. Dié reëls werk met die tradisionele onderskeid tussen luukse en nie-luukse verbeterings.[195] Luukse verbeterings mag slegs deur die trustees (uitvoerende raad) aangebring word indien hulle daartoe gemagtig word deur 'n eenparige besluit van die deeleienaars.[196] Indien nie-luukse verbeterings beoog word, moet die trustees eers die eienaars skriftelik daarvan in kennis stel, met 'n aanduiding van die wenslikheid, doel, koste, wyse van finansiering en die uitwerking wat dit op die bydraes van die deeleienaars sal hê. Enige deeleienaar mag dan 'n spesiale vergadering belê waarop die voorstel by wyse van spesiale besluit gewysig, goed- of afgekeur kan word. Sodanige besluit bind die trustees.[197]

Die modelreëls sonder bepaalde gevalle uit waar bogenoemde prosedure nie gevolg hoef te word nie. Die trustees word byvoorbeeld toegelaat om afsonderlike elektrisiteits- en gasmeters vir elke eenheid te installeer indien hulle aldus deur 'n gewone meerderheidsbesluit gemagtig word.[198] Volgens die modelgedragsreëls vereis klein veranderings aan die gemeenskaplike eiendom nie 'n meerderheidsbesluit nie, maar kan dit met die skriftelike toestemming van die trustees aangebring word.[199] Ten einde sekuriteitstoestelle en skerms teen

190 A 577*quinquies* § 3.
191 *Ibid.*
192 In België word die huurwaarde van 'n gebou elke 10 jaar op 'n jaarbasis bereken en hierdie "kadastrale inkomste" van die gebou vorm dan die basis waarop oa erfbelasting (*onroerende voorheffing*) gehef word. Sien die Wet op de Inkomstenbelasting.
193 A 577*quinquies* § 4.
194 *Idem* § 5.
195 Sien Van der Merwe *Sakereg* 152–153.
196 Aanhangsel 8 r 33(1).
197 R 33(2).
198 R 33(3).
199 Aanhangsel 9 r 4(1).

insekte en diere te kan oprig, word slegs vereis dat die trustees die aard en ontwerp daarvan en die wyse waarop dit opgerig gaan word, skriftelik goedkeur.[200]

5 12 Bestuur van die *appartementsgebouw* of deeltitelskema

5 12 1 Algemeen

Die grootste leemte in die Belgiese wetgewing is dat geen voorsiening vir die bestuur van die skema gemaak word nie. Indien die bestuur nie in die reglement van mede-eiendom gereël word nie, moet teruggeval word op die algemene beginsels van vrye mede-eiendomsreg.[201]

Die Belgiese wetgewing bepaal dienooreenkomstig dat dade van beheer en beskikking ten opsigte van die gesamentlike saak slegs gesamentlik (deur eenparige besluit) verrig mag word. Indien een *appartementseigenaar* die regter van die noodsaaklikheid van 'n bepaalde daad van beheer kan oortuig, kan die regter die ander verplig om hul samewerking te verleen.[202] Hierdie veiligheidsklep vind veral aanwending in gevalle waar 'n halstarrige minderheid hulle teen 'n praktiese bestuursreëling verset. Aan die ander kant kan die minderheid hierdie bepaling gebruik waar die meerderheid versuim om die skema volgens die bestuursreëls vervat in die reglement te bestuur.[203] 'n Deeleienaar wat op eie inisiatief bestuurshandelinge uitvoer waarvoor gesamentlike optrede vereis word, mag nie dié handelinge teenoor sy deelgenote afdwing of sy uitgawes van hulle verhaal nie. Hy sal dit egter wel teenoor buitestanders, byvoorbeeld 'n aannemer van werk of 'n argitek, kan afdwing sonder dat laasgenoemde persone hulle daarop kan beroep dat die optrede van die *appartementseigenaar* nie deur sy deelgenote gesteun word nie.[204]

Origens hoef alle dade van beheer en bestuur nie noodwendig gesamentlik deur die deeleienaars verrig te word nie. Ingevolge die wetboek is elke deeleienaar geregtig om op eie inisiatief dade ter behoud van die saak en van voorlopige beheer te verrig.[205] Soos reeds gesien is, sluit dade ter behoud onder andere die herstel van 'n dak wat deur 'n storm beskadig is, in. Voorbeelde van dade van voorlopige beheer is die verkoop van bederfbare gemeenskaplike sake (soos voedsel wat vir die gemeenskaplike eetsaal aangekoop is) en die instel van 'n skadevergoedingseis op grond van skade aan die *appartementsgebouw*.[206]

In die Belgiese praktyk word die bestuur van 'n bepaalde *appartementseigendom* vrywel in elke reglement van mede-eiendom op 'n vaste basis geplaas. Deurgaans word voorsiening gemaak vir 'n algemene vergadering as beraadslagende en besluitnemende orgaan asook, in navolging van die Franse reg, vir 'n *syndicus* of bestuurder as uitvoerende orgaan. Die funksie van die bestuurder is om die deurlopende bestuur van die skema te behartig en die besluite van die algemene vergadering uit te voer. 'n Bestuursraad word somtyds aangestel as

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200 R 4(2).
201 A 577*bis* § 5 6.
202 A 577*bis* § 6. Sien Mertens *Appartementsrecht* 195; Pede-Pierson a 577*quinquies* § 8; Mundeleer-Gol a 577–9 § 3 4.
203 Sien Kadaner "L'administration de l' immeuble divisé" in *La copropriété* (1985) 181.
204 Aeby *et al Propriété* nr 385; De Page en Dekkers *Traité Elémentaire* VI nr 1156 1160A; Derine *et al Zakenrecht* nr 798.
205 A 577*bis* § 5.
206 Sien Mertens *Appartementsrecht* 196; Vileyn 1983 *Tijdschrift voor Privaatrecht* 22.

verbindingskanaal tussen die algemene vergadering en die *syndicus*. Die meeste skemas maak ook gebruik van 'n opsigter om lopende toesig te verseker.[207]

Die uitgangspunt van die Wet op Deeltitels is dat die gemeenskap van deeleienaars nie behoorlik kan funksioneer sonder 'n permanente bestuursliggaam om hul belange te behartig nie.[208] Daarom maak die wet uitdruklik voorsiening vir 'n sentrale bestuursorgaan, naamlik die regspersoon bestaande uit al die deeleienaars.[209] Die regspersoon funksioneer deur middel van die algemene vergadering[210] as besluitnemende orgaan en die raad van trustees wat die bevoegdhede van die regspersoon uitoefen en die besluite van die algemene vergadering uitvoer.[211] Indien die regspersoon nie sy pligte behoorlik uitvoer nie, kan enige belanghebbende die hof nader om die aanstelling van 'n administrateur in die plek van die regspersoon en trustees.[212]

Die regspersoon moet sorg dat die bepalings van die wet en die reëls nagekom word en dat die skema tot voordeel van al die deeleienaars beheer en bestuur word.[213] Die wet bevat 'n uitvoerige uiteensetting van die werksaamhede en bevoegdhede van die regspersoon.[214] Hierdie werksaamhede en bevoegdhede word behoudens die bepalings van die wet en die reëls asook beperkings of opdragte van die algemene vergadering, deur die trustees verrig en uitgeoefen.[215]

Hoewel die bepalings van die Maatskappywet nie op die regspersoon van toepassing is nie[216] het die regspersoon volle regspersoonlikheid met ewigdurende erfopvolging. Verder is dit bevoeg om as eiser en verweerder namens die deeleienaars in regsgedinge ter behartiging van hulle belange op te tree.[217] Dit verskil van die Belgiese vereniging van deeleienaars wat geen regspersoonlikheid het nie. Een gevolg hiervan is dat 'n derde wat 'n aksie teen deeleienaars as 'n groep wil instel, elke deeleienaar afsonderlik moet dagvaar.[218] Beide Belgiese wetsvoorstelle maak gevolglik daarvoor voorsiening dat die vereniging van *appartementseigenaars* met regspersoonlikheid beklee word.[219]

5 12 2 Die algemene vergadering

Ingevolge sowel die Belgiese as die Suid-Afrikaanse reg is die algemene vergadering die belangrikste bestaansorgaan van die regspersoon of die vereniging van *appartementseigenaars*.[220] Die Wet op Deeltitels verplig die ontwikkelaar om binne 60 dae na die datum van instelling van die regspersoon 'n algemene

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207 Sien Mertens *Appartementsrecht* 196 – 197.
208 Sien Van der Merwe en Butler 246.
209 A 36 – 38.
210 Sien Aanhangsel 8 r 50 – 67.
211 Sien *idem* r 4 – 40.
212 A 46; sien verder Van der Merwe en Butler 287 – 289.
213 A 36(4) en 37(1)(r).
214 A 37(1) en 38.
215 A 39(1); sien verder Van der Merwe en Butler 263 – 266.
216 A 36(5).
217 A 36(6). Sien verder Van der Merwe en Butler 41 – 43; sien ook a 41 – 43.
218 Sien in die algemeen Van Halteren "Deux questions relatives á la révision du statut de la copropriété des immeubles divisés, Section II, Faut-il conférer la personnalité juridique aux associations de copropriété" in *La copropriété* (1985) 88 – 110.
219 Pede-Pierson a 577*quater* § 2; Mundeleer-Gol a 577 – 9 § 1.
220 Sien vir België die modelreglement van Aeby a 7.01.

vergadering met 'n voorgeskrewe agenda te hou.[221] Die Belgiese modelreglement bevat nie 'n soortgelyke bepaling nie, maar poog om die magsposisie van die ontwikkelaar (*bouwpromotor*) sover moontlik gedurende die vroeë stadium te beperk.[222] Die wetsvoorstel van Pede-Pierson veroorloof enige deeleienaar om die eerste vergadering byeen te roep.[223]

Sowel die Suid-Afrikaanse as die Belgiese modelreëls vereis dat 'n jaarlikse algemene vergadering gehou word.[224] Die vergadering word byeengeroep deur die trustees (Suid-Afrika)[225] of die bestuurder of voorsitter van die vergadering (België)[226] en voldoende kennis moet aan deeleienaars gegee word.[227] 'n Buitengewone algemene vergadering kan daarnaas ook deur die trustees of 'n bepaalde aantal deeleienaars aangevra word.[228]

Sowel die Suid-Afrikaanse as die Belgiese reg verbind die reg van 'n persoon om die algemene vergadering by te woon en daarop te stem aan die eiendomsreg van 'n deel of *kavel*.[229] Stemreg kan persoonlik of deur middel van 'n gevolmagtigde uitgeoefen word.[230] Indien meer as een persoon geregtig is op 'n *kavel*, kan hulle gevolmagtigdes aanwys om namens hulle die vergadering by te woon.[231] In die Belgiese reg geld dit nie slegs ten opsigte van medeeienaars nie maar ook ten opsigte van meerdere saaklikgeregtigdes soos 'n vruggebruiker en blooteienaar van 'n *kavel*.[232] Ingevolge die Belgiese modelreëls mag 'n bestuurder nie as gevolmagtigde aangestel word nie. Ten einde 'n magsblok te voorkom, beperk die Belgiese modelreëls ook die aantal stemme wat een eienaar as gevolmagtigde mag uitoefen.[233] Die modelreëls bevat verdere bepalings omtrent die agenda[234] van die algemene vergadering en die kworumvereiste.[235]

Ingevolge sowel die Suid-Afrikaanse as die Belgiese reg word die waarde van 'n deeleienaar se stem volgens sy kwota bepaal.[236] Gewone besluite word by

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221 A 37(7) gelees met Aanhangsel 8 r 50.
222 Kadaner *L'administration* 172.
223 A 577*quater* § 1 3.
224 Aanhangsel 8 r 51; modelreglement van Aeby a 7.02.
225 Sien Van der Merwe en Butler 267.
226 Derine *et al Zakenrecht* nr 799; Kadaner *L'administration* 173; Mundeleer-Gol a 577 – 8 § 3.
227 Aanhangsel 8 r 54 (ten minste 14 dae). Sien vir België modelreglement van Aeby a 7.02 (ten minste 8 dae); Pede-Pierson a 577*quater* § 3 3 (ten minste 5 dae). Sien ook Derine *et al Zakenrecht* nr 799; Aeby *et al Propriété* nr 400 402; Kadaner *L'administration* 174.
228 Aanhangsel 8 r 53. Sien vir België die modelreglement van Aeby a 7.03; Mundeleer-Gol a 577 – 8 § 5 a 577 – 9 § 3.
229 Aanhangsel 8 r 62. Sien vir België Pede-Pierson a 577*quater* § 1 1; Mundeleer-Gol a 577 – 6 § 1. Let daarop dat huurders en ander bewoners van *appartementen* nóg sitting, nóg stemreg op die algemene vergadering het.
230 Aanhangsel 8 r 67. Sien vir België Pede-Pierson a 577*quater* § 8 4; Mundeleer-Gol a 577 – 6 § 1 2.
231 Aanhangsel 8 r 66. Sien vir België modelreglement van Aeby a 7.08.
232 Modelreglement van Aeby a 7.05 § 2; sien ook Mertens *Appartementsrecht* 197.
233 Modelreglement van Aeby a 7.08; Pede-Pierson a 577*quater* § 4 2 – 3; Mundeleer-Gol a 577 – 6 § 4.
234 Aanhangsel 8 r 56. Sien vir België modelreglement van Aeby a 7.02.
235 Aanhangsel 8 r 57 (wat 'n wisselende kworum afhangende van die aantal eenhede in die skema vereis). Sien vir België Mundeleer-Gol a 577 – 6 § 1 2; Pede-Pierson a 577*quater* § 1 – 3.
236 Aanhangsel 8 r 63.

wyse van 'n meerderheidsbesluit geneem.[237] In Suid-Afrika het elke deeleienaar by die opsteek van hande een stem. Enige deeleienaar kan egter versoek dat die stemming per stembrief geskied en dan word slegs die waarde van elke stem in aanmerking geneem.[238] Vir belangrike besluite word 'n eenparige of spesiale besluit ingevolge die Wet op Deeltitels vereis.[239] Om 'n eenparige besluit te verkry, moet ten minste 80% van al die lede op die vergadering teenwoordig wees en dan sonder teenstem ten gunste van die voorstel stem. By spesiale besluite moet 'n meerderheid van 75% van die aanwesige lede ten gunste van die voorstel stem. 'n Eenparige of spesiale besluit kan ook verkry word indien al die deeleienaars of 75% van al die eienaars 'n skriftelike besluit onderteken.[240] Die Belgiese modelreglement vereis steeds eenparigheid vir belangrike besluite soos die wysiging van kwotas, die vervreemding van gemeenskaplike eiendom en die verandering van die bestemming van dele.[241] Vir minder belangrike besluite, byvoorbeeld die goedkeuring van rekeninge van die bestuurder, word 'n gewone of gekwalifiseerde meerderheid vereis.[242] Besluite wat uitsluitend van belang is vir sogenaamde *particuliere* gemeenskaplike gedeeltes wat slegs vir die gemeenskaplike gebruik van 'n sekere aantal deeleienaars beskikbaar is, word slegs deur daardie eienaars volgens hulle proporsionele stemreg geneem. As die verwarmingstelsel van 'n reeks sakeondernemings op die grondvloer van 'n *appartementegebouw* byvoorbeeld vervang moet word, beslis slegs die belanghebbende deeleienaars daaroor.[243] Die wetsvoorstel van Mundeleer-Gol bepaal dat enige deeleienaar binne 'n maand nadat die besluit geneem is, die hof kan nader om 'n onreëlmatige, bedrieglike of onregmatige besluit nietig te laat verklaar.[244] Nie-nakoming van 'n formele vereiste kan in beginsel slegs tot nietigheid van 'n besluit aanleiding gee indien dit met bedrog of persoonlike benadeling gepaard gaan.[245] Desnieteenstaande aanvaar die Belgiese regspraak en regsleer dat nienakoming van 'n formele vereiste wat daarop gemik is om die ewewaardige belange van die gemeenskap te beskerm, sonder meer nietigheid van die besluit tot gevolg het.[246]

Volgens Belgiese *appartementseigendomspraktyk* moet 'n woordelikse verslag van die beraadslagings en besluite van die algemene vergadering in 'n notule opgeneem en in 'n spesiale register oorgeskryf word.[247] Ten einde afdwingbaarheid teenoor derdes te verseker, moet besluite met saaklike werking in die akteskantoor geregistreer word. Voornemende kopers en huurders van woonstelle word slegs deur die reëls en besluite van die skema gebind indien hulle in die tersaaklike koop- of huurkontrak opgeneem word. Dit verseker dat die koper en huurder hulle later op hierdie reëls en besluite kan beroep en dat dit

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237 Sien vir België Pede-Pierson a 577*quater* § 5 1; Mundeleer-Gol a 577–6 § 5.
238 Aanhangsel 8 r 60 gelees met r 63.
239 Sien Van der Merwe en Butler 271–272 vir aangeleenthede wat 'n eenparige en spesiale besluit vereis.
240 Sien a 1(1) *sv* "eenparige besluit" en "spesiale besluit".
241 Sien Pede-Pierson a 577*quinquies* § 6.
242 Derine *et al Zakenrecht* nr 799; Pede-Pierson a 577*quinquies* § 2 3 6; Mundeleer-Gol a 577–7 § 1.
243 Modelreglement van Aeby a 7.05 § 1; sien Mertens *Appartementsrecht* 197.
244 A 577–9 § 2.
245 *Ibid.*
246 Vgl hieroor Derine *et al Zakenrecht* nr 799; Aeby *et al Propriété* nr 416.
247 Modelreglement van Aeby a 7.09.

teen hulle afgedwing kan word.[248] Omdat die modelreëls of wysiging daarvan by die akteskantoor ingedien word, is alle deeleienaars outomaties ingevolge die Wet op Deeltitels aan die geldende reëls van die skema gebonde.[249]

5 12 3 Uitvoerende orgaan: trustees of bestuurder

Benewens die algemene vergadering maak die Belgiese modelreglement voorsiening vir 'n tweede bestuursorgaan, naamlik die *syndicus* of bestuurder. Die *syndicus* (letterlik "beheerder") word gewoonlik in die oorspronklike reglement benoem en moet later deur die algemene vergadering, of indien nie, deur die hof bevestig word.[250] Hy mag 'n deeleienaar wees maar dit is nie 'n vereiste nie.[251] Ewemin word vereis dat hy 'n natuurlike persoon moet wees; 'n regspersoon soos 'n maatskappy wat in die bestuur van *appartementsgebouwen* spesialiseer, kan ook as bestuurder aangestel word.[252] Die deeleienaars stel dikwels uit hulle geledere 'n voorsitter van die algemene vergadering aan; die *syndicus* dien dan as sekretaris.[253] Niks verhoed die eienaars om 'n raad uit hul geledere te benoem om die *syndicus* by te staan en te beheer nie.[254]

Ingevolge die Wet op Deeltitels word 'n aantal trustees op elke algemene jaarvergadering gekies om die bestuur van die deeltitelskema te behartig en die besluite van die algemene vergadering uit te voer.[255] Alle deeleienaars word vanaf die instelling van die regspersoon tot op die datum van die eerste algemene vergadering outomaties as trustees van die regspersoon beskou.[256] Daarna moet die trustees by die eerste algemene jaarvergadering en by elke jaarvergadering daarna, gekies word.[257] Die aantal trustees word deur die algemene vergadering bepaal met dien verstande dat daar minstens twee trustees moet wees.[258] Die trustee kan 'n algemene bestuurder (*managing agent*) aanstel om die lopende bestuur van die skema te behartig. Sodanige bestuurder moet aangestel word indien die geregistreerde verbandhouer van 50% van die eenhede of die deeleienaars by meerderheidsbesluit op 'n algemene vergadering dit versoek.[259]

Ingevolge die Suid-Afrikaanse wet tree die trustees as verteenwoordigers van die regspersoon op. Aangesien die wet, onderworpe aan bepaalde beperkings, die werksaamhede en bevoegdhede van die regspersoon aan die trustees oordra,[260] is dit onnodig om 'n algemene vergadering vir elke uitvoerende handeling te belê. Die trustees besluit eenvoudig op 'n vergadering van trustees[261]

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248 Sien Kadaner *L'administration* 189 – 190; Dehan en De Page "L'opposabilité des décisions de l'assemblée génerale de copropriétaires" in *La copropriété* (1985) 162 – 165. Sien ook Mundeleer-Gol a 577 – 10 wat verder vereis dat die bestuurder 'n register van die reëls van die huishoudelike reglement moet hou.

249 A 35(5).

250 Sien Pede-Pierson a 577*quater* § 6; Mundeleer-Gol a 577 – 8 § 1. Volgens die modelreglement van Aeby a 7.11 word die bestuurder deur die algemene vergadering benoem.

251 Modelreglement van Aeby a 7.11.

252 Mertens *Appartementsrecht* 198 vn 64.

253 *Idem* 197.

254 Sien modelreglement van Aeby 7.14; Kadaner *L'administration* 225 – 227.

255 Aanhangsel 8 r 28. R 5 bepaal dat die meerderheid trustees deeleienaars moet wees.

256 Aanhangsel 8 r 4(2).

257 R 6.

258 R 4(1).

259 R 46(1).

260 A 39 gelees met Aanhangsel 8 r 26(1).

261 Sien Aanhangsel 8 r 15 – 24.

oor enige aangeleentheid wat binne hul bevoegdhede val.[262] Aangesien die trustees 'n vertrouensposisie beklee, moet hulle altyd eerlik en te goeie trou optree en wesenlike botsings tussen hulle eie belange en dié van die regspersoon vermy.[263]

Volgens Belgiese reg is die bestuurder of *syndicus* lashebber van die gesamentlike *appartementseigenaars* en nie van die algemene vergadering of 'n individuele eienaar nie.[264] Hy moet dus sy mandaat namens die gesamentlike eienaars behoorlik uitvoer en aan hulle verantwoording doen.[265] Aan die ander kant is hulle solidêr aanspreeklik vir regshandelinge deur hom uitgevoer. Aangesien hy 'n outonome opdrag ontvang, is hy nie soos die trustees van die Suid-Afrikaanse reg 'n ondergeskikte orgaan van die algemene vergadering nie. Hy tree namens sowel meerderheids- as minderheidsgroepe op. Slegs indien sy mandaat in die reglement van eiendom uitgebrei word, is hy bevoeg om die besluite van die algemene vergadering uit te voer. 'n Verdere funksie wat normaalweg in die reglement van mede-eiendom aan hom opgedra word, is om regsgedinge teen derdes aanhangig te maak in belang van die *appartementsgebouw*, dringende handelinge van instandhouding en herstel te verrig, bydraes in te samel en uitgawes te betaal, dokumente te bewaar en versekeringskontrakte te sluit.[266] Die vergoeding van die bestuurder asook sy bevoegdheid om 'n plaasvervanger aan te stel, word ook in die reglement gereël.[267]

In beginsel kan 'n bestuurder vir 'n bepaalde of onbepaalde tyd benoem word. Teoreties kan die reglement ook 'n bepaling bevat dat 'n *syndicus* nie voor afloop van sy benoeming ontslaan mag word nie.[268] Die wetsvoorstel van Pede-Pierson bepaal gevolglik dat 'n lashebber se mandaat nie vir langer as drie jaar mag duur nie. Beide wetsvoorstelle verbied bedinge van onherroeplikheid in die reglement en maak daarvoor voorsiening dat 'n bestuurder te eniger tyd voor afloop van sy termyn deur 'n meerderheidsbesluit van die algemene vergadering ontslaan kan word.[269]

5 13 Beëindiging van deeleiendom

Die Belgiese wetgewing bevat geen uitdruklike bepalings omtrent die beëindiging van *appartementseigendom* nie.[270] Daarom moet op die bepalings van die modelreglement of algemene regsbeginsels teruggeval word om hierdie kwessie op te klaar. Hiervolgens kan deeleiendom om juridiese of materiële redes opgehef word. Juridiese redes vir beëindiging is die volgende: indien 'n eenparige besluit (of 'n gekwalifiseerde meerderheidsbesluit soos in die reglement bepaal) verkry word om die deeleiendom te beëindig; indien die reg van opstal of erfpag waarop

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262 Sien Aanhangsel 8 r 25 – 32 omtrent die funksies, bevoegdhede en pligte van trustees.
263 A 40.
264 Mertens *Appartementsrecht* 197 – 198; sien ook Pede-Pierson a 577*quater* 6 1; Mundeleer-Gol a 577 – 8 § 1 2.
265 Mertens *Appartementsrecht* 198; Aeby *et al Propriété* 442. Sien ook Kadaner *L'administration* 220 – 225.
266 Derine *et al Zakenrecht* nr 800B; sien ook modelreglement van Aeby a 7.12; Pede-Pierson a 577*quater* § 6 2; Mundeleer-Gol a 577 – 8.
267 Sien Pede-Pierson a 577*quater* § 6; Mundeleer-Gol a 577 – 8 § 6.
268 Sien Mertens *Appartementsrecht* 198.
269 Sien Pede-Pierson a 577*quater* § 6; Mundeleer-Gol a 577 – 8 § 6.
270 Die rede hiervoor is waarskynlik omdat geen ooreenstemming oor beëindiging by die voorbereiding van die wet van 1924-07-08 bereik kon word nie. Sien die *Annalen van de Senaat 1923 – 1924* 1172 – 1174.

die deeleiendom gestruktureer is, verval; indien alle deeleiendomsregte in een hand (byvoorbeeld dié van die ontwikkelaar) verenig word; en indien die *appartementseigendom* in sy geheel onteien word.[271]

Wat materiële redes betref, onderskei die Belgiese regsliteratuur tussen veroudering van die gebou en vernietiging of beskadiging daarvan. Indien 'n gebou so verouderd raak dat dit nie meer bewoonbaar of winsgewend verhuurbaar (*gemis aan rendabiliteit*) is nie, kan deeleienaars *appartementseigendom* in beginsel slegs by eenparige besluit beëindig. Verskeie skrywers meen dat 'n gewone meerderheidsbesluit in hierdie omstandighede voldoende behoort te wees. Dit sou die deeleienaars dwing om 'n keuse tussen herstel en modernisering of beëindiging van *appartementseigendom* te maak.[272] In die geval van vernietiging of beskadiging van die gebou, pas die regsliteratuur die saakvervangingsteorie toe wat die *appartementseigenaars* verplig om versekerings- en skadevergoedingsuitbetalings ter heropbou en herstel van die gebou aan te wend.[273] Hierdie resultaat word slegs vermy indien die deeleienaars by eenparige besluit anders besluit.[274] Volgens sommige skrywers behoort hierdie aangeleentheid meer uitvoerig in die reglement van elke *appartementseigendom* gereël te word. So kan die wedersydse verpligting tot heropbou gekwalifiseer word. Indien die vervangende geldsom byvoorbeeld ontoereikend is, kan deeleienaars toegelaat word om by wyse van 'n gekwalifiseerde meerderheid van heropbou af te sien. Die omvang van die gekwalifiseerde meerderheid kan aan die hand van die graad van vernietiging of beskadiging van die gebou en die omvang van die tekort in die plaasvervangende geldsom uitgewerk word. Die reg van elke deeleienaar om by beskadiging of gedeeltelike vernietiging van die gebou op eie inisiatief die gebou te herstel en dan die koste van sy deelgenote te verhaal,[275] behoort in die lig van bogenoemde in die reglement gekwalifiseer te word.

Indien op heropbou besluit word, moet die deeleienaars self in beginsel die koste verbonde aan die herstel van hulle *appartemente* betaal.[276] Die koste van herstel van die gemeenskaplike eiendom word proporsioneel tot die kwota van elke eienaar onderling verdeel. Die reglement kan strafmaatreëls bevat ten einde eienaars wat teen heropbou gekant is, te dwing om tot die koste by te dra.[277] Indien op beëindiging besluit word, herleef mede-eiendomsreg van die grond en die gebou. Elke eienaar is dan geregtig om verdeling van die grond en gebou te eis.[278] Ten einde sake behoorlik af te handel, bepaal die wetsvoorstel van Mundeleer-Gol onder andere dat die deeleienaarsvereniging bly voortbestaan totdat alle rekeninge vereffen is.[279]

Net soos ingevolge die Belgiese reg kan deeleiendom ingevolge die Suid-Afrikaanse wet beëindig word indien die eiendom van alle eenhede in een hand

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271 Sien Aeby *et al Propriété* nr 551 – 553; Derine *et al Zakenrecht* nr 802.
272 Aeby *et al Propriété* nr 551; Derine *et al Zakenrecht* nr 804A. Sien verder Mundeleer-Gol a 577 – 12 § 1 4.
273 Aeby *et al Propriété* nr 532 – 537; Derine *et al Zakenrecht* nr 804B; Timmermans *Praktische handleiding* nr 129 – 131. Sien verder Mundeleer-Gol a 577 – 12 § 2 en a 577 – 7 § 2.
274 Sien Pede-Pierson a 577*quinquies* § 10; Mundeleer-Gol a 577 – 7 § 1.
275 A 577*bis* § 3.
276 Derine *et al Zakenrecht* nr 804A.
277 Sien modelreglement van Aeby a 6.04; sien verder Mundeleer-Gol a 577 – 9.
278 Derine *et al Zakenrecht* nr 805.
279 A 577 – 13. Alle regsvorderinge verjaar na 5 jaar.

verenig is en dié eienaar aansoek doen om die deeltitelregister te sluit,[280] of indien die deeleienaars die regspersoon by eenparige besluit gelas om die geheel van die gemeenskaplike eiendom te vervreem.[281] Daarbenewens kan 'n deeltitelskema slegs beëindig word indien die gebou fisies vernietig is of indien die eienaars by eenparige besluit of die hof op aansoek van 'n belanghebbende 'n bevel uitreik dat dit reg en billik is dat die gebou geag word vernietig te wees.[282] Sodanige eenparige besluit of hofbevel kan in beginsel op grond van vernietiging, beskadiging of selfs blote veroudering van die gebou verkry word.[283] Benewens die bevel, kan die hof voorwaardes oplê of bevele gee ten einde 'n billike oplossing van botsende belange te bewerkstellig.[284]

Indien 'n eenparige besluit of 'n hofbevel verkry is dat die gebou geag word vernietig te wees en ook indien die gebou slegs beskadig is, kan die deeleienaars, weer eens by eenparige besluit, of die hof op aansoek van 'n belanghebbende, 'n skema vir die heropbou van die hele of 'n gedeelte van die gebou of geboue magtig. Op dieselfde manier kan ook voorsiening gemaak word vir die oordrag aan die ander deeleienaars van die belange van deeleienaars wie se dele geheel of gedeeltelik vernietig is. Ter uitvoering van die heropbouskema kan die eienaars ook verskeie besluite neem, of die hof kan bevele uitreik, met betrekking tot byvoorbeeld die aanwending van versekeringsgeld, wedersydse uitbetalings, die wysiging van die deelplan en kwotas en die oplegging van voorwaardes.[285]

Slegs indien die gebou geag word vernietig te wees en die deeleienaars of die hof nie die opsie aanvaar om die gebou te herbou nie, kan die deeleienaars by wyse van 'n eenparige besluit, besluit om nie te herbou nie.[286] Indien hierdie besluit in die akteskantoor aangeteken is, word die deeleienaars mede-eienaars van die grond in onverdeelde aandele in verhouding tot hulle vorige deelnemingskwotas. Die grond val dan terug na die grondregister. Enige belanghebbende kan by die hof aansoek doen om ontbinding van die regspersoon.[287]

Kritiek teen die bepalings van die Wet op Deeltitels is eerstens dat die wetgewer ongelyksoortige aangeleenthede in een artikel probeer reël, naamlik vernietiging, gedeeltelike vernietiging, beskadiging en blote veroudering. Die vraag kan tereg gestel word of elkeen van hierdie gebeurlikhede nie 'n eiesoortige reëling verg nie. Tweedens is die bepalings omtrent heropbou onvoldoende: geen tydsbepaling word op die duur van die proses geplaas nie en die trustees word nie verplig om so gou doenlik 'n vergadering te belê om heropbou te bespreek nie. Bowendien lyk dit of algehele of gedeeltelike heropbou ooreenkomstig die ou deelplan moet geskied sonder inagneming van die estetiese of ekonomiese eiendresultaat. Derdens is die prosedure om die skema te beëindig onnodig ingewikkeld. Eers moet 'n eenparige besluit of 'n hofbevel verkry word dat die gebou geag word vernietig te wees, en daarna moet die eienaars eenparig besluit om nie te herbou nie. In stede daarvan behoort die deeleienaars toegelaat te

280 A 14(6).
281 A 17(5).
282 A 48(1).
283 Sien Van der Merwe en Butler 295 – 296.
284 A 48(2).
285 A 48(3).
286 A 49(1).
287 A 49(3) en (4).

word om van die begin af eenparig te besluit om die deeltitelskema te beëindig.[288]

5 14 Oplossing van geskille

Die oplossing van geskille tussen deeleienaars onderling of tussen die regspersoon en 'n deeleienaar oor die oortreding van wetsbepalings en reëls word in die Belgiese reg gewoonlik in die reglement gereël. Die reglement van 'n skema bevat normaalweg 'n bepaling dat 'n geskil eers aan die algemene vergadering voorgelê moet word en indien geen skikking in dié forum bereik kan word nie, moet dit na 'n onafhanklike arbiter verwys word. Die uitsprake van arbiters word egter selde gepubliseer en bevat gewoonlik geen algemene beginsels wat as riglyne vir die oplossing van toekomstige geskille kan dien nie. Daarom word aanbeveel dat geskille wat in 'n deeleiendomsgemeenskap ontstaan, deur 'n vrederegter wat die laagste trap in die Belgiese hofhiërargie is en in elke kanton of distrik gesetel is, verhoor moet word. Op hierdie wyse kan geskille spoedig en goedkoop afgehandel word.[289] Wat Suid-Afrika betref, behoort oorweeg te word om die jurisdiksie van die hof vir klein eise uit te brei ten einde ook hierdie geskille aan te hoor.

6 SLOTSOM

'n Vergelyking tussen die Suid-Afrikaanse en Belgiese wetgewing dui daarop dat die Suid-Afrikaanse wetgewing geneig is om deeleiendom oor te reguleer in plaas daarvan om slegs algemene beginsels in die wet te stel wat dan verder in besonderhede in die regulasies uitgewerk kan word. Daarteenoor is die Belgiese wetgewing gewoon te beknop om die ingewikkelde regsverhoudings te reguleer wat ingevolge deeleiendom ontstaan. Die individuele deeleienaars het net nie voldoende kennis en oorsigtelikheid om hul regsverhouding self deur middel van die onderlinge ooreenkomste vervat in die reglement van deeleiendom te reël nie. Vaste reëls omtrent onder andere verbeterings aan die gemeenskaplike eiendom en die bestuur van die skema blyk 'n *sine qua non* vir 'n gelukkige en tevrede deeleiendomsgemeenskap te wees.

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288 Sien verder Van der Merwe en Butler 304 – 309.

289 Sien modelreglement van Aeby a 8.03; Derine *et al Zakenrecht* nr 794 met n 233; Mertens *Appartementsrecht* 217.

The law has got to be stated over again; and I venture to say that in fifty years we shall have it in a form of which no man could have dreamed fifty years ago (Holmes *Use of law school. Speeches* (1913) 34).

Deliktuele aanspreeklikheid weens misbruik van die regsproses

JMT Labuschagne
MA DPhil LLD
Professor in die Inheemse Reg, Universiteit van Pretoria

SUMMARY

Delictual liability for abuse of legal process

The delict of malicious prosecution is scrutinised in this article. It is pointed out that the use of the phrase "malicious prosecution" is unsatisfactory and too narrow. The abuse of criminal, civil and administrative procedure should entail delictual liability. The instigation of a legal process is not always a requirement. In apt circumstances the continuation of a legal process should suffice. Abuse of legal process can also occur by omission. A successful delictual claim for abuse of legal process should in certain circumstances be possible even if the plaintiff was convicted in a preceding criminal trial. Generally, *animus iniuriandi* is a prerequisite for the traditional delict (*iniuria*) of abuse of legal process. In certain circumstances, it is submitted, negligence should suffice.

1 INLEIDING

Hoewel dikwels in veral Anglo-Amerikaanse gewysdes en literatuur na 'n delik kwaadwillige vervolging ("malicious prosecution") verwys word, is dit duidelik dat dié terminologie enersyds te beperkend en andersyds verwarrend is. In sy gesaghebbende werk oor die persoonlikheidsreg verwys Neethling[1] na deliktuele aanspreeklikheid weens kwaadwillige regsgedinge en onderskei daaronder weer tussen kwaadwillige vervolging en kwaadwillige siviele gedinge. Fleming[2] verwys in dieselfde trant na kwaadwillige vervolging as 'n verskyningsvorm van "abuse of legal procedure". Wat duidelik blyk, is dat die begrip "kwaadwillige vervolging" nie dit waarom dit werklik gaan, behoorlik beskryf nie. Daarom word die begrip "misbruik van die regsproses" gebruik. Die redes daarvoor blyk uit die bespreking wat volg.

Die geskiedkundige oorsprong en ontwikkeling van die reëls ten aansien van deliktuele aanspreeklikheid in dié verband word nie hier behandel nie aangesien ander skrywers dit reeds redelik omvattend ondersoek het.[3]

Deliktuele aanspreeklikheid weens die misbruik van die regsproses staan midde in die spanningsveld gevorm deur twee waardes van besondere sosio-juridiese belang. Aan die een kant is daar die waarde wat ten doel het om regsonderdane

1 *Persoonlikheidsreg* (1991) 170 – 186 (aangehaal as Neethling).
2 *The law of torts* (1987) 579 589.
3 Lee "Malicious prosecution in Roman-Dutch law" 1912 *SALJ* 22; Neethling 170 – 171; Pauw "Kwaadwillige vervolging ('malicious prosecution') en die actio iniuriarum – 'n ander standpunt" 1978 *THRHR* 394.

teen die gevolge van ongeregverdigde gedingvoering te beskerm, en aan die ander kant is daar die waarde beliggaam in die gemeenskapsbehoefte om burgers aan te moedig om die owerheid te ondersteun in sy strewe on geregtigheid te bevorder deur, onder andere, misdadigers aan die man te bring.[4] In die Verenigde State van Amerika word, hierby aansluitend, gewaarborg dat iemand wat 'n saak het deur die howe aangehoor sal word; hierteenoor is daar egter wetgewing, met onder andere deliktuele konsekwensies, om beuselagtige gedingvoering ("frivolous litigation") te bekamp. Litigasie is beuselagtig as dit onderneem word "primarily to delay or prolong the resolution of litigation, or to harass or maliciously injure another".[5]

2 MISBRUIK VAN DIE STRAFPROSES

In die Amerikaanse saak *Stauffacher v Brother*[6] word die volgende vereistes vir die onderhawige aksie gestel: (i) die aanvang of kontinuering van oorspronklike strafverrigtinge (ii) deur die verweerder; (iii) die *bona fide* beëindiging daarvan ten gunste van die eiser; (iv) die afwesigheid van 'n waarskynlike oorsaak ("probable cause") vir sodanige verrigtinge; (v) die kwaadwillige voer van die verrigtinge deur die eiser; en (vi) die veroorsaking van vermoënskade en/of persoonlikheidsnadeel aan die eiser. Hierdie vereistes word as sodanig deur Gilbert[7] in 'n annotasie tot die saak *Watzek v Walker*[8] bevestig.

Neethling[9] meld in hoofsaak dieselfde vereistes maar voeg vereistes (i) en (ii) saam. 'n Soortgelyke benadering word aangetref by byvoorbeeld Amerikaanse,[10] Kanadese[11] en Nieu-Seelandse[12] skrywers.[13] In die bespreking wat volg, word dié benadering ook as uitgangspunt gevolg.

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4 Sien Fleming 579: "On one side, it needs no emphasis that the launching of scandalous charges is apt to expose the accused to serious injury, involving his honour and self-respect as well as his reputation and credit in the community. Malicious prosecution, therefore, bears close resemblance to defamation, both being infringements of essentially the same complex of interests on the part of the plaintiff. On the other side, however, is the competing interest of society in the efficient enforcement of the criminal law, which requires that private persons who co-operate in bringing would-be offenders to justice, should be adequately protected against the prejudice which is likely to ensue from termination of the prosecution in favour of the accused. So much weight has been attached to this consideration that the action for malicious prosecution is held on tighter rein than any other in the law of torts. Incidentally, it may also explain why this action was never absorbed into the law of defamation."

5 Schaus "Sanctions for frivolous litigation take hold in New York" 1990 *Buffalo LR* 305.

6 (1940) 128 ALR 925 (South Dakota SC) 927.

7 "Malicious prosecution: liability for instigation or continuation of prosecution of plaintiff mistakenly identified as person who committed an offence" 66 ALR 3d 10 15.

8 (1971) 66 ALR 3d 1 (CA Arizona).

9 171 – 172; sien ook Neethling "Kwaadwillige vervolging as iniuria ('malicious prosecution')" 1978 *THRHR* 161; Neethling, Potgieter en Visser *Law of delict* (1994) 329.

10 Pool "Malicious prosecution in Illinois: wrong without a remedy" 1981 *Ill Bar J* 754; sien ook *Joiner v Benton* (1980) 26 ALR 4th 558 (SC Illinois) 563.

11 Bailey "Malicious prosecution" in McBean (red) *Remedies in tort* (1990) hfst 15 11 – 12.

12 Todd "The tort of malicious prosecution" 1989 *New Zealand Univ LR* 420.

13 Vgl ook Fleming 580; *Ramakulukusha v Commander, Venda National Force* 1989 2 SA 813 (VSC) 837; *Pyett v Francis* (1907) 28 NLR 194 197; *Mthimkhulu v Minister of Law and Order* 1993 3 SA 432 (OK) 438 – 439; *Minister of Law and Order v Thusi* 1994 2 SA 224 (N) 226 – 227; Neethling, Potgieter en Visser 329.

2 1 Aanstigting (''instigation'')

Die problematiek in dié verband dek die volgende temas:

2 1 1 As algemene reël vereis aanstigting 'n mate van aktiewe optrede

Die Suid-Afrikaanse sake vereis dat die verweerder moet opgetree het met die oogmerk dat 'n vervolging teen die eiser ingestel word en dit inderdaad deur sy aktiewe optrede bewerkstellig het.[14] Uit die saak *Waterhouse v Shields*[15] blyk dat die verweerder gepoog het om 'n lasbrief vir die arrestasie van die eiser te Kaapstad te verkry. Toe hy nie daarin kon slaag nie, het hy telefonies sodanige lasbrief in Johannesburg verkry. Nadat hy die lasbrief verkry het, het hy die polisie aktief gehelp om die eiser op te spoor en persoonlik na die eiser se huis tydens arrestasie gegaan. Gedurende die voorlopige ondersoek het hy sy prokureur spesifiek versoek om die aanklaer by te staan. Die hof beslis dat die verweerder aktief-instrumenteel tot die vervolging teen die eiser was.[16] In *Manjiya v Brigg*[17] het die hof daarop gewys dat waar die polisie self sonder instruksies van die verweerder opgetree het, nie gesê kan word dat die verweerder die vervolging aangestig het nie.

In *Lederman v Moharal Investments (Pty) Ltd*[18] wys appèlregter Jansen daarop dat die konsep aanstigting of inwerkingstelling van strafverrigtinge ''is the causing of a certain result, ie a prosecution, which involves the vexed question of causality''. Hy wys verder daarop dat die beantwoording van dié kousaliteitsvraag veral problematies is as die nodige formele stappe om die vervolging in werking te stel deur die polisie gedoen is, maar daar gepoog word om te bewys dat 'n ander (verweerder) eintlik vir die vervolging verantwoordelik was. Appèlregter Jansen aanvaar nietemin die benadering, soos onder andere blyk uit *Waterhouse v Shields*, as die korrekte. Ek wil nie hier toetree tot die debat oor welke kousaliteitsteorie[19] aangehang behoort te word nie, hoewel die teorie wat feitelike en juridiese kousaliteit as selfstandige elemente erken vir my die aanvaarbaarste voorkom.[20]

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14 *Baker v Christiane* 1920 WLD 14 16; *Tshabalala v Barnard* 1934 OPD 57 59; *Thorneley v Herschensohn* 1936 NPD 550 559 – 560.

15 1924 CPD 155 169.

16 Sien ook Neethling 1978 *THRHR* 164: ''Samevattend kan die toets vir die vereiste van aanstigting, soos deur Amerasinghe voorgestel, myns insiens kernagtig soos volg herformuleer word: Die verweerder het die vervolging aangestig indien al die omringende omstandighede 'n afleiding regverdig dat hy hom deur sy optrede met die vervolging geïdentifiseer het (met ander woorde opgetree het met die oogmerk om die eiser te laat vervolg) en dat die vervolging inderdaad uit sy optrede gevolg het.''

17 1915 EDL 406 410.

18 1969 1 SA 190 (A) 197; vgl *Sheppy v Barry Bros* (1906) 23 SC 341 342 – 343.

19 Sien tav die *conditio sine qua non*-teorie vir feitelike kousaliteit wat blykbaar deur die howe onderskryf word, *S v Mokgethi* 1990 1 SA 32 (A) 39; *Minister of Police v Skosana* 1977 1 SA 31 (A); Van Oosten *Oorsaaklikheid by moord en strafbare manslag* (LLD-proefskrif UP 1981). Sien verder Kodilinye ''Setting in motion malicious prosecutions: the Commonwealth experience'' 1987 *IQLR* 157 158 – 161.

20 Sien bv Van Rensburg *Juridiese kousaliteit en aspekte van aanspreeklikheidsbeperking by die onregmatige daad* (LLD-proefskrif Unisa 1970); Potgieter ''Feitelike en juridiese kousaliteit'' 1990 *THRHR* 267; Visser ''Conditio sine qua non'' 1989 *THRHR* 561; Neethling, Potgieter en Visser 161 – 167; Snyman *Strafreg* (1992) 81 – 82.

2 1 2 Die effek van 'n voorafgaande inkriminerende verklaring aan die polisie of ander regsbeampte

In die Amerikaanse saak *Koble v Carey*[21] is beslis dat 'n aksie nie kan slaag indien die verweerder bloot al die feite binne sy kennis aan 'n vrederegter openbaar en 'n strafgeding dan in werking gestel word nie. 'n Soortgelyke benadering is in die Kanadese saak *Berman v Jenson*[22] gevolg.

In *Michau v Westerman*[23] het W op versoek van die militêre owerheid 'n beëdigde verklaring gemaak tot die effek dat M sekere hoogverraadhandelinge verrig het. Die militêre owerheid het op grond hiervan, asook op grond van ander beëdigde verklarings, 'n vervolging teen M ingestel. Die hof beslis dat die maak van sodanige beëdigde verklaring die reg nie in werking stel nie. Dit het dieselfde effek as om as getuie in 'n hof op te tree.[24] Hierdie benadering is deur die appèlhof (per appèlregter Muller) in *Prinsloo v Newman*[25] bevestig:

> "In view of what has been stated, it is my conclusion that, on the evidence, there was no justification for a finding that the information placed before the prosecutors by Captain Prinsloo went beyond an honest statement of the relevant facts on which the prosecution was instituted and that he left it to the prosecutors to decide whether a prosecution should be instituted or not. It follows that, in my judgment, the trial Court erred in holding that the plaintiff had established that Captain Prinsloo had instigated the prosecution, or, as alleged in the plaintiff's particulars of claim, that he had 'perferred' the charge and 'caused the prosecution of the plaintiff'."

2 1 3 Aanspreeklikheid van 'n regsverteenwoordiger

Sover my kennis strek, is daar nog nie 'n gerapporteerde saak in Suid-Afrika wat gehandel het oor die vraag of, en indien wel, in welke mate 'n regsverteenwoordiger aanspreeklik is vir misbruik van die strafproses deur sy kliënt op sy aandrang of aanmoediging nie. In die VSA was daar al verskeie sake in die verband. Kraut[26] het 'n analise van die sake onderneem en konkludeer soos volg:

> "An attorney will not be held liable for malicious prosecution merely by reason of his representation in good faith of his client. As in the case of an action for malicious prosecution generally, malice and want of probable cause must be shown. Thus, although an attorney has the right to rely in good faith upon statements of facts made to him by his client, yet if the client is acting with malice and without probable cause, and the attorney knows it, he will be liable for malicious prosecution. Similarly, acts of the attorney himself, made with malice and want of probable cause, will make him liable for malicious prosecution. So, if he acts without the authority of his client, or conspires with his client, he is liable."

Soos blyk uit hierdie uiteensetting, kom die beginsels van die Amerikaanse reg ten aansien van misbruik van die strafproses grootliks ooreen met dié van die Suid-Afrikaanse reg. Die Amerikaanse reg in dié verband kan in die lig hiervan myns insiens ook hier ter plaatse met vrug gevolg word.

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21 (1918) 12 ALR 1227 (Arkansas SC) 1230.
22 (1989) 77 Sask R 181 (QB); Bailey ii.
23 (1900) 17 SC 432 434 – 435.
24 Sien ook *Madnitsky v Rosenberg* 1949 1 PH J5 (W); *Baker v Christiane supra* 17.
25 1975 1 SA 481 (A) 495.
26 "Liability of attorney acting for client, for false imprisonment or malicious prosecution of third party" 27 ALR 3d 1113 1117 (annotasie tot *Munson v Linnick* (1967) 27 ALR 3d 1104 (California CA)).

2 1 4 Aanstigting deur 'n late

Bailey,[27] wat oor die Kanadese reg skryf, wys daarop dat indien voortgegaan word met 'n vervolging terwyl die aanstigter intussen inligting bekom het wat duidelik op die onskuld van die beskuldigde dui, dit misbruik van die strafproses daarstel. Hier het 'n mens myns insiens met late-aanspreeklikheid te make aangesien daar by die verkryging van die inligting oor die beskuldigde se onskuld 'n plig op die aanstigter rus om die inligting deur te gee sodat die vervolging gestaak kan word. Hierdie siening word bevestig in die Amerikaanse saak *Seidel v Greenberg*.[28] In dié saak het die aandeelhouers en beamptes van 'n maatskappy wat saamgespan het om brandstigting te pleeg met die doel om versekeringsgeld te bekom, toegelaat dat die boekhouer van dié misdaad aangekla word terwyl hy niks daarmee te doen gehad het nie. Die boekhouer het suksesvol kompensasie van die werklike samesweerders vir kwaadwillige vervolging geëis. Die hof merk soos volg op:[29]

> "The question is not simply whether a criminal event is foreseeable, but whether a *duty* exists to take measures to guard against it. Whether a *duty* exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution."

2 1 5 Kontinuering van 'n strafgeding

Dit is interessant om daarop te let dat daar nie 'n siviele[30] eis bestaan teen 'n getuie wat vals of selfs kwaadwillige getuienis aflê nie. Meineed is nie 'n delik nie.[31] Kwaadwillige optrede buite die getuiebank, soos blyk uit die delik "kwaadwillige vervolging", kan egter wel tot siviele aanspreeklikheid aanleiding gee. Hierdie onderskeid is moeilik verdedigbaar. So verklaar Cane:[32]

> "How are we to explain these apparently inconsistent propositions? This may be possible by observing the limits of the immunity from action given to participants in the legal process. On the whole, it only extends to things said or done in court, and to preparation for trials. It does not extend to the decision whether or not to institute proceedings. It should be noted, however, that it is not tortious simply to institute unjustified legal proceedings for an improper purpose. The public interest in the due administration of justice is taken to demand, in addition, that the defendant did not honestly believe that the proceedings were justified or, if he did, that his belief was unreasonable. But it is not clear that this distinction between the institution and the conduct of proceedings is justified. If it is not necessary to protect parties from tort liability for maliciously and knowingly (or unreasonably) instituting unjustified proceedings, why is it necessary to protect them from tort liability for maliciously and knowingly (or unreasonably) giving false evidence? And if it is not necessary to protect parties from tort liability in the latter situation, why is it necessary to protect other participants in the legal process from similar liability?"

Dit blyk egter duidelik dat deliktuele aanspreeklikheid weens misbruik van die strafproses ook behoort te kan volg ten aansien van 'n persoon wat nie die proses aangestig[33] het nie maar wel deur 'n buitegeregtelike verklaring gekontinueer het. Indien A byvoorbeeld weet B word valslik van 'n misdaad aangekla

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27 13.
28 (1969) 40 ALR 3d 987 (New Jersey SC).
29 995.
30 Sien tav strafregtelike aanspreeklikheid Labuschagne "Dekriminalisasie van meineed" 1991 *TRW* 20.
31 Sien die Engelse sake *Roy v Prior* (1970) 2 All ER 729 (HL); *Dawkins v Lord Rokeby* (1875) 7 HL 744; *Watson v McEwan* (1905) AC 480.
32 *Tort law and economic interests* (1991) 285.
33 Vgl die feitestel in *Mall v Goolam* (1906) 27 NLR 425 430.

deur C, wat *bona fide* 'n strafgeding aangestig het, en hy maak buite-geregtelik 'n kwaadwillige verklaring aan 'n polisieman dat B wel die misdaad gepleeg het as gevolg waarvan die staat met die strafproses voortgaan, is hy myns insiens deliktueel aanspreeklik weens misbruik van die strafproses, nieteenstaande die feit dat hy nie die geding aangestig het nie.

2 1 6 Aanspreeklikheid van 'n polisie-informant

As algemene reël is 'n polisie-informant in ons reg op anonimiteit geregtig.[34] In *Sebastian v Consalves*[35] word daarop gewys dat dit nie beteken dat nie in 'n hof bewys mag word wie die informant is nie:

> "On grounds of public policy, and in order that persons should have that protection from disclosure which would enable them to give information freely to the police so that crime may be investigated . . . the general rule is that not only may the police authorities not disclose the identity of the informer, but a witness himself cannot be compelled to answer questions directed to prove that he is the informer. But public policy does not prohibit proof that the defendant was in fact the informer; if it did, no action for malicious prosecution would be competent. Such proof may be furnished by the direct evidence, to inference drawn therefrom, or third persons. It may also be furnished by an admission by the defendant in his plea to a claim for damages for malicious prosecution . . . by an admission by him to a third party outside the Court."

In *S v Safatsa*[36] wys die appèlhof egter daarop dat die reël teen die openbaarmaking van die identiteit van 'n polisie-informant nie dieselfde dwingende aard as regsprofessionele privilegie[37] het nie. Die howe het dan ook verskeie uitsonderinge geskep op die reël dat die identiteit van die polisie-informant vertroulik is: Eerstens geld dié reël slegs as die openbaarmaking van die identiteit van die informant tot nadeel van die regsadministrasie sal wees.[38] Tweedens is daar geen reël wat 'n getuie verbied om self te openbaar dat hy 'n informant is nie.[39] Derdens kan vrae aan 'n getuie gestel word oor inligting wat hy aan die polisie verskaf het as dit reeds bekend is dat hy 'n informant is.[40] Vierdens kan die hof openbaarmaking van die identiteit van en inligting verskaf deur die informant beveel as dit waarskynlik die onskuld van die beskuldigde sal bewys.[41]

In *R v Van Schalkwyk*[42] het die hof aangedui dat 'n persoon aan die volgende drie vereistes moet voldoen om as informant te kwalifiseer: Eerstens is

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34 *Marais v Lombard* 1958 4 SA 224 (OK) 231.
35 1939 TPD 172 175.
36 1988 1 SA 868 (A) 885.
37 Sien hieroor Labuschagne en Kotzé "Regsberoepprivilegie" 1982 *De Jure* 97 283.
38 *Ex parte Minister of Justice: In re R v Pillay* 1945 AD 653 669.
39 *Boshoff v Marais* 1933 TPD 55 57; *Sebastian v Consalves supra* 175 – 176; *Baker v Christiane supra* 15: "[A]dmissions by an informer other than those made to persons in their official capacity, as to his own identity and as to the nature of the information on which the law was set in motion are admissible in evidence against such informer in an action for malicious prosecution."
40 *R v Van Schalkwyk* 1938 AD 543 555.
41 *Tranter v Attorney-General and the First Criminal Magistrate of Johannesburg* 1907 TS 415 423: "So that I take the rule of the English law to be that no question can be put, and no document admitted in evidence, which would disclose the name of the informer in connection with a public prosecution, or the information which he gave, except *in favorem innocentiae* – where, in the opinion of the judge, it is likely that the evidence would tend to establish the innocence of the accused. That rule applies not only to proceedings at the criminal trial itself, but to any subsequent civil proceedings arising out of it; and therefore *a fortiori* to a private criminal prosecution, founded on the allegation that the person being prosecuted is the original informer."
42 548.

hy iemand "who gives information of a kind prejudicial to others whose emnity he may thereby provoke". Tweedens moet die inligting van so 'n aard wees dat dit tot 'n strafregtelike vervolging kan lei; en derdens moet die inligting aan regsbeamptes ("officers of justice") verskaf word.[43] Marx[44] wys daarop dat dit empiries dikwels moeilik is om te onderskei tussen 'n informant en 'n lokvink omdat "[t]here are pressures inherent in the role that push the informant toward provocation".[45] Dit skep 'n teelaarde vir misbruik. Daar bestaan myns insiens in ieder geval geen geldige rede waarom 'n leuenagtige en kwaadwillige informant deur die reg beskerm behoort te word nie.[46]

2 1 7 Aanspreeklikheid van regsprekers en owerheidsamptenare

In die VSA bestaan daar nie eenstemmigheid oor die vraag of polisiemanne en ander misdaadbekampingsamptenare vir kwaadwillige vervolging aanspreeklik kan wees nie.[47] Hieroor verklaar Drechsler:[48]

> "In the great majority of cases the civil liability of a law enforcement officer has been determined by the decision of whether or not the doctrine of judicial immunity extends to such type of public officer.
>
> While there is a direct conflict of authority on this point, the better view seems to be that the doctrine is applicable to law enforcement officers and that they therefore are immune from liability for malicious prosecution even though they may have acted maliciously and without probable cause.
>
> The reason for the above-stated rule is that public policy requires that law enforcement officers be protected from harassment by civil actions in the performance of their duty, the efficient functioning of the law enforcement machinery being dependent largely upon the investigation and the accusation of offenders by properly trained officers."

In Suid-Afrika bestaan egter geen twyfel dat polisiemanne en ander misdaadbekampingsamptenare en/of die staat aanspreeklik gehou kan word vir misbruik van die strafproses nie.[49]

In die VSA[50] besit die prokureur-generaal en aanklaers absolute immuniteit teen 'n eis vir misbruik van die strafproses.[51] In Suid-Afrika is die posisie blykbaar dieselfde, hoewel daar sekere kontrolemeganismes ten aansien van die beslissings van die prokureur-generaal en sy gevolmagtigdes bestaan.[52] 'n Prokureur-generaal of staatsaanklaer wat *mala fide* optree, behoort myns insiens nie regsbeskerming te geniet nie.

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43 Die blote verskaffing van inligting aan die polisie met die doel om 'n persoon te laat arresteer, maak nie van iemand 'n informant nie – *R v Makaula* 1949 1 SA 40 (K) 45 – 46.

44 "Thoughts on a neglected category of social movement participant: the agent provocateur and the informer" 1974 *American Journal of Sociology* 404.

45 Vgl ook Stickland "Agents Provocateurs" 1974 *Police Review* 523; Labuschagne "Die lokvink en lokvinkbetrapte in die strafregspleging" 1976 *De Jure* 18.

46 Sien ook *Suliman v Hansa* 1971 4 SA 69 (D) 73.

47 Sien *White v Towers* (1951) 28 ALR 2d 636 (California SC) 640. In *McIntosh v City and County Denver* (1936) 103 ALR 1509 (Colorado SC) 1511 is beslis dat 'n munisipaliteit vir kwaadwillige vervolging aanspreeklik gehou kan word agv optrede van sy polisiebeamptes.

48 "Civil liability of law enforcement officers for malicious prosecution" 28 ALR 2d 646 (annotasie tot *White v Towers*) 649.

49 Sien *Mlambo v Pietermaritzburg Corporation* (1913) 34 NPD 346 349; *Landman v Minister of Police* 1975 2 SA 155 (OK) 156.

50 *White v Towers supra* 640; Drechsler 650.

51 Bailey 30.

52 Morkel en Labuschagne "Die diskresie van die prokureur-generaal" 1980 *SASK* 165 – 168.

Wat die deliktuele aanspreeklikheid in die onderhawige verband van regters en ander regsprekers in die VSA betref, verklaar Ghent samevattend soos volg:[53]

> "The question of the liability of a judge or other judicial officer for acts performed in the purported exercise of his judicial authority depends, for the most part, on the question of jurisdiction. If the jurisdiction of the officer is complete, and attaches both to the person and the subject matter, then, no matter how erroneous his judgment may be, so long as he acts within the scope of his jurisdiction and in a judicial capacity, no personal liability attaches to him. On the other hand, if he acts wholly without jurisdiction, as distinguished from merely acting in excess of his jurisdiction, his judicial office can afford him no protection."

Ook in dié geval behoort *mala fides* van die regspreker myns insiens tot deliktuele aanspreeklikheid aanleiding te gee. 'n *Amp* behoort 'n *persoon* nooit volledig te vrywaar nie. 'n Ander benadering sou tot misbruik aanleiding gee en sou in finale sin die status van die amp self ondergrawe.

2 2 Onsuksesvolle beëindiging van strafverrigtinge

Daar kan as algemene reël gestel word dat 'n deliktuele eis weens misbruik van die strafproses nie sal slaag indien die eiser in die voorafgaande strafsaak skuldig bevind is nie. Soos hieronder[54] aangetoon word, bestaan daar uitsonderinge op dié reël.

2 2 1 Die effek van 'n onskuldigbevinding

Uit *Hopewell v Conroy*[55] blyk dat die ontslag van 'n beskuldigde in 'n strafsaak voldoende is om af te lei dat hy onskuldig is. Dit staan die verweerder van 'n latere siviele saak egter vry om te bewys dat die eiser (beskuldigde in strafsaak) inderdaad die misdaad gepleeg het.[56] Ten aansien van die Kanadese reg verklaar Bailey soos volg:[57]

> "The reason for termination of the proceedings is not important. The plaintiff need only show the absence of judicial determination of his guilt, not a judicial determination of his innocence. This logically follows from the presumption that a man is innocent until he has been found guilty by due process of law. Thus, the plaintiff need not show acquittal on the merits: the proceedings may have been terminated because of a defect in the indictment or irregularity of procedure."

In die Amerikaanse saak *Asia Investment Co Ltd v Borowski*[58] is egter beslis dat 'n ontslag op tegniese gronde of om prosessuele redes of om 'n ander rede wat nie onbestaanbaar met aanspreeklikheid is nie, nie 'n "favourable termination" is nie. Die Kanadese benadering is te verkies aangesien dit in ieder geval die verweerder vrystaan om in die siviele saak te bewys dat die eiser skuldig is, maar dan blykbaar bloot op 'n oorwig van waarskynlikheid wat die algemene bewysstandaard in siviele sake is.[59]

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53 "Civil liability of judicial officer for malicious prosecution or abuse of process" 64 ALR 3d 1251 (annotasie tot *Osebekoff v Mallory* (1971) 64 ALR 3d 1242 (SC Iowa)) 1254 – 1255. Sien ook Williams "Civil liability of judicial officer for malicious prosecution or abuse of process" 173 ALR 836 (annotasie tot *Hoppe v Klapperich* (1947) 173 ALR 819 (Minnesota SC)) 837 – 838.

54 Sien par 2 2 6 hieronder.

55 (1896) 6 CTR 457 460.

56 *Burkett v Smith* 1920 AD 106; Neethling 1978 *THRHR* 173.

57 15 – 16.

58 (1982) 30 ALR 4th 561 (California CA) 565 – 567.

59 Oosthuizen *Die bewys- en weerleggingslas in die Suid-Afrikaanse reg* (LLD-proefskrif UP 1980) 195.

Kragtens artikel 297(1)(c) van die Strafproseswet kan die hof 'n beskuldigde met 'n waarskuwing of berisping ontslaan; so 'n ontslag het die uitwerking van 'n vryspraak behalwe dat die skuldigbevinding as 'n vorige veroordeling aangeteken word. Dit is duidelik dat so 'n straf vir doeleindes van 'n deliktuele eis weens misbruik van die strafproses nie as sodanig as 'n onskuldigbevinding beskou sal word nie. Trouens, waarskuwing en berisping word regtens inderdaad as 'n straf beskou.[60] Ook waar die hof die beskuldigde ontslaan op grond van die stelreël *de minimis non curat lex* (met ander woorde bevind het dat 'n "misdaad" wel gepleeg is) behoort dit, met behoud van wat hieronder gesê word, nie vir onderhawige doeleindes as 'n mislukte vervolging beskou te word nie.[61]

In die Amerikaanse saak *Seelig v Harvard Cooperative Society*[62] is beslis dat 'n bekentenis deur die eiser in 'n voorafgaande strafverhoor bewys van aanspreeklikheid daarstel, indien daar nie 'n geskil oor die toelaatbaarheid van die bekentenis was nie. Hierdie reël spreek vir sigself.

2 2 2 Weiering van die prokureur-generaal om te vervolg en ontslag na voorlopige ondersoek

Weiering van die prokureur-generaal om te vervolg het volgens ons howe dieselfde effek as 'n onskuldigbevinding.[63] Ontslag van die eiser by 'n voorlopige ondersoek op grond van 'n gebrek aan getuienis, stel myns insiens insgelyks bewys van 'n mislukte vervolging daar.[64]

2 2 3 Beëindiging van strafverrigtinge deur kompromie

In beide die VSA[65] en Kanada[66] dui die vrywillige beëindiging van die strafverrigtinge deur kompromie nie op 'n onsuksesvolle beëindiging daarvan nie. Gulbis[67] verduidelik ten aansien van die Amerikaanse reg soos volg:

> "The reason for this rule is said to be that a compromise or settlement is such an admission of probable cause as to estop the accused from afterward retracting the

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60 Labuschagne "Die strafteoretiese begronding van berisping en vonnisuitstel" 1978 *SASK* 245.

61 Vgl Labuschagne "De minimis non curat lex" 1973 *Acta Juridica* 304.

62 (1973) 66 ALR 3d 89 (AC Massachusetts) 94 en Gilbert "Confession as defense in action for malicious prosecution" 66 ALR 3d 95 100.

63 *Els v Minister of Law and Order* 1993 1 SA 12 (K) 14–15 18–19; *Greyling v Tunca* 1920 EDL 8; *Lamue v Zwartbooi* (1896) 13 SC 403 407: "While a prosecution is actually pending its result cannot be allowed to be prejudged by the civil action, but as soon as the Attorney-General, in the exercise of his quasi-judicial function, has decided not to prosecute, there is a sufficient termination of the original proceedings to allow of the civil action being tried. A different view of the law would lead to the extraordinary result that the clearer the proof of a person's innocence is, the greater difficulty would he have in obtaining damages for false and unfounded charges maliciously made against him. On the other hand, the law, as I have stated it to be, need not lead to any hardship on the defendant in an action for malicious prosecution. If, after the Solicitor-General has refused to prosecute, there is a reasonable probability that the Attorney-General will prosecute or an undertaking by the defendant himself to prosecute without delay, it would be quite competent for the Court to postpone the civil trial until after verdict in the fresh criminal proceedings."

64 Sien die Amerikaanse saak *Jaffe v Stone* (1941) 128 ALR 775 (California SC) 779.

65 *Nelson v National Casualty Co* (1929) 67 ALR 509 (Minnesota SC) 512.

66 Bailey 15–16.

67 "Termination of criminal proceedings as result of compromise or settlement of accused's civil liability as precluding malicious prosecution" 26 ALR 4th 565 (annotasie tot *Joiner v Benton* (1980) 26 ALR 4th 558 (SC Illinois)) 570.

> implied admission and trying the issue which by settlement he waived. It has also been maintained that a compromise or settlement estops the accused from taking advantage of the termination for a malicious prosecution action since the settlement or compromise leaves open the question of guilt. The general rule, however, is not unqualified. If the settlement is obtained under duress, the general rule does not apply and in such circumstances, the courts have held that a settlement or compromise does not preclude a subsequent malicious prosecution action."

Hierdie sienswyse kan onderskryf word.

2 2 4 Ontstaan van die grond van die aksie

In verskeie sake is daarop gewys dat die grond van aksie vir misbruik van die strafproses eers ontstaan na mislukking van die vervolging. Die verrigtinge van arrestasie tot ontslag vorm 'n aaneenlopende eenheid en daar word gereken dat geen persoonlike nadeel die beskuldigde juridies toegevoeg is voordat hy ontslaan is nie.[68]

2 2 5 Gedeeltelike mislukking van vervolging

In die Kanadese saak *Banks v Bliefernich*[69] is die eiser (beskuldigde) ontslaan op 'n klagte van aanranding, maar het skuldig gepleit op en is skuldig bevind aan klagtebedreiging ("threatening charges"). Die eiser se eis vir misbruik van die strafproses ten aansien van eersgenoemde klagte word toegestaan omdat 'n kwaadwillige en vals bewering nie minder beledigend is bloot omdat dit by 'n geldige klagte gevoeg word nie.

2 2 6 Gevalle waar 'n suksesvolle vervolging nogtans op misbruik van die strafproses neerkom

Uit 'n beslissing van die Duitse *Bundesgerichtshof*[70] blyk dat 'n objektief-ware klagte kragtens artikel 826 *BGB* sedestrydig ("sittenwidrig") kan wees as besondere omstandighede bestaan wat verwerplik en met die algemene gevoel van welvoeglikheid ("Anstandsgefühl") strydig is. In hierdie geval het dit gegaan oor optrede tydens die *Nazi*-bewind wat, volgens beskaafde standaarde, inherent immoreel was. In dié verband bestaan daar myns insiens twee gevalle waar die strafproses nieteenstaande 'n skuldigbevinding misbruik kan word: Eerstens is daar die gevalle waar die betrokke strafregsreël(s) strydig is met elementêre menseregte,[71] soos die strafbaarstelling van geslagsomgang tussen persone van verskillende rasse (byvoorbeeld die herroepe artikel 16 van die Ontugwet (tans: Wet op Seksuele Misdrywe) 23 van 1957, in Suid-Afrika). Tweedens behoort 'n deliktuele eis weens misbruik van die strafproses, met behoud van die ander deliksvereistes, ook toegestaan te word indien die aard en erns van die misdaad geheel en al buite verhouding is tot die skade en nadeel wat deur die vervolging aan die eiser (beskuldigde) veroorsaak is.

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68 *Els v Minister of Law and Order supra*; *Bacon v Nettleton* 1906 TH 138 142–143; *Thompson v Minister of Police* 1971 1 SA 371 (OK) 375.

69 (1988) 4 WWR 296, 24 BCLR (2d) 397, 44 CCLT 144 (SC) aangehaal deur Bailey iii.

70 (1955) 17 *BGHZ* (Urt v 25 Mai 1955) 327.

71 Sien *S v Ebrahim* 1991 2 SA 553 (A) en die Kanadese saak *Reference re Public Service Employee Relations Act* (1987) 1 SCR 313 349.

2 3 Subjektief- en objektief-begronde oorsaak

2 3 1 Terminologie

Vir 'n suksesvolle eis weens misbruik van die strafproses is dit nodig dat die eiser afwesigheid van "reasonable and probable cause" moet bewys. Soms word slegs die begrip "reasonable cause" deur die howe[72] gebruik en in die Amerikaanse reg[73] word die begrip "probable cause" deurgaans aangewend. Neethling[74] verwys in dié verband na afwesigheid van redelike gronde. Daar bestaan klaarblyklik geen verskil tussen die terme "reasonable" en "probable" nie. So verklaar Rogers:[75]

> "The conjunction of these adjectives is a heritage from the redundancies in which the old pleaders delighted, and although it has been said that reasonable cause is such as would operate on the mind of a discreet man, while probable cause is such as would operate on the mind of a reasonable man, this does not help us much, for it is difficult to picture a reasonable man who is not discreet."

Soos blyk uit die bespreking wat volg, is nóg die woord "redelik" ("reasonable") nóg die woord "waarskynlik" ("probable") beskrywend van dit waarom dit werklik gaan, veral in die lig van die feit dat daar ook 'n subjektiewe dimensie in die spel kom.

2 3 2 Die vervolging moet subjektief en objektief begrond wees

Die Kanadese Supreme Court[76] het die begrip "reasonable and probable cause" omskryf as "a genuine belief based on reasonable grounds that the proceedings are justified". Dit is ook die benadering van die Suid-Afrikaanse,[77] (sekere) Amerikaanse[78] en Nieu-Seelandse[79] howe.

(a) Subjektiewe begronding

Ene RCC[80] vat die posisie in die Amerikaanse reg soos volg saam:

> "In order that a person who has instituted a prosecution against another be able to interpose the defense of probable cause to an action for damages alleged to have resulted from such prosecution, it is necessary that the prosecutor should have had an actual belief in the guilt of the accused person."

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72 Sien bv *Van Noorden v Wiese* (1883) 2 SC 43 50; *Carne v Howe* (1898) 15 SC 232 236; *Van Litzenberg v Louw and De Beer* (1899) 16 SC 283 286; *Renaud v Madore* (1900) 21 NLR 179 184; *Collins v Minnaar* 1931 CPD 12 14; *Beckenstrater v Rottcher and Theunissen* 1955 1 SA 129 (A) 136.

73 Sien bv *Norvell v Safeway Stores* (1957) 59 ALR 2d 1407 (Maryland CA) 1411.

74 176.

75 *Winfield and Jolowicz on tort* (1989) 547.

76 *Meyer v Gen Exchange Ins Corp* (1962) SCR 193 200; Bailey 18.

77 *Beckenstrater v Rottcher and Theunissen supra* 136; *Prinsloo v Newman supra* 495: "Reasonable and probable cause means an honest belief founded on reasonable grounds that the institution of proceedings is justified. The concept involves both a subjective and an objective element."

78 Sien Shelton "Changing the standards of probable cause in malicious prosecution" 1989 *Arizona State LJ* 1231.

79 Todd 427.

80 "Actual belief on part of prosecutor as element of probable cause in action for malicious prosecution" 65 ALR 225 (annotasie tot *Dunlop v Chesapeake and Ohio Railway Co* (1929) 65 ALR 221 (West Virginia SCA)) 231.

Dit is ook 'n akkurate beskrywing van die stand van die reg in Suid-Afrika.[81]

Indien die verweerder (subjektief) weet dat die eiser 'n verweer het en geregtig is om te doen wat hy doen, kan hy hom nie daarop beroep dat 'n redelike man nie daarvan bewus sou gewees het nie.[82] In *Prinsloo v Newman*[83] het die appèlhof daarop gewys dat selfs al het die verweerder 'n sekere mate van twyfel oor die skuld van die eiser, daar nie sonder meer afgelei kan word dat hy nie *bona fide* geglo het dat die eiser die misdaad gepleeg het nie.

Ons howe het beslis dat die verweerder hom kan verweer dat hy op grond van advies van 'n regsadviseur opgetree het, dit wil sê dit kan sy aanspraak dat hy subjektief in die skuld van die eiser geglo het, bevestig.[84] Dit is ook die posisie in die Amerikaanse reg.[85] Neethling[86] lewer die volgende kommentaar:

> "Dit is verder interessant om daarop te let dat daar reeds beslis is dat die feit dat die verweerder regsadvies ingewin het voordat hy die vervolging ingestel het, 'n faktor is wat op die bestaan van redelike gronde kan dui. Met hierdie beskouing kan ek my nie vereenselwig nie. Weliswaar kan die inwin van regsadvies die verweerder se subjektiewe geloof in die skuld van die eiser beïnvloed. Sodanige optrede kan egter beslis nie op die bestaan van redelike gronde as sodanig dui nie."

(b) Objektiewe begronding

Volgens ons howe is dit nie voldoende dat die verweerder in die waarheid van sy beskuldiging geglo het nie; hy moet boonop redelike gronde vir dié geloof gehad het.[87] Hy moet ook redelike stappe gedoen het om homself van die feite te vergewis voordat hy die strafproses in werking stel.[88] Die posisie in die Amerikaanse reg in dié verband is gelykluidend en is by geleentheid soos volg saamgevat:[89]

> "The failure of a person who has received information tending to show the commission of a crime to make such further inquiry or investigation as an ordinarily prudent man would have made under the same circumstances, before instituting a prosecution, renders him liable for proceeding without probable cause."

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81 Sien hieroor *October v Henning* (1900) 10 CTR 428; *Kaplan v Abrahamson* (1894) 9 EDC 96 99; *Mlambo v Pietermaritzburg Corporation* (1913) 34 NPD 346 349; *Cunningham v Simpson* (1907) 28 NLR 619 621 – 622; *Nourse v The Farmers' Co-operative Company Ltd* (1905) 19 EDC 291 312; *Kroomer v Lobascher* (1903) 13 CTR 674 679.

82 Vgl Bailey 23.

83 499.

84 *Heiberg v McWilliam, Kilroe and King* 1905 TS 219 220: "When a man consults his legal adviser in order to ascertain his legal position, that fact, coupled with the terms of the advice given, may have an important bearing on the question of malice, and (if his subsequent action is in pursuance of his solicitor's advice) on the further question of the existence of reasonable and probable cause."

85 GJC "Malicious prosecution: acting on advice of justice of the peace, magistrate, or layman" 12 ALR 1230 (annotasie tot *Kable v Carey*) 1231.

86 1978 *THRHR* 166; sien ook Neethling 177 180.

87 Sien bv *Pyett v Francis supra* 198; Neethling 179. Sien ook die Amerikaanse sake *Nelson v National Casualty Co supra* 512; *Watzek v Walker* (1971) 66 ALR 3d 1 (CA Arizona) 5.

88 Sien *Troutman v Davis* (1899) 8 EDC 171 184; Bailey 21 – 22.

89 RCL "Institution of prosecution on false information without investigation as showing lack of probable cause" 5 ALR 1688 (annotasie tot *Kennedy v Burbidge* (1919) 5 ALR 1682 (Utah SC) 1688.

(c) Trefwydte van die vereiste van subjektiewe en objektiewe begronding

In *Prinsloo v Newman*[90] verklaar appèlregter Muller:

> "In my view the test of reasonable and probable cause, in so far as the subjective element as well as the objective element is concerned, is not limited to the factual situation, but extends also to the other aspect, namely, whether the facts (known and suspected) constitute an offence in law. And, applying that test, each case must be considered on its merits."

Aanknopingspunte vir dié siening kan ook in vroeëre sake gevind word.[91]

(d) Die effek van 'n skuldigbevinding wat tersyde gestel word

In *Rambhroas v Mungal*[92] word daarop gewys dat indien die eiser deur 'n landdros skuldig bevind is maar die beslissing deur 'n hoër hof tersyde gestel word, dit aanduidend daarvan is dat die aanklag (objektief) begrond is, maar dit stel nie afdoende bewys daar nie. 'n Soortgelyke benadering word in die Amerikaanse staat Michigan gevolg:[93]

> "Ultimate acquittal of an accused of a crime in proceedings which are made the basis of an action for malicious prosecution does not establish want of probable cause where the record shows that there was a previous conviction, unless the conviction was obtained by fraud or unfair means."

Hiermee gaan ek akkoord.

2 4 *Animus iniuriandi*

Daar word dikwels gestel dat 'n eis in onderhawige verband slegs kan slaag as die verweerder met kwaadwilligheid (*dolo malo*) opgetree het;[94] vandaar die benaming "kwaadwillige vervolging".

In *Spiegel v Miller*[95] word kwaadwilligheid, met beroep op die Engelse saak *Mitchell v Jentus*,[96] soos volg omskryf:

> "[T]he term malice in this form of action is not to be considered in the sense of spite or hatred against an individual, but of *malus animus*, as denoting that the party is actuated by improper and sinister motives."

Hierdie siening is, hoewel soms deur die aanwending van ander terme, deur latere howe bevestig.[97] In byvoorbeeld *Waterhouse v Shields*[98] het die verweerder strafverrigtinge teen die eiser aangestig met die doel om 'n aansoek om 'n interdik om die eiser te verbied om in sekere goedere handel te dryf, te versterk. Die hof beslis dat dit 'n onbehoorlike motief daarstel. In *Carne v Howe*[99] is beslis dat dit op 'n onbehoorlike motief neerkom om 'n ander valslik van diefstal aan te kla met die doel om hom onder druk te plaas om 'n skuld te delg.

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90 498 – 499.
91 Sien *Renaud v Madore supra* 185; *Hotz v Shapiro* (1902) 12 CTR 988 992; *Wolstenholme v Boyes* (1878) 3 Buch 184 185.
92 (1916) 37 NPD 389 396.
93 Warren "Acquittal, discharge, or discontinuance of criminal charge as evidence of want of probable cause in malicious prosecution action" 59 ALR 2d 1413 (annotasie tot *Norvell v Safeway Stores*) 1434.
94 Vgl bv *Beckenstrater v Rottcher and Theunissen supra* 134.
95 (1881) 1 SC 264 273.
96 5 B and Ad 588.
97 Sien bv *Carne v Howe supra* 236; *Fyne v The African Realty Trust Ltd* (1906) 20 EDC 248 251; *Waterhouse v Shields* 1924 CPD 155 168; *May v Union Government* 1953 2 PH J 11(N).
98 169.
99 235.

Kwaadwilligheid kan uit die gedrag van die verweerder afgelei word,[100] ook uit sy optrede na die aanstigting van die strafproses.[101] Kwaadwilligheid is selfs al uit roekeloosheid en nalatigheid[102] en uit die afwesigheid van 'n redelike oorsaak ("reasonable and probable cause")[103] afgelei. Die weerhouding van 'n relevante feit kan op kwaadwilligheid dui.[104] As 'n objektiewe en subjektiewe begronding bestaan, kan geen vorm van kwaadwilligheid 'n aksie fundeer nie.[105] Indien die verweerder strafverrigtinge teen die eiser aangestig het, word sy (andersins geregverdigde) optrede nie regtens as kwaadwillig beskou indien hy ook 'n bybedoeling ("additional and ulterior motive") gehad het nie.[106]

In plaas van die Engelsregtelike begrip van kwaadwillige bedoeling ("motive") te gebruik, bestaan daar hedendaags by ons howe[107] en skrywers[108] die neiging om eerder die begrip *animus iniuriandi* aan te wend. So verklaar appèlregter Wessels:[109]

> "[A]lthough it became customary to allege 'malice' in pleadings in actions of the type now under consideration, our law has always required a plaintiff to prove only the existence of the requisite legal intention to injure, without requiring him to establish in addition the defendant's motive, ie, that he acted maliciously."

Bailey,[110] wat oor die Kanadese reg skryf, verduidelik dat kwaadwilligheid verwys na "any improper or indirect motive not in furtherance of justice" en stel dit dan gelyk aan "an intent to use the legal process in question for some purpose other than its legally appointed and appropriate purpose".[111]

Soos die opskrif van dié artikel reeds aandui, gaan ek met hierdie siening akkoord. Motief is hiervolgens slegs in 'n indirekte verband ter sake, naamlik in soverre dit op 'n opsetlike misbruik van die regsproses dui.[112] *Animus iniuriandi* kan ook in die vorm van *dolus eventualis* bestaan.[113] In die VSA het die howe selfs verder gegaan en 'n delik geskep wat beskryf kan word as nalatige "misbruik" van die regsproses.[114]

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100 Sien bv *Ochse v King Williams Town Municipality* 1990 2 SA 855 (OK) 859.
101 *Carne v Howe supra* 236.
102 *Banbury v Watson* 1911 CPD 449 460; *Spiegel v Miller supra* 272–273; *Stuart v Nkalumo* (1919) 40 NPD 55 57–58.
103 *Maserowitz v Richmond* 1905 TS 342 343. In die Amerikaanse saak *Kable v Carey supra* 1229 is beslis dat kwaadwilligheid nie afgelei kan word uit die afwesigheid van "probable cause" alleen nie.
104 *Estate Logie v Priest* 1926 AD 312 325.
105 Bailey 24; *Burkett v Smith* 1920 AD 106 108; *De Kock v Uys* (1878) 3 Buch 184 185; *Moreno v Milner* (1880) 1 EDC 145 146.
106 *Beckenstrater v Rottcher and Theunissen supra* 140.
107 *Moaki v Reckitt and Colman (Africa) Ltd* 1968 3 SA 98 (A) 105; *Ochse v King William's Town Municipality supra* 857; *Burkett v Smith supra* 108.
108 Neethling 180; Neethling 1978 *THRHR* 170; Lupton "Some aspects of malicious prosecution, wrongful arrest, and the right of privacy" 1973 *Speculum Juris* 47 54.
109 *Moaki v Reckitt and Colman (Africa) Ltd supra* 104.
110 24.
111 Vgl ook Jolowicz "Abuse of the process of the court: handle with care" 1990 *Current Legal Problems* 81; Heuston en Buckley *Salmond and Heuston on the law of torts* (1987) 461–464.
112 Neethling, Potgieter en Visser 120–121.
113 *Barclays National Bank Ltd v Traub* 1981 4 SA 291 (W) 297. Op die onderskeid tussen motief en opset (*animus iniuriandi*) word nie hier verder ingegaan nie (sien Neethling 59–60).
114 Sien *Firstly v Bill Watson Ford* (1972) 99 ALR 3d 1106 (CA Louisiana) 1110–1111 met annotasie deur Landis "Liability for negligently causing arrest or prosecution of another" 99 ALR 3d 1113.

2 5 Benadeling

Die eiser kan genoegdoening/skadevergoeding eis vir persoonlikheidsnadeel en vermoënskade. Die persoonlikheidsgoedere wat deur misbruik van die regsproses aangetas kan word, dek die hele spektrum daarvan, insluitend vryheid, aansien, waardigheid, die gevoelslewe[115] en selfs privaatheid.[116] 'n Slagoffer van 'n misbruik van die strafproses is geregtig op getakseerde koste aangegaan om homself te verdedig.[117]

3 MISBRUIK VAN DIE SIVIELE PROSES

Die regsposisie ten aansien van die misbruik van die strafproses is *mutatis mutandis* van toepassing op siviele gedinge.[118] Laasgenoemde sluit in sekwestrasie-,[119] interdik-[120] en uitleweringsprosedure,[121] asook die prosedure om iemand geesteskrank te laat verklaar.

In die VSA bestaan spesifieke wetgewing wat ten doel het om beuselagtige ("frivolous") gedingvoering te bekamp. Reël 11 van die Federale Siviele Proseswetgewing, soos gewysig in 1983 en 1987, bepaal soos volg:

> "Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee."

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115 Sien Pool 755; Bailey 32; McGregor *Damages* (1988) 1032; Cane 265; Neethling 184 – 185; *Beukes v Raal* 1918 CPD 168 172.

116 Spivey "Threatening, instituting, or prosecuting legal action as invasion of right of privacy" 42 ALR 3d 865 (annotasie tot *Montgomery Ward v Larragoite* (1970) 42 ALR 3d 859 (New Mexico SC)) 876.

117 *Law v Kin* 1966 3 SA 480 (W): *Van der Merwe v Strydom* 1967 3 SA 460 (A) 469 – 470; BGH Urt v 8.3 1951 *NJW* 596.

118 Neethling 185 – 186; Lupton 53; *Beukes v Steyn* (1877) 7 Buch 22 24 – 25; *Kahn v Deenik* (1907) 24 SC 396 399; *Salmon v Lamb's Executor and Naidoo* 1906 EDC 351 374; *Schreiber v Paper* 1906 EDC 34 37; *Puffette v Fennell and Austin* 1906 EDC 6; *Cohen, Goldschmidt and Co v Stanley and Tate* (1884) SAR 133 137.

119 *Estate Logie v Priest* 1926 AD 312; *Hyman v Clutee* 1935 TPD 176; *Ismail v Zieve* 1924 CPD 517.

120 *Sliom v Wallach's Printing and Publishing Co Ltd* 1925 TPD 650 654; *Beck v Holland and Co* (1883) 1 SAR 89 92; *Clarke and Co v Johnson* (1883) 3 EDC 248 249; *Hooper v Moore and Varty* (1921) 42 NPD 96 101.

121 *Keller v Butler* (1927) 55 ALR 349 (New York CA) 350.

Hierdie reël het in sy huidige vorm gestalte gekry omdat daar 'n algemene besorgdheid was oor die groot hoeveelheid litigasie en die hoë koste vir die litigante asook die staat met die instandhouding van die hofsisteem.[122] Paradoksaal genoeg het die uitleg van dié reël in 'n magdom sake ter sprake gekom, met die gevolg dat die howe se tyd eintlik nog meer in beslag geneem is.[123] Die howe se interpretasies het verder aanleiding tot verwarrende uitsprake gegee.[124] Die belangrikste beswaar teen reël 11 is dat dit litigasie ten aansien van burgerregte en arbeidsdiskriminasie ontmoedig.[125] So het 'n hof by geleentheid verklaar:[126]

> "Sometimes there are reasons to sue when one cannot win. Bad court decisions must be challenged if they are to be overruled, but the early challenges are certainly hopeless. The first attorney to challenge *Plessy v Ferguson* was certainly bringing a frivolous action, but his efforts and the efforts of others eventually led to *Brown v Board of Education*."

4 MISBRUIK VAN DIE ADMINISTRATIEFREGTELIKE PROSES

Ook ten aansien van die administratiefregtelike proses geld bogaande reëls *mutatis mutandis*. 'n Goeie voorbeeld in dié verband is die Kanadese saak *Stoffman v Ontario Veterinary Association*.[127] 'n Veearts is van onprofessionele gedrag voor 'n professionele tribunaal aangekla en onskuldig bevind. Hy bring vervolgens 'n suksesvolle aksie vir genoegdoening vir misbruik van die administratiefregtelike proses teen die organisasie wat hom aangekla het. In die Amerikaanse saak *Melvin v Pence*[128] is 'n deliktuele aksie ingestel nadat die verweerder kwaadwillig voor 'n beroepsliggaam gepoog het om die eiser se beroepslisensie (om as privaatspeurder op te tree) te laat herroep.

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122 Ripple en Saalman "Rule 11 in the constitutional case" 1988 *Notre Dame LR* 788.

123 Ripple en Saalman 789; Schwarzer "Rule 11 revisited" 1988 *Harvard LR* 1013; Greco "Standard of appellate review of rule 11 decisions" 1989 *Fordham LR* 251; Hsiung "Legal ethics: Rule 11 sanctions" 1987 *Annual Survey of American Law* 401; Kramer "Viewing rule 11 as a tool to improve professional responsibility" 1991 *Minn LR* 793.

124 Dyer "A genuine ground in summary judgement for rule 11" 1989 *Yale LJ* 413; Junkin "The right to counsel in 'frivolous' criminal appeals: a reevaluation of the guarantees of Anders v California" 1988 *Tex LR* 181. Sien ook Davis "The frivolous appeal reconsidered" 1990 *Criminal Law Bulletin* 305-306: "Two ethical duties clash in the frivolous appeal. First, appellate counsel has an ethical obligation to represent his client zealously. This duty assumes a constitutional dimension because a criminal defendant at the appellate level is entitled to the Sixth Amendment right to the effective assistance of counsel on appeal. On the other hand, appellate counsel also has the ethical obligation not to pursue frivolous appeals. The courts are busy enough without appeals that clearly have no merit."

125 Kramer 793 – 794; Considine "Rule 11: conflicting appellate standards of review and a proposed uniform approach" 1990 *Cornell LR* 727.

126 *Eastway Constr Corp v City of New York* 637 F Supp 558 575 (EDNY, 1986) aangehaal deur Collins "Applying rule 11 to rid courts of frivolous litigation without chilling the bar's creativity" 1987 – 1988 *Kentucky LJ* 891.

127 (1990) 73 OR (2d) 737, 3 CCLT (2d) 317, 71 DLR (4th) 720 (Div Ct) aangehaal deur Bailey ii.

128 (1942) 143 ALR (US Court of Appeals for District of Columbia) 151 – 152.

5 KONKLUSIE

Die volgende belangrike gevolgtrekkings kan uit bogenoemde navorsing gemaak word:

(a) Die misbruik van die straf-, siviele en administratiefregtelike proses kan aanleiding tot deliktuele aanspreeklikheid gee.

(b) Aanstigting van 'n regsproses is nie altyd 'n voorwaarde vir 'n suksesvolle eis nie. Die kontinuering daarvan kan in gepaste omstandighede voldoende wees.

(c) Misbruik van die regsproses kan ook deur 'n late geskied.

(d) 'n Persoon wat in 'n voorafgaande regsproses aanspreeklik bevind is, behoort in sekere gevalle, soos hierbo[129] beskryf is, 'n suksesvolle eis vir misbruik van die regsproses te kan instel.

(e) Optrede *animo iniuriandi* is, in tradisionele sin, 'n vereiste vir 'n suksesvolle deliktuele eis weens misbruik van die regsproses. Die motief waarmee die verweerder opgetree het, het bloot indirekte betekenis in soverre dit kan dien as materiaal om *animus iniuriandi* te bewys. Irrelevant is die motief egter nie. Nalatige "misbruik" van die regsproses behoort egter ook in gepaste omstandighede tot deliktuele aanspreeklikheid te lei.

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129 Par 226.

Suspension, derogation and *de facto* deprivation of fundamental rights in Bophuthatswana

JD van der Vyver
BCom LLB Honns (BA) LLD LLDhc
Professor of Law, University of the Witwatersrand;
IT Cohen Professor of International Law and Human Rights,
Emory University, Atlanta, Georgia

In a preceding article,[1] the general principles applying to the limitation provisions of the Declaration of Fundamental Rights in the Republic of Bophuthatswana Constitution Act 18 of 1977 came under the spotlight. It was pointed out there that certain fundamental rights are not subject to limitation at all, while the limitation provisions applying to the others may be classified into those that make provision for the (complete) *suspension* of, and those that authorise (partial) *derogations* from, the fundamental rights concerned. It was further argued that suspension and derogation provisions of the Constitution and in legislation enacted pursuant to the constitutional mandate must be distinguished from the *de facto deprivation* of a fundamental right through an executive decision, act or decree.

In the present survey, the suspension and derogation provisions of the Constitution and constitutional problems attending the *de facto* deprivation of a fundamental right will be analysed in greater detail. This analysis must, obviously, be understood against the background and in the light of the outline given in the preceding article.

It is of the utmost importance to distinguish clearly between those limitation provisions in the Declaration of Fundamental Rights that contemplate the suspension of fundamental rights, and those that authorise no more than derogations from fundamental rights.

1 SUSPENSION PROVISIONS

Suspension of a fundamental right denotes its total abolition in defined circumstances. Provision is made in the Declaration of Fundamental Rights for the following instances of suspension of a fundamental right:

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1 See Van der Vyver "Limitation provisions of the Bophuthatswanan bill of rights" 1994 *THRHR* 47. (The two articles were accepted for publication before Bophuthatswana ceased to exist as an "independent" state during March 1994 – *Editor*.)

(a) Section 10: The right to life

The right-to-life provision is complicated by its strange formulation: the section does not define a right to life but – in the typical style of the second generation of rights – imposes *a duty on the state* to protect the life of everyone. The confines of this duty are thereupon circumscribed: the law shall protect a person's right to life, but not when that person has been sentenced to death by a court of law following his conviction of a crime for which capital punishment is a competent sentence,[2] or when death ensues in consequence of the use of force (to an extent that was absolutely necessary) in the course of self-defence against unlawful violence,[3] in order to effect an arrest or prevent the escape of someone lawfully detained,[4] or for the purpose of quelling a riot or insurrection.[5]

Translated into rights talk, the section in effect provides that the right to life has its limits and is placed in jeopardy by the rights holder when he commits a capital offence, engages in "unlawful violence" against the person of someone else, resists arrest or attempts to escape from lawful custody, or participates in or comes under cross-fire during a riot or insurrection.

(b) Section 12(5): The right of *habeas corpus*

In terms of section 8(2), any person may apply to the supreme court to enforce the rights conferred under the provisions of the Declaration of Fundamental Rights. Section 8(4) entrusts the State President with the competence in specified circumstances to cause proceedings in which the lawfulness of the detention of a person is contested, to be postponed for a period not exceeding two months, and if needs be, for a further period not exceeding one month. The legality of executive intervention in the due process of law under this provision is dependent on certain formal and substantive constraints and, since one is here dealing with a suspension of constitutional rights, the onus rests on the public authority to prove that the concerned formalities and conditions have been satisfied.

The procedure to be observed entails the following mandatory formalities:

- A certificate under the hand of the State President must be lodged with the court.
- In the certificate, the State President must allege that, having received information from the National Security Council, he is satisfied that affidavits, other documents or evidence to be tendered by the public official cited as the respondent in the proceedings, will or is likely to prejudice any general criminal or public investigation into certain state security matters or offences specified in the section.
- The certificate must also specify the period, not to exceed two months, for which suspension of the proceedings is sought.

A similar certificate seeking a further suspension must be lodged with the court on the first day following the initial period of two months. It would seem that the section makes no provision for a further suspension in cases where the

2 S 10(1).
3 S 10(2)(a).
4 S 10(2)(b).
5 S 10(2)(c).

initial certificate has specified a period of less than two months. The certificate for a further postponement of the proceedings must

- allege that despite all reasonable endeavours, the general investigation could not be concluded within the period of two months; and
- state the period, not to exceed one month, for which the further postponement is sought.

The question whether these formalities have been complied with, is objectively justiciable. Since the State President is only required to allege that "he is satisfied", the question whether the general criminal or public investigation will indeed be prejudiced by any affidavit, other document or evidence to be tendered by the respondent in answer to the *habeas corpus* application, is not justiciable on its merits. The phrase, "he is satisfied", does not relate to the question whether the State President has indeed received information from the State Security Council and that question is therefore justiciable, but because of the presumption *omnia praesumuntur rite esse acta*, the onus will rest on the applicant to prove that this has not been done.

The only substantive requirement concerns the actual existence of a general criminal or public investigation into an alleged conspiracy or armed or military rebellion or insurrection or other act of treason or sedition aimed at unconstitutionally effecting a change of government, or into any of the other state security offences specified in the section. Since one is here dealing with a substantive requirement, the presumption that formalities have been complied with does not apply. Should this requirement, therefore, be placed in issue by the applicant, the onus will rest on the (public official) respondent to prove the general investigation.

Upon receipt of the certificate, the court has no option whatsoever but to postpone the application for the period stated in the certificate.

In *Bopalamo v The Government and Other Cases*,[6] the legality of a certificate submitted to the court in terms of section 8(4) was contested on several grounds. An application for postponement, based on the section 8(4) certificate, was made by way of motion proceedings. In the certificate upon which the application was based, the acting State President alleged that divulging the information "will prejudice" the investigation. However, in the supporting affidavit, the acting State President claimed that he was satisfied that divulging the information concerned "will or is likely to prejudice" a pending criminal investigation. The act itself requires the State President to certify that he is satisfied that the affidavits, other documents or evidence in question "will or is likely to divulge information *which will prejudice* any general criminal or public investigation" into the matters specified in section 8(4).[7] The wording of the certificate, therefore, was in conformity with that of section 8(4), while the affidavit went beyond the section's confines by, in addition, testifying to the acting State President's belief that the information "is likely" to prejudice the investigation.

The court dismissed the submission that, because of this discrepancy between the certificate and the affidavit, the application for postponement should be

6 5 BSC 140 (1988).
7 Emphasis added.

refused. Waddington J reasoned that the phrase "will prejudice" should be interpreted to leave room for some doubt in the mind of the (acting) State President. In so far as the acting State President founded the affidavit on his belief that the information "is likely" to prejudice the criminal investigation that was pending at that time, the court found, he therefore acted within the confines of the empowering provision.

The correctness of this finding is open to doubt. Section 8(4) makes a clear distinction between the phrases "will or is likely to divulge information" and "will prejudice any general . . . investigation". It is submitted that the (acting) State President must be satisfied that the information *will* (definitely) prejudice the investigation; and in so far as the acting State President, according to the affidavit, demanded a postponement of the matter based on his belief that the information "is likely to" prejudice the investigation, he acted *ultra vires* the empowering provision.[8]

The provisions of section 8(4) also apply in general to applications contesting the legality of detention in the interest of national security or public safety as sanctioned by section 12(3)(g). Such applications will of necessity take the form of an *actio de libero homine ad exhibendum*, and everything stated thusfar under the present heading would therefore apply in this regard. Reference in section 8(4) to section 12(3)(g) alongside section 12(5) was in fact superfluous. Section 12(5) deals comprehensively with *habeas corpus* proceedings, including unlawful detentions under the pretext of section 12(3)(g).

The suspension of proceedings in terms of section 8(4) may also be demanded in cases based on the alleged infringement of freedom of expression[9] and freedom of assembly.[10]

The court will suspend proceedings pursuant to a section 8(4) certificate only if the substance of such proceedings relates to the enforcement of any of the fundamental rights specified in sections 12(3)(g), 12(5), 15(1) and 16(1). In *Molotlegi v President of Bophuthatswana*[11] – a case concerning invasion of the right to privacy of the applicant – the court for that reason rightly refused to entertain an application for suspension of the proceedings on the strength of a section 8(4) certificate.

(c) Section 12(6): The right to a public hearing

Section 12(6) specifies several grounds upon which the press and public may be excluded from all or part of a trial. The pertinent portion of that subsection provides:

> "[J]udgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private

8 The problem of a discrepancy between an affidavit and the certificate in such matters will in all likelihood not arise again. The court in *Bopalamo*, quite rightly, directed that s 8(4) certificates ought not to be brought to the court's notice by means of motion proceedings. The certificate can simply be handed in from the dock by counsel for the public authority. However, the principle remains that strict compliance with the requirements of s 8(4) is called for.

9 S 15(1).

10 S 16(1).

11 1989 3 SA 119 (BGD).

life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

The section does not expressly state how or by whom the press and public may be excluded, but it would seem – if current practice in South Africa and the verb "be excluded" is considered – that such exclusion is to be imposed by the presiding judicial officer. It is at least evident that exclusion of the press and public "where publicity would prejudice the interests of justice" is dependent on "the opinion of the court" and applies "in special circumstances".

Assuming that the decision to exclude the press and public is to be taken by the presiding judicial officer, it becomes evident that such exclusion is not a "restriction" of the fundamental right within the meaning of section 18(1). That subsection requires "restrictions" of a fundamental right to be effected by "a law of Parliament" and to be of "general application". It would be absurd to contend that the presiding judicial officer should call upon Parliament to pass a law for the exclusion of the press and public whenever in the special circumstances he considers it to be in the interest of justice to proceed with a trial *in camera*. Such a law, having to be based on "special circumstances", would also hardly be one of "general application" within the meaning of section 18(1).

It would seem, therefore, that one is here dealing with a suspension of the right to a public trial, which as such is not subject to section 18.

(d) Section 12(6): The right to a speedy trial

The due process provisions of section 12(6) have in a sense been fragmented by the legislature. Whereas certain clauses of the subsection apply without limitation,[12] others have been subjected to suspension or derogation.

The right to a speedy trial must be read in conjunction with section 12(7A)(a): a person may be held in custody "pursuant to and for the purpose of or in connection with" a general criminal or public investigation into certain specified state security matters or offences; and if he is charged with any of the offences under investigation, he may not be brought to trial until such time as the investigation is concluded, unless the Attorney-General, acting in concurrence with the Minister of Law and Order, authorises the trial to proceed.

(e) Section 12(7)(c): The right to legal representation

The right of a person charged with a criminal offence to legal representation of his own choice, and the right of an accused to be provided with legal assistance should he lack the means to pay a lawyer and "when the interests of justice so require", was made subject to the sweeping exception, "unless a law otherwise provides". No criterion is stipulated in the Declaration upon which the statutory denial of the right to legal representation must be based. This leaves the refusal of a right to legal representation entirely up to the legislature. The clause in section 12(7)(c) dealing with legal representation in effect simply provides that if statutory law is silent on the point, all accused in criminal matters shall have the right

(i) to legal representation of their own choice; and

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12 See Van der Vyver *supra* fn 1 par 1.

(ii) for a legal representative to be provided for them if they cannot afford a lawyer and "when the interests of justice so require".

The right to legal representation of an accused is also subject to suspension under section 12(7A)(b). That section stipulates the circumstances in which a person detained in the course of a general criminal or public investigation into certain state security offences may be denied access to a legal representative. The wording of the paragraph is indeed couched in general terms: while the investigation is in progress, the subsection provides, the detainee

> "irrespective of whether or not he has been charged . . . [shall] not be entitled to visitation by any other person, and no one shall have a right of access to the person so in custody, except with the written authority of the . . . Minister [of Law and Order] and subject to such terms and conditions as that Minister may determine and specify in such authority".

This clause was enacted "notwithstanding the provisions of subsections (5), (6) and (7)" of section 12. Of these subsections, only section 12(7)(c), which deals with legal representation, could possibly have a bearing on the provision under consideration. The Declaration in fact in none of its provisions makes allowance for visitation rights of a detaineee. The only possible meaning which the subsection in the present context could have, is to deny a detainee under subsection (7A) access to a legal representative; and this denial applies only for as long as the investigation is in progress.

A cross-reference in section 12(7A)(b) to section 25(7) of the Internal Security Act 32 of 1979 affords the detainee, by way of exception, access to a magistrate and a medical practitioner once a fortnight; and the minister may in writing authorise a clergyman of the religious denomination to which the detainee *bona fide* belongs, to visit the detainee once a week.

Note, though, that the power entrusted to a state official by legislation other than the Constitution to determine the place where and conditions under which a person may be detained,[13] does not include the competence to deny the detainee access to a legal representative.[14]

(f) Section 13(3): The right to establish private educational institutions

The section dealing with private educational institutions is indeed a strange provision to find in a bill of rights. The Declaration proclaims the right to establish private educational institutions, but entirely subjects the realisation of that "right" to the discretion of the government, who may "allow" such institutions subject to conditions "the government may deem fit" and provided the educational aims and standards of the proposed institution are not inferior to those of state educational institutions. It would seem that this provision was not really intended to create a constitutional right to establish private educational institutions; on the contrary, it empowers the government to allow or refuse the establishment of such institutions. It is clear, in any event, that if this is indeed a fundamental right, the government may suspend that right.

(g) Section 17(2): Property rights

In terms of section 17(2), the right to own and possess private and communal property may be terminated in a particular instance by means of expropriation,

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13 See eg s 25(1) of the Internal Security Act 32 of 1979.
14 See *Monnakale v Republic of Bophuthatswana* 1991 1 SA 598 (BGD) 626–627.

provided expropriation is authorised [in general] by an act of Parliament, the property is acquired by the state for the public benefit, and reasonable compensation is paid to the person deprived of his property.

The Declaration makes no provision for confiscation of property, either in conjunction with a criminal conviction or otherwise. Since it is not within the province of the supreme court to rewrite or substantively to amplify the Declaration – its function is confined to enforcing it – it will have no alternative but to find that confiscation provisions in the criminal law of Bophuthatswana are unconstitutional and void.

2 DEROGATION PROVISIONS

Derogation provisions imply the partial limitation of a fundamental right in circumstances and by means of procedures stipulated in the Constitution. The general dictates of section 18 are particularly pertinent in this regard.[15]

(a) Section 12(3): Personal liberty and security

The right to liberty and security of one's person is subject to limitations pertaining to lawful arrests and detention. Those limitations include imprisonment following a conviction by a competent court;[16] lawful arrest or detention of a person reasonably suspected of having committed an offence;[17] detention of a minor by lawful order for the purpose of educational supervision or with a view to bringing him before a legal authority;[18] lawful detention to prevent the spreading of an infectious disease, or in the case of persons of unsound mind, addicted to a habitforming drug, or found to be vagrant;[19] lawful arrest or detention to secure fulfilment of a court order or any obligation prescribed by law;[20] lawful arrest or detention of a person to prevent his unauthorised entry into Bophuthatswana or with a view to his deportation or extradition;[21] lawful detention in the interests of national security or public safety;[22] and detention (*incommunicado* and without trial for as long as the investigation is in progress) of a person "by virtue of his arrest or detention pursuant to and for the purpose of or in connection with any general criminal or public investigation" into certain state security matters.[23]

It is not clear what the legislature intended to convey by requiring that the detention and/or arrest, or in the one case the detention order, of the persons affected by section 12(3) must be "lawful". One might assume that the detention, arrest or order must be sanctioned by law, but that is already required by section 18(1). Section 12(3), furthermore, requires even in its introductory clause that the procedure by which the detention, arrest or order is to be executed, must be "prescribed by law", which in itself presupposes that the detention, arrest or order as such has been sanctioned by law.

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15 See Van der Vyver *supra* fn 1 par 2.
16 S 12(3)(a).
17 S 12(3)(b).
18 S 12(3)(c).
19 S 12(3)(d).
20 S 12(3)(e).
21 S 12(3)(f).
22 S 12(3)(g).
23 S 12(7A).

Perhaps the following distinction made in German constitutional jurisprudence could be helpful in solving the riddle: in some instances derogation provisions in the German Basic Law in themselves and without further ado sanction the particular limitation of a basic right; in other instances the Basic Law requires further legislation, enacted pursuant to the derogation provision concerned, to sanction the limitation of a basic right. Starck[24] thus classified the limitation provisions of the Basic Law into four categories:

(i) The first group consists of legislative reservations of power describing substantive limits on the fundamental right involved, which are divided yet further into those which are directly effective constitutionally and others which need to be further enacted through law.

(ii) The second group consists of "formal" legislative reservations of power, that is, not touching on substantive limits but rather left to the legislature to be defined.

(iii) The third group consists of "formal" legislative reservations of power, which refer to those laws which protect objects and values without explicitly limiting the freedom of expression as such.

(iv) The fourth group of fundamental rights does not contain any explicit limits.

If the distinction made in the "first group" referred to by Starck is what the word "lawful" in section 12 seeks to convey, then the detention, arrest or order must in each instance be sanctioned by legislation other than the Constitution itself. This would mean that whereas the legality requirement of section 18(1) may, as a general rule, be satisfied by the derogation provision in the Declaration of Fundamental Rights itself, in the case of detentions, arrests and orders contemplated by section 12(3) the constitutional sanction must be acted upon by the legislature and sanctioned in other enactments.

Section 12(7A) does not require the arrest and detention of persons contemplated in that section to be "lawful". Section 12(7A) in fact makes provision for the suspension of a detainee's right to institute the *interdictum de libero homine exhibendo*, to a trial within a reasonable time, and to certain other due process entitlements; and, as indicated earlier,[25] section 18 does not apply to suspensions. The constitutional provision itself, therefore, adequately and conclusively regulates the abridgements of the fundamental rights to which that subsection relates.

(b) Section 13(1) and (2): The right to privacy

Sections 13(1) and (2), 14, 15 and 16 are, except for minor editorial differences, substantively the same as, respectively, articles 8, 9, 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), and valuable guidance may therefore be derived from the Strasbourg jurisprudence (opinions of the European Commission of Human Rights and the European Court of Human Rights) as to the meaning of those sections.[26]

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24 "Constitutional definition and protection of rights and freedoms" in Starck (ed) *Rights, institutions and impact of international law according to the German Basic Law* (1987) 26–27.

25 See Van der Vyver *supra* fn 1 par 3(b).

26 See also again Van der Vyver *idem* par 6 as to the general concepts to be found in these sections.

The rights included under the general label of "privacy" entail respect for private and family life, and for the home and correspondence of everyone.[27] Section 13(2) authorises interference with this right by a public authority "in accordance with law" and in so far as it is

> "necessary in a democratic society in the interests of national security, public safety or the economic well-being of Bophuthatswana, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others".

(c) Section 14(2): Freedom of religion

Section 14(1) proclaims "the right to freedom of thought, conscience and religion" of everyone; but in terms of section 14(2), only freedom of religion is subject to limitation.

Section 14(2) indeed mentions "freedom of religion and belief" as a fundamental right, the manifestation of which may be subjected to certain derogations, and one may argue that "belief" in that context has been used as a composite noun to denote freedom of thought and of conscience. The word "belief" may, however, also be interpreted as simply a further exposition of "religion". "Religion", after all, may denote a particular denominational creed (for instance the religion of Islam or Roman Catholicism), or it may signify a certain conviction (for instance belief in Jesus Christ or in Buddha). The phrase "religion or belief" in section 14(2) makes it abundantly clear that "religion" must be understood in both meanings of the word. There are two compelling reasons for preferring the latter construction:

(i) Had the legislature intended the word "belief" to denote "freedom of thought" and "freedom of conscience", and given the sequence in which "freedom of thought, conscience and religion" are mentioned in section 14(1), one would have expected "belief" to have been mentioned before "religion" in section 14(2).

(ii) One should always interpret statutory provisions, as far as the words used by the legislature permit, *in favorem libertatis*, and by confining the derogation provisions of section 14(2) to freedom of religion, "manifestations" of the other two freedoms mentioned in section 14(1) will remain free of state intervention.

This means that freedom of thought and of conscience cannot in any circumstances be subjected to limitations; and this, in turn, compels one to make a clear distinction between freedom of thought, freedom of conscience and freedom of religion.

Freedom of thought is the broadest of these concepts and, literally interpreted, includes the right to hold an opinion with regard to any conceivable subject matter. However, certain anomalies would arise if freedom of thought as contemplated in section 14 is to be given such a wide meaning. This is so because "freedom to hold opinions" is dealt with in section 15 as a component of "freedom of expression" and must therefore be taken to have a meaning that differs from "freedom of thought". It is therefore submitted that "freedom of

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27 S 13(1).

thought'' should be given a narrower interpretation, in conformity with its meaning in the world of scholarship, to denote convictions as to dogmatic or ideological structures only, including political systems. The right to *express* one's opinion about such structures might indeed be subject to the constraints of section 15(2), but any legislation, executive act or administrative control that would adversely affect a person – any person – by virtue of his dogmatic convictions or ideological persuasions *per se*, would be unconstitutional. If, for instance, the freedom of any person is restricted in Bophuthatswana by reason of that person being a communist or because she believes in a socialist form of government, or if the education department should entertain a policy of not hiring someone who believes in the theory of evolution, or if the public service were to dismiss an employee merely because he is known to subscribe to the ideology of apartheid, that legislation, hiring policy and executive intervention would be unconstitutional.

It should be noted that the above distinction between ''freedom of thought'' and ''freedom to hold opinions'' is not supported by any commentaries on the European Convention which the writer was able to consult. Van Dijk and Van Hoof[28] suggest that the freedom of thought provision[29] applies to opinions that reflect the personal conviction of the person whose opinion is at stake, while the freedom to hold opinions[30] applies to the expression of any opinion.[31]

In Strasbourg jurisprudence, the negative side of freedom of thought has been emphasised: freedom of thought entails a prohibition against indoctrination through education or influencing by the state.[32] In the *Case of Kjeldsen, Busk Madsen and Pedersen*[33] it was held that compulsory sex education in Danish schools did not constitute a violation of the freedom of thought provision in the European Convention.[34]

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28 *Theory and practice of the European Convention on Human Rights* (1984) 306.

29 S 14 of the Bophuthatswanan Constitution.

30 *Idem* s 15.

31 The view that ''freedom of thought and conscience'' requires the person concerned personally to subscribe to the conviction for which he claims protection, is supported by the opinion of the European Commission of Human Rights in *Application 7050/75 (Arrowsmith v United Kingdom)* European Commission of Human Rights (1980) 19 *Decisions and Reports* par 71. The Commission there decided that a person advocating pacifism cannot claim the protection of art 9 of the European Convention when his actions do not ''actually express the belief concerned''. The Commission did not, however, use this directive as a criterion for distinguishing freedom of thought from the freedom to hold an opinion.

32 See Frowein and Peukert *Europäische Menschenrechtskonvention: EMRK-Kommentar* (1985) 212.

33 *Publications of the European Court of Human Rights* Series A vol 23 (1976).

34 Reading the right to education provision in the European Convention in conjunction with several other articles, including the freedom of thought provision, the European Court of Human Rights, in the *Case of Kjeldsen supra* fn 33, stated: ''53. In particular, the second sentence of Article 2 of the Protocol does not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum, for otherwise all institutionalised teaching would run the risk of proving impracticable. In fact, it seems very difficult for many subjects taught at schools not to have, to a greater or lesser extent, some philosophical complexion or implication. The same is true of religious affinities if one remembers the existence of religions forming a very broad dogmatic and moral entity which has or may have answers to every question of a philosophical, cosmological or moral nature.

Freedom of conscience and freedom of religion share a certain common ground, but matters of conscience include persuasions that are not essentially religious in nature. Within the domain of conscription, for instance, conscientious objections to undergoing military training or participating in military activity may indeed be founded on religious conviction (in which event section 14(2) would apply); but one may also entertain conscientious objections of a non-religious nature. One might thus be conscientiously compelled not to do military service simply by reason of being a pacifist,[35] or because of the kind of armoury used by the defence force, or because of one's ethnic association with the enemy to be confronted in case of *de facto* armed conflict, or by reason of one's personal objection, as a matter of principle, to the régime or political system to be defended by belligerent force. Section 14(1) compels the legislature and government of Bophuthatswana to respect and make allowance for such manifestations of non-religious conscientious objections to serving in the military forces. This can be done by making provision for alternative service of a non-military nature to be performed by conscripts with conscientious objections.

In order to apply the distinctions mandated by the wording of section 14, the supreme court will require clarity as to the meaning of *religion*. Guidance in this regard may be found in the judgment of Rumpff JA in *Publications Control Board v Gallo (Africa) Ltd*,[36] where it was held that "religion" essentially implies the belief in, some kind of commitment to and the serving of a supreme being or unseen power. The judgment also recognised that such belief, commitment or subservience is absolutely subjective and cannot be denied merely because it is perceived to be unreasonable.[37]

Freedom to uphold religious convictions as such may also not be subjected to any constraints whatsoever. However, the freedom "to manifest one's religion or belief" may be subjected to derogations, provided such derogations

- are prescribed by law; and
- are necessary in a democratic society in the interest of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

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The second sentence of Article 2 implies on the other hand that the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information and knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that must not be exceeded.

Such an interpretation is consistent at one and the same time with the first sentence of Article 2 of the Protocol, with Articles 8 to 10 of the Convention and with the general spirit of the Convention itself, an instrument designed to maintain and promote the ideals and values of a democratic society."

35 Cf Application No 7050/75 before the European Commission of Human Rights, *supra* fn 31 regarding pacifism.

36 1975 3 SA 665 (A) 672.

37 See also the *Report of the Commission of Inquiry into Scientology* (RP 55 of 1973) par 13.10. The report concluded that the so-called Church of Scientology, while professing to be "a religion without God and without reverence to a higher power" (par 13.11(b)), was neither a church nor a religion (par 13.16, 15.3(c)).

(d) Section 15: Freedom of expression

Freedom of expression is circumscribed in section 15(1) as including "freedom to hold opinions and to receive and impart information and ideas". As indicated earlier, "freedom to hold opinions" as contemplated in section 15 must essentially be distinguished from "freedom of thought" as per section 14. Whereas the latter concept ought in the writer's opinion to be taken to denote more structured persuasions only – the freedom to subscribe to some or other dogmatic system or ideology – "freedom to hold opinions" would cover the residue of non-disciplined (fact-related or fantasy-inspired) notions: the opinion that Bophuthatswana is a fine country, that gambling should be abolished in Sun City, that the needs of residents of the Winterveld are neglected by the authorities, and so on.

Public authorities are instructed not to interfere with these freedoms, "regardless of frontier", except for the licensing of broadcasting, television or cinema enterprises. The implications of this provision may be seen by some as rather startling. It means, amongst other things, that the Bophuthatswanan authorities are not permitted to block out radio or television broadcasts from neighbouring countries. Even though, therefore, South Africa, for the protection of advertisers on its own television programs, obstructed the reception of Bophuthatswanan television in the country by technical means, "everyone" in Bophuthatswana has a constitutional right to be informed by SATV. It would clearly also be unconstitutional for Bophuthatswana to utilise its licensing competence as a smokescreen for depriving people in the country of the right to be informed across national borders by radio and television.

Section 15(2) differs from the other derogation clauses in that it supplies a distinct reason for limiting freedom of expression: Limitations are warranted, the subsection proclaims, because the "right of expression" carries with it duties and responsibilities. Two observations may be made from this provision:

First, whereas section 15(1), where the fundamental freedom under consideration is defined, speaks of "the right to freedom of expression", section 15(2), in circumscribing the conditions under which this right may be curtailed, refers to "the right of expression". It is submitted that these two phrases, while different in substance, should (according to the presumption of statutory interpretation that applies to a change in language) in each instance be given a distinct meaning. "The right to freedom of expression" includes – the legislature tells us – "freedom to hold opinions and to receive and impart information and ideas". It is submitted that "the right of expression" should be interpreted as not including "freedom to hold opinions" or "freedom to . . . receive . . . information and ideas". Only part of "the right to freedom of expression", namely "freedom to . . . impart information and ideas" may therefore, in the appropriate circumstances, be subjected to limitations. This interpretation not only does justice to the presumption of construction referred to above, but also coincides with the literal meaning of "the right of *expression*". Furthermore, it is the concrete expression (in the sense of imparting) of information and ideas, and not the holding or receiving thereof, that "carries with it duties and responsibilities". There is a further special reason for excluding "freedom to . . . receive . . . information and ideas" from those components of freedom of expression that may be subjected to limitations. It concerns the further provision in the

same sentence that instructs public authorities not to interfere with the freedom under consideration "regardless of frontier". Reference in that context to "the requirements for the licensing of broadcasting, television or cinema enterprises" indicates that this instruction is aimed in particular at receiving information through those particular mass media. Since this freedom must be respected by public authorities "regardless of frontier", any other interpretation will lead to a profound absurdity. As indicated earlier, the instruction to public authorities precludes them from blocking external broadcasts and television signals. If this provision had been intended to afford a right to the broadcasting, television and cinema enterprises in the sense of "freedom to impart information and ideas", it would mean that, for instance, the South African Broadcasting Corporation is given a constitutional right by the Declaration of Fundamental Rights of Bophuthatswana. The Declaration in reality circumscribes the fundamental rights of persons in Bophuthatswana; and their interest in the present provision is the freedom to receive information and ideas through the medium – in the present context – of radio, television and the cinema industry.

It may be noted in passing that in the European context it makes sense to construe the equivalent provision in article 10(1) of the European Convention to include the fundamental right of broadcasting, television and cinema enterprises to impart information and ideas "regardless of frontiers". The Convention is an international (regional) instrument for the protection of human rights and accordingly concerns itself with fundamental rights enjoyed in different member states and across the national boundaries of those states. The phrase, "regardless of frontier", was in all likelihood uncritically copied from the European Convention without the drafters really contemplating its exact meaning and relevance in a municipal bill of rights; but then, again, the Bophuthatswanan legislature did change "frontiers" in the European Convention to the singular "frontier" in the Bophuthatswanan Declaration and must therefore have given the matter some thought. That, however, is not a matter for judicial speculation: the phrase does appear in the Bophuthatswanan Constitution and the supreme court must make the most of it in a meaningful way!

The second observation to be made from the opening lines of section 15(2) can be succinctly stated: If a derogation from freedom of expression should fall squarely within the substantive and procedural confines stipulated in section 15(2) for such derogations, but evidence indicates that the derogation was not motivated by a possible breach of the duties and responsibilities attending the right of expression, then that derogation will be null and void. It will, therefore, in due course become necessary for the supreme court to circumscribe the particular duties and responsibilities attendant on the right of expression.

With a view to those duties and responsibilities only, the right of expression may be subjected

- to formalities, conditions, restrictions or penalties;
- prescribed by law; and provided
- the formalities, conditions, restrictions or penalties are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health

and morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

To illustrate the point made here with regard to duties and responsibilities, take the facts in the *Sunday Times Case*[38] – note, though, that the court, while coming to the same conclusion, did not follow the same line of reasoning. The case concerned the publication by *The Sunday Times* of London of a series of articles concerning the thalidomide tragedy at a time when civil actions for the recovery of compensation were pending before British courts. The newspaper was consequently convicted of contempt of court under the *sub iudice* rule. The punishment could clearly be justified as a penalty which is necessary in a democratic society in the interest of maintaining the impartiality of the judiciary. However, the duty and responsibility of the media to inform the public and to comment on a matter of such profound importance and public interest was the newspaper's primary concern; by remaining silent on the issue, it would have acted in breach of the duties and responsibilities attendant on freedom of expression as contemplated by article 10 of the European Convention. For that reason, the conviction could not be upheld as a legitimate derogation under article 10(2) of the Convention.

In the present context, mention may be made of the opinion of the European Commission of Human Rights in *Application No 7805/77 (X & Church of Scientology v Sweden)*[39] that "the level of protection" conferred by the freedom of expression provision is less in cases of "commercial speech" (advertisements) than it would be when the expression of political ideas is at stake.

(e) Section 16: Freedom of assembly and of association

The substance of the fundamental right(s) under the present heading is not further defined in the Declaration, except that the first right is confined to "peaceful assembly" and that the second is circumscribed as "freedom of association with others". Uncertainties that might arise in this regard include the question whether the latter freedom also embraces trade union rights.[40]

Derogations from freedom of peaceful assembly and of association with others must

- be prescribed by law; and
- be necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The derogation provisions of section 16(2) differ from their counterparts in sections 14(2) and 15(2): Whereas the latter subsections authorise the legislature to subject the manifestation of one's religion or belief and the right of expression (respectively) to limitations of the kind, under the circumstances and

38 *Publications of the European Court of Human Rights* Series B vol 28 (1982); see also 1994 *THRHR* 69.

39 European Commission of Human Rights (1979) 16 *Decisions and Reports* 68 par 5.

40 Since the drafters confined the constitutionally protected rights to the so-called first-generation rights, it might be argued that the right to join a trade union – clearly one of the second-generation rights – is not covered by the phrase "association with others". There are, on the other hand, compelling arguments in support of the opposite view.

in accordance with the procedures specified therein, section 16(2) addresses public authorities in stronger, prohibitory language: "No restriction shall be placed on the exercise of such rights other than . . ." The legislature here followed the style of the First Amendment to the Constitution of the United States of America: "Congress shall make no law . . ." In the United States, the rights enunciated in the First Amendment were held to be "preferred freedoms"; a phrase which in turn denotes that the courts will not lightly uphold any derogation from those rights.[41] It is submitted that the same principle should be applied to section 16 of the Bophuthatswanan Constitution in the sense that the supreme court ought to be more reluctant to find that the necessity requirement has been satisfied than it would under sections 14 and 15.

Section 16(2), on the other hand, goes on to provide that members of the armed forces, the police and the administration of Bophuthatswana may place "lawful restrictions" on the exercise of the freedom of peaceful assembly and of freedom to associate with others. This clause is fraught with interpretational difficulties.

Do "lawful restrictions" mean any restriction imposed by law? If that is the case, the tail-end of section 16 would render meaningless the protection guaranteed by this section; especially when one considers that "the armed forces . . . the police or . . . the administration of Bophuthatswana" embrace almost the entire state bureaucracy. It is submitted that the clause under consideration simply upholds the distinction between the legal sanctioning of a derogation and the actual administrative execution in an individual case of the powers conferred on public officials by the concerned legislation. "[T]he imposition of lawful restrictions" in that sense refers back to the circumstances specified in section 16 itself that would render a derogation "lawful"; and legislation that exceeds the limits of those enabling provisions in section 16(2) would consequently remain invalid.

3 *DE FACTO* DEPRIVATIONS AND THE PROBLEM OF EXECUTIVE DISCRETION

Whenever feasible, the actual deprivation of a person's fundamental right occurs – as we have seen – through the medium of an executive act. Quite often the executive act takes the form of, or is preceded by, a discretionary administrative decision. The constitutionality of administrative decisions depriving a person of a fundamental right will be considered next.

From the point of view of judicial control of executive discretion, South African administrative law is founded on the following general principles:

- All discretionary decisions of an executive official are subject to the court's review powers, founded on the principles of natural justice; and such decisions may accordingly be set aside if it should appear that the official failed to apply his mind to the matter, was prompted by an ulterior motive, acted *mala fide*, or exceeded his powers.
- Whenever a discretionary power is defined in language such as: "If in the opinion of . . .", then the decision taken by the official is not, on its merits,

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41 See the famous fn 4 in *United States v Carolene Products* 304 US 144 (1938).

subject to judicial scrutiny; it is the opinion of the official that must prevail and the court is not entitled to substitute its own opinion for that of the official.

● If the legislature requires the official to have "reason to believe . . .", or to base his decision on "reasonable grounds", then the decision of such official is substantively justiciable; the court has the power and in fact a duty in such cases to establish whether, objectively, reasons existed for the opinion and decision of the official.

The supreme court of Bophuthatswana has accepted the authority of South African precedents that underlie the above directives.

(a) The principles of natural justice

In *Chairman of the Licensing Board v Jeena*,[42] Theal-Stewart CJ thus endorsed the applicability to quasi-judicial decisions of the rules of natural justice:

> "When a statute confers quasi-judicial powers to affect prejudicially the rights of a person or property, there is a presumption, in the absence of an express provision or of a clear intention to the contrary, that the powers will be exercised in accordance with the fundamental principles of justice (*Lek v Estate Agents Board* 1987 3 SA 160 (C) at 172B. See also *Publications Control Board v CNA* 1970 3 SA 479 (A) at 488 – 9)."[43]

(b) Subjective executive discretion

The supreme court has also applied the above rules of administrative law in matters involving the *de facto* deprivation of fundamental rights through discretionary decisions, acts or decrees of the executive. The correctness of these decisions of the supreme court is placed in question here.

The problem is essentially this: the Declaration of Fundamental Rights in some of its provisions authorises derogations from, and the eventual deprivation of, certain fundamental rights if a particular specified contingency is found to exist *as a matter of fact*. If the legislature, acting upon the authority of such a derogation provision, were to sanction the limitation of the fundamental right concerned whenever *in the opinion of*, for instance, the Minister of Law and Order, the constitutionally specified contingency exists, then that provision would in the writer's opinion be unconstitutional. There may, namely, be a fundamental difference between the *de facto* existence of a certain contingency (as required by the enabling provision of the Constitution) and the opinion of the minister. That in itself is sufficient ground for proclaiming the derogation legislation void. The fact that the wording of the derogation legislation ("if in the opinion of . . .") renders the opinion and decision of the Minister unassailable – except within the limited confines of the courts' review powers – makes it doubly so. Take the following example:

Section 2(1)(b) of the Internal Security Act 32 of 1979 conferred on the Minister of Law and Order the competence to declare an organisation unlawful "[i]f the Minister is satisfied" that the organisation engages in activities which endanger or are calculated to endanger national security or public safety. In

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42 1988 BSC 110 113.

43 See also *Government of the Republic of Bophuthatswana v Segale* 1990 1 SA 434 (BAD) 451A – B.

Molotlegi v The Minister of Law and Order[44] – a case concerning the banning of the Bofokeng Women's Club – Lawrence AJ decided that the phrase "if the Minister is satisfied . . ." denotes a discretionary power founded on a subjective criterion and, consequently, that the reasons for the minister's opinion were not objectively justiciable. The constitutionality of the minister's discretionary power was – unfortunately – not contested in that case. Lawrence AJ consequently concluded[45] that

> "[t]he provisions of the Internal Security Act must be regarded as valid and in my opinion are in no way in conflict with the provisions of the Constitution".

The writer begs to differ. Section 16(2) of the Constitution, upon which the legality of the minister's discretionary power ultimately depended, authorises "restrictions" of the right to freedom of association with others "as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety . . ." Since the wording of section 2(1)(b) of the Internal Security Act precludes the court from inquiring whether the interests of national security or public safety indeed warranted the banning of the Bofokeng Women's Club, as required by section 16(1), section 2(1)(b) is clearly unconstitutional.

Counsel for the applicant in *Molotlegi* approached the problem of the discrepancy between section 16(1) of the Constitution and section 2(1)(b) of the Internal Security Act differently: because section 16(1) requires the minister's decision to declare an organisation unlawful to be founded on "the interests of national security or public safety", therefore – in spite of the subjective language of section 2(1)(b) – the respondent bears an onus to show, as a matter of fact, that the banning order was necessary in a democratic society in the interests of national security or public safety. The question whether that is indeed the case would, by virtue of the dictates of section 16(1), always be justiciable.

This approach raises the important question as to the court's response to South African precedents and practices that would render a particular legal institution unconstitutional in Bophuthatswana: Should the supreme court uphold those precedents and practices and declare the legal institution unconstitutional; or would it be within the power of the court to interpolate or deviate from those practices and precedents in order to uphold the legality of the legal institution based upon them? The same problem came up in *S v Chabalala*,[46] where the majority seemingly opted for the latter alternative but Van den Heever JA expressed the opinion that in following that route the court may be usurping a legislative function.

The writer agrees with the reservations expressed by Van den Heever JA in *Chabalala*. When a particular statutory provision is capable of two interpretations, one rendering it unconstitutional and the other bringing it within the confines of the Constitution, then the court clearly must prefer the latter interpretation.[47] It is a different matter, though, when a particular interpretation has been firmly established as a rule of precedent; and not less so when that precedent has been established by South African courts as part of the common law of Bophuthatswana. The supreme court must in either case take the

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44 Case no M5/89 (BGD) 1989-08-04.
45 41.
46 1986 3 SA 619 (BAD).
47 See *Smith v Attorney-General, Bophuthatswana* 1984 1 SA 196 (BSC) 202G–H.

law as it finds it; and if that law happens to be unconstitutional, the court is duty-bound to declare it void.

Applied to the facts in *Molotlegi*, the approach preferred by counsel for the applicant was the wrong strategy to follow. Instead of leaving the constitutionality of section 2(1)(b) unchallenged and opting for a re-evaluation in Bophuthatswana of subjectively worded discretionary powers, the better approach would have been to accept the legal position pertaining to subjective discretionary powers as established by precedent, and petition the court to find the law sanctioning such powers to be unconstitutional.

Nor ought *Molotlegi* to be regarded as authority for dismissing this submission, since the reasoning as to the unconstitutionality of section 2(1)(b) (and of similar provisions) was not raised by counsel or considered by the court in that case.

There is one further aspect of the court's reasoning in *Molotlegi* that ought not to remain unchallenged. Counsel for the applicant sought support for his submission in the joint judgment of Waddington and Khumalo JJ in *Segale v Government of Bophuthatswana*.[48] The court in *Molotlegi* rejected the authority of *Segale*, partly because that judgment had been overruled on appeal,[49] but also because Lawrence AJ could not distinguish the reasons that prompted the court in *Segale* to find section 31 of the Internal Security Act to be constitutional from those that obtained in *Molotlegi*. In this regard Lawrence AJ proclaimed:[50]

> "The Appeal Court [in *Segale*] held that Section 31 of the Internal Security Act which is a similar restriction on the freedoms which emerge from the Constitution is not in conflict [with the Constitution] and is valid and enforceable. I can see no difference in the restriction which emerges from the provision of Section 2 of the said Act and which is valid and enforceable.
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> Indeed Counsel for the Applicant conceded in argument that the constitutionality of Section 2(1)(b) cannot be contested."

The court (and counsel for the applicant) failed to appreciate that the discretionary power of the minister in terms of section 31 of the Internal Security Act to refuse permission for the holding of a gathering may be acted upon only if "he is *on reasonable grounds* satisfied" that his refusal "is necessary in a democratic society in the interests of national security or public safety . . ."[51] The discretionary power in this instance falls within the category of executive decisions founded on reasonable – and objectively justiciable – grounds, and is therefore not on par with the powers defined in section 2(1)(b). It is important to note, though, that the power of the minister to impose conditions for the holding of a gathering is again founded on subjective – non-justiciable – grounds[52] and is therefore unconstitutional.

(c) Objective executive discretions

Several judgments of the supreme court considered discretionary powers of the executive founded upon the reasonable belief of the official concerned. As indicated earlier, a court of law may in such instances be called upon to inquire

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48 1987 3 SA 237 (BGD).
49 43; and see *Government of the Republic of Bophuthatswana v Segale* 1990 1 SA 434 (BAD).
50 26.
51 See s 31(1)(b)(i) (emphasis added).
52 See s 31(1)(b)(ii).

into the reasons that prompted an administrative act or decision and to set the act or decision aside should it appear that those reasons did not warrant the act or decision.

In *Government of the Republic of Bophuthatswana v Moletsane*[53] the court was called upon to consider the scope of the State President's discretionary power, in terms of section 3 of the Security Clearance Act 40 of 1985 (B), to dismiss from office any person in the employ of the Bophuthatswanan government "if he [the President] is on reasonable grounds satisfied" that the employee endangers or constitutes a threat to the public safety or national security, or to the maintenance of law and order. The court rightly decided that it was within its province to inquire whether in fact reasonable grounds existed for the dismissal of the public servant; and the court found on the facts in the case that no evidence was produced to show, on a preponderance of probabilities, that the respondent constituted a threat to the public safety or national security or to the maintenance of law and order.

No constitutional issues were raised in argument or in the judgment in *Moletsane*. Security of employment typically belongs to the second generation of human rights, which category of rights was not intended to enjoy constitutional protection in Bophuthatswana. The judgment can, therefore, not be faulted.

What, however, would the position be if an executive official were to be given the power to deprive someone of a fundamental right "if he is on reasonable grounds satisfied" that any of the constitutionally defined conditions for such *de facto* deprivation existed?

Where fundamental rights are at stake, the power of *de facto* deprivation must here again be exercised strictly within the confines of the enabling provision in the Constitution. It would therefore not be constitutionally "kosher" for the supreme court to uphold the *de facto* deprivation of a fundamental right simply because the grounds for the decision, act or decree appear to be reasonable. Evidence must be produced by the (public official) respondent to show that the constitutional derogation condition – for instance the interests of national security or public safety – has been satisfied as a matter of fact.

The above submission has never been argued before or considered by the supreme court. The passages in *Government of the Republic of Bophuthatswana v Segale*[54] dealing with the competence of the Minister of Law and Order to prohibit certain gatherings in fact never addressed the distinction between the so-called objective and subjective discretionary powers of the executive. The court, for instance, failed to distinguish between the (objective) discretion of the minister to prevent a gathering from being held and his (subjective) discretion to impose conditions under which a gathering may be held.[55] The constitutionality of a subjective or objective discretion *per se* that implicates a fundamental right was not considered in the judgment. Certain passages in the judgment of Galgut AJA and indeed the comments of Theal-Stewart CJ do indicate, though, that the court was satisfied that the *de facto* deprivation of freedom of assembly and of speech was, in the circumstances of that case, objectively justified.

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53 1992 3 SA 800 (BAD).
54 1990 1 SA 434 (BAD).
55 *Idem* 450D–E.

The judgment in *Nyamakazi v The Minister of Law and Order*[56] also dealt with the competence of the Minister of Law and Order, in terms of section 31 of the Internal Security Act 32 of 1979, to prohibit a gathering if "he is on reasonable grounds satisfied" that certain objectives necessitate such *de facto* deprivation of the right to freedom of assembly. The principle that permeates the judgment concerns the supreme court's competence to evaluate and to pronounce upon the reasonableness of the minister's decision.[57] Certain guidelines appear from the judgment for establishing the reasonableness of the minister's decision: the minister is presumably required to be "bona fide in his approach" in accepting information at his disposal as being "correct and a true picture of the situation"; the prevailing circumstances of unrest in the country must be taken into consideration, and so on.

The truth is, however, that the constitutional provisions sanctioning derogations from freedom of assembly require more of the court: It should on the facts in the matter judge whether banning of the gathering *was indeed* "necessary in a democratic society in the interests of national security or public safety" or any of the other objectives stated in section 16(2) of the Constitution. Although the minister's decision may have been taken on reasonable grounds within the above meaning, he may have been mistaken; and if so, the constitutional condition for the deprivation of freedom of assembly will not have been satisfied. Although it is often said that in matters of administrative discretion a court of law should avoid the temptation of substituting its own opinion for that of the executive official concerned – a proposition that is without doubt a basic principle of administrative law – this does not apply when the administrative decision, act or decree implicates any of the fundamental rights. The derogation provisions of the Declaration of Fundamental Rights are founded on fact and not on executive opinion; and, whenever the existence of such facts is placed in dispute, it is for the court to decide whether or not, upon the evidence placed before it, the contingency upon which the public official has based his decision, act or decree, is indeed fact or fiction.

(d) Combining subjective and objective executive discretions

Monnakale v Republic of Bophuthatswana[58] dealt with most peculiar legislation. Section 25(1) of the Internal Security Act 32 of 1979 authorised the Commissioner of Police, subject to directions of the Minister of Law and Order, to order the detention for interrogation of a person "if the Commissioner has reason to believe" that the detainee had engaged in activities likely to constitute an offence under the act or is withholding information regarding such an offence. In terms of section 25(2), the commissioner must within 14 days submit to the Attorney-General the reasons for the arrest and detention of the detainee, and the Attorney-General may then, "upon consideration of those reasons" and after consultation with the Minister of Law and Order, mandate the continued detention of the detainee for a period of not more than 90 days.

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56 Case no CA185/90 (BGD) 1990-12-13.

57 The judgment confusingly and inaccurately states that similar legislation to the provision in issue in that case called for "the subjective approach", but the court then went on "to scrutinize the Respondent's decision and to decide whether the reasons for his decision were in fact reasonable" (ie the "objective" approach).

58 1991 1 SA 598 (BGD).

The main issue in the dispute was whether the Attorney-General had to disclose to the court the reasons that prompted him to order the further detention of the detainee in terms of section 25(2).

Applying the norms that have come to be accepted in South African administrative law, Friedman J had no difficulty in finding that the reasons for the commissioner's decision were justiciable: he must have "reason to believe . . ." and the court is competent to inquire whether or not his decision was reasonably justified. However, the powers of the Attorney-General have been defined in subjective terms: he simply has to consider the reasons supplied to him by the Commissioner of Police and consult with the Minister of Law and Order, and thereafter it is entirely up to him to decide whether the further detention of the detainee is warranted. Therefore, "it is not the function of the Court to enquire into the correctness of the Attorney-General's decision".[59]

The effect of this statement of the law can be summarised as follows: If the legality of a person's detention is placed in issue at the section 25(1) stage, the Commissioner of Police will have to take the court into his confidence as regards the reasons that prompted his decision, and the court may order the release of the detainee if it should find that those reasons, in the context of the constitutional grounds upon which section 25 relies for its validity, did not constitute good grounds for the arrest and detention of the applicant. Once the detention of the applicant has entered the section 25(2) stage, the decision of the Attorney-General supersedes that of the commissioner and the reasons for the applicant's (further) detention are no longer justiciable.

The peculiar consequences of *Monnakale* attracted negative comments from the supreme court in *Bokaba v The Minister of Law and Order*.[60] Khumalo J left the question of the correctness of *Monnakale* open; as in fact did Comrie J but he included in his judgment a reasoned outline to show that *Monnakale* was in all likelihood wrongly decided[61] and that "[i]n future litigation under s 25 the respondent may be well advised to take the Court into its confidence".

The judgments in *Monnakale* and *Bokaba* both failed to appreciate that section 25 of the Internal Security Act confers powers on the executive that clearly exceed the limitations of the enabling provision of the Constitution – in this instance section 12(3)(g), which authorises "lawful detention in the interests of national security or public safety".

Any derogation provision that excludes the jurisdiction of the court to inquire whether the *de facto* deprivation of personal liberty under cover of section 12(3)(g) indeed serves the interests of national security or public safety is unconstitutional and void. This already applies to the objective discretion of the Commissioner of Police provided for in section 25(1) – at least if the supreme court were to persist in the supposition that its inquiry must remain confined to the reasonableness of the commissioner's decision instead of the interests of national security or public safety as a matter of fact. The *Monnakale* interpretation of section 25(2) clearly renders that provision unconstitutional. Nor would the

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59 *Idem* 624.

60 Case no M277/92 (BGD) 1992-10-29.

61 Comrie J was not sure whether, for purposes of the *stare decisis* rule, the two-judge court constituted a full bench – which, if it was, would facilitate the overruling of *Monnakale*. The court in *Bokaba* was in fact not a full bench.

obiter dictum of Comrie J in *Bokaba* save its skin – again if the reasonableness of the decision of the Attorney-General under section 25(2) is to be all there is to consider.

It should be noted for the record that section 25 may be unconstitutional for other reasons as well. Detention for interrogation is authorised by that section upon suspicion of certain offences stipulated in the Internal Security Act having been committed by the detaineee or within his knowledge. Some of those offences are entirely unrelated to "the interests of national security or public safety".[62] Since detention without trial may thus be founded on offences that have no bearing on "the interests of national security or public safety", the ninety-days-detention provision cannot receive a kiss of life from section 12(3)(g) of the Constitution.[63]

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62 Eg, in terms of s 41(3) of the Internal Security Act, a local authority or company which, or any other person who, supplies any community in Bophuthatswana with light, power or water, or with sanitary or transportation services, must, under threat of punishment, cause a copy of s 41 of the act to be posted up at a conspicuous place at the premises from which such supplies or services are carried out – the section in essence prohibits persons employed in public utility services from acting in breach of their contract of employment in a manner that would interrupt such services – and if someone is suspected by the Commissioner of Police of withholding information that could lead to the arrest of an employer that failed to thus display s 41, he may be arrested and detained for interrogation under s 25.

63 Counsel for the applicant in *Bopalamo v The Government and Other Cases* 1988 5 BSC 140 made the same submission. The Court did not deal clearly with the argument but simply stated (157G): "An examination of the offences created under the Internal Security Act discloses at a glance that the majority are concerned directly with the maintenance of the integrity of the State and with offences akin to treason and sedition." S 25 was found in that case to be constitutional.

I turn now to the absence of precedents in other jurisdictions, and this is a convenient stage to deal generally with the value of foreign authorities in this field. In Marais v Richard *. . . Jansen JA said, the basic criterion must be the juridical convictions in South Africa and not elsewhere. This is not mere legal chauvinism. As Judges we are expected to know and understand our own society and its institutions, particularly its legal ones. We do not have the same understanding of foreign societies. Foreign authorities can be very valuable in showing how problems have been dealt with elsewhere, but one must always bear in mind that circumstances may be different there, sometimes in subtle but important ways (per* EM Grosskopf JA in *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 3 SA 597 (A) 593).

AANTEKENINGE

DANGERS IN THE USE OF SYNONYMS TO DESCRIBE DIFFERENT CATEGORIES OF CONTRACTUAL PROVISIONS: "IMPLIED" AND "TACIT" *

The use of "implied" and "tacit", sometimes as synonymous and sometimes as indicating different classes of provisions of contracts, can lead to difficulties. In *Group Five Building Ltd v Government of The Republic of South Africa (Minister of Public Works and Land Affairs)* 1993 2 SA 593 (A) the appellant, plaintiff in the court of first instance, alleged in paragraph 11 of its particulars of claim that

> "[i]t was an express, alternatively tacit, further alternatively implied term of the contract between the parties that:
>
> 11.1 all variations and instructions would be given timeously in relation to the actual progress of the works, alternatively at an opportune time, further alternatively in such a way and at such a time so as not to disrupt the general progress or momentum or method or sequence of construction of the works by the plaintiff;
>
> 11.2 in the event of late or inopportune instructions or variations, plaintiff would be entitled to extension of time and/or additional remuneration and/or damages caused by such variations or instructions" (597F – H).

In alleging three alternative possibilities, namely (a) an "express" term, (b) a "tacit" term, and (c) an "implied" term, the appellant must have had in mind in regard to (b) and (c) two different categories of unexpressed terms. These two categories would be the two into which unexpressed terms normally fall, namely (i) those which the parties had in mind but did not express or which they would have asserted, promptly and unanimously, if they had been asked (those which pass the hypothetical bystander test), and (ii) those imposed by law in the absence of both express terms and of terms which pass the hypothetical bystander test (see *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A) 531D – 533B and the other authorities referred to in my *The principles of the law of contract* (1989) 255 – 258 269 – 295 (*Contract*)).

As the claim that there was an express term as alleged was without substance (599E – F), only the two categories of unexpressed terms will be considered in this note. It appears from the extract from the opinion of Streicher J (599A – B of the AD report) and the first sentence thereafter that the learned judge in the court of first instance had used the words "tacit" and "implied" in the

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* This note continues the discussion in 1993 *THRHR* 116 – 118; so the points made and the authorities referred to there will not be repeated.

sense given in the *Alfred McAlpine* case (*supra* 526B – E 532F), namely "tacit" for the provisions which pass the hypothetical bystander test and "implied" for those which the law imposes in the absence of provisions agreed upon by the parties, whether that agreement be expressed or not expressed. These last mentioned I will refer to as "residual" (see *Contract* 257 – 258 283 – 291).

On appeal to the full court of the Transvaal Provincial Division (1991 3 SA 787 (T)) Leveson J, with whom Joffe J and Myburg AJ concurred, after dealing with the allegation concerning an express term, said (790E – G):

> "The remaining aspects of para 11 of the particulars of claim related to the allegation that the term in question was either tacit or implied. I am not sure that there is full clarity on the scope of a 'tacit' term. I suppose a term can be said to be tacit when it is necessarily implied by law as in *Aymard v Webster* 1910 TPD 123. Or it could be tacit because nothing is said when the contract is concluded, as in the case where a contract is formed by the conduct of the parties. *Festus v Worcester Municipality* 1945 CPD 186 deals with that. But I do not think that it is necessary to engage in a full discussion on its scope. For present purposes it can be said that a tacit term has no greater scope than an implied term. In either event, if the appropriate question be put by the proverbial bystander the answer would be the same."

The statement that "a term can be said to be tacit when it is *necessarily* implied *by law*" (emphasis added) indicates that "tacit" in this sentence is being used to describe residual provisions, not those which pass the hypothetical bystander test, which latter are sometimes referred to as "implied *by the parties*" or "*on the facts*". Hence, as in *Burgess v Wickham* 33 LJ QB 17 28 which is cited with approval in *Aymard v Webster supra* 132, "tacit" was used by the full court in the sentence under discussion in a sense different from that in which it was used in the pleadings and in the court of first instance. However, in the next sentence ("Or it could be tacit because nothing is said when the contract is concluded . . .") the court used "tacit" to mean "implied *by the parties*": see *Festus's* case *supra* 193 where Jones AJP said that

> "[i]f the act or conduct of a party cannot be satisfactorily explained except upon the supposition of an agreement, the Court will assume that there has been a tacit or implied agreement".

(Note that Jones AJP considered that the words "tacit" and "implied" were interchangeable.) It follows that "tacit" was used by the full court in consecutive sentences to refer to two different categories of unexpressed terms. With respect, this is likely to lead to misunderstanding.

The last two sentences of the quotation (*supra* 790E – G) also, with respect, give rise to difficulty in that it is said that the hypothetical bystander test is used to identify *both* a "tacit" *and* an "implied" term, it not being specified whether the word "implied" was used in the context in which it occurred to mean "implied by the parties" or "implied by law". The words "tacit" and "implied" (the latter without the qualification "by the parties" or "by law") are generally regarded as synonymous (*Contract* 257). If the court (790F) was using them as synonymous, it was treating *both* words as descriptive of *one only* of the categories of unexpressed provisions, namely those implied "by the parties", and it was, with respect, correct in saying that the hypothetical bystander test applied whichever word was used; but if by "implied" the court meant "implied by law" (the phrase it used at 790E) it must, with respect, be pointed out that that meaning of "implied" refers to residual provisions, which provisions are not identified by the hypothetical bystander test.

The *Group Five Building Ltd* case having reached the Appellate Division, Corbett CJ, with whom the other members of the court concurred, said that

> "before us two basic points were argued: (i) whether the tacit/implied term pleaded in para 11 of the particulars of claim could form part of the contract between the parties, and (ii) . . .
>
> With regard to the tacit (or implied) term, it should be noted, in the first place, that although para 11 of the particulars of claim speaks, in the alternative, also of an express term to the same effect, appellant does not suggest that there is any basis for claiming that such an express term formed part of the building contract" (599D – E).

With respect, it is not clear whether the learned chief justice meant that counsel (a) had argued, and that the point at issue concerned, only two alternatives, namely (i) an express term, and (ii) another term which could be described as "the tacit (or implied) term"; or (b) that counsel had raised the question whether *either* the tacit term *or* the implied term pleaded could form part of the contract. *Prima facie* the use of the singular ("the tacit/implied term") indicates the first alternative as does the passage where the learned chief justice said that the various alternative formulations of the alleged term in paragraph 11.1 of the particulars of claim

> "hardly accord with the acknowledged principle that a term sought to be *implied* in a contract must be capable of clear and exact formulation (see Christie *The Law of Contract in South Africa* 2nd ed at 200 and the authorities there cited)" (600D – E; emphasis added).

Professor Christie's statement, and his authorities, refer to provisions which pass the hypothetical bystander test (those which, in the usage adopted in the *Alfred McAlpine* case above, are "tacit", *not* "implied"), not to the formulation of residual provisions. The last mentioned arise in any of the ways referred to in *Contract* 292 and may well, when a court needs to formulate them, lead to argument about their correct formulation (see eg *idem* 284-291).

It may be that in the passage quoted above (*Group Five Building Ltd* 600D – E) the court had in mind earlier instances in which it was said that a "tacit" term could be "implied" (see 1993 *THRHR* 116-118 to which add *Saridakis t/a Auto Nest v Lamont* 1993 3 SA 164 (C) 172A – B), but even if this was the case, the statement refers to one only of the categories referred to in the particulars of claim, a circumstance that indicates that the court did not consider the other of the categories of unexpressed terms.

Attention needs to be drawn to the difficulties referred to above in order that in future in pleading, in argument before a court, and in exposition (whether by a court or by an author) two points may be borne in mind. The first is that use of otherwise synonymous words, such as "implied" and "tacit", to designate different categories of provisions of contracts is liable to lead to misunderstanding and confusion and it is better to use a completely different word, such as "residual", for the category of terms supplied by law in the absence of agreement (expressed or unexpressed) by the parties. The second is that when, in the absence of an express term, the passage in *Hudson's building and engineering contracts* ((10 ed) quoted in *Group Five Building Ltd supra* 599F – I) comes to be considered (its applicability was left open at 600B), it should be considered from two aspects: (i) would a clause on the time element have passed the hypothetical bystander test; and (ii) if not, what is the residual provision on the point? It will be remembered that in the absence of an express term relating

to time there may well be a term which passes the hypothetical bystander test; and, again in the absence of an express term, if there is no term which passes the hypothetical bystander test, there will be a residual one, no contract being without a time element (*Contract* 393).

AJ KERR
Rhodes University

GEDAGTES OOR DIE VERGELYKINGSTOETS BY DIE BEPALING VAN VERMOËNSKADE

1 Inleiding

Vermoënskade kan omskryf word as *die afname as gevolg van 'n skadestigtende gebeurtenis in die nuttigheid van 'n vermoënsbestanddeel by die bevrediging van die betrokke vermoënshebbende se regserkende behoeftes* (sien Visser en Potgieter *Skadevergoedingsreg* (1993) 44).

Die vraag wat hier aandag geniet, is wat die korrekte toets of maatstaf is waarvolgens skade bepaal word.

Dit moet duidelik wees dat 'n tipe vergelykingsmetode noodsaaklik is om die afname in die nuttigheid van 'n vermoënsbestanddeel te bepaal. Reinecke 1976 *TSAR* 56 is skynbaar egter van mening dat skade *nie* vasgestel word deur 'n vergelyking te trek tussen die posisie na plaasvind van die beweerde skadestigtende gebeurtenis en die hipotetiese posisie as die gebeurtenis nie plaasgevind het nie. Die "beoordeling van die voldonge gevolge" van die gebeurtenis is volgens hom die manier waarop skade bepaal word en hy maak nie hier melding van enige vergelykingsmetode nie. Elders meen Reinecke (bv 1988 *De Jure* 236) wel dat 'n mens die waarde van 'n bate voor en na die skadestigtende gebeurtenis van mekaar moet aftrek.

Enige standpunt dat geen vergelykingsmetode aangewend hoef te word om skade te bepaal nie, is ooglopend verkeerd. Die "voldonge gevolge" van 'n skadestigtende gebeurtenis kan onmoontlik bepaal word sonder om ten minste die posisie *voor* die gewraakte gebeurtenis (bv die verweerder se beweerde delik) te vergelyk met die posisie *na* die gebeurtenis. Hoe anders kan die *effek* of gevolg (die vermeende vermoënskade) bepaal word? Volgens CFC van der Walt (*Die sommeskadeleer en die "once and for all"-reël* (LLD-proefskrif Unisa 1977) 11 vn 8) kan skade taallogies net met verwysing na 'n toestand van voordeel of nie-skade gedefinieer word sodat 'n vergelyking altyd daarby veronderstel word (sien ook Van Aswegen *Die sameloop van eise om skadevergoeding uit kontrakbreuk en delik* (LLD-proefskrif Unisa 1991) 168). Die positiewe reg aanvaar dan ook tereg dat 'n vergelykingsmetode nodig is om skade te bepaal. Die vraag is wat die presiese aard van hierdie vergelykingstoets is.

2 Die tradisionele sommeskadeleer

Tradisioneel word die vergelykingsmetode van die sommeskadeleer, soos dit deur die Duitse juris Mommsen ontwikkel is, gesien as die basis vir die aard en bepaling van vermoënskade in ons reg. (Sien veral Van der Walt *Sommeskadeleer* 3 ev wat aandui dat dit as gemeenregtelike skadebegrip in die Suid-Afrikaanse reg oorgeneem is op gesag van Windscheid en Grüber; vgl ook Zimmermann *The law of obligations* (1990) 824; *Union Government v Warneke* 1911 AD 657 665; *Oslo Land Co v Union Government* 1938 AD 584 590; *De Jager v Grunder* 1964 1 SA 446 (A) 456; *Swart v Van der Vyver* 1970 1 SA 633 (A) 643; *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 22; *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 4 SA 1 (A) 8.)

Van der Walt 1980 *THRHR* 4 beskryf die vergelykingstoets waarvolgens die sommeskadeleer funksioneer, soos volg:

> "Ingevolge die sommeskadeleer bestaan skade in die negatiewe verskil tussen die betrokkene se huidige vermoënsposisie (na plaasvind van die gewraakte gebeurtenis) en sy hipotetiese vermoënsposisie wat huidig sou bestaan het indien die gewraakte gebeurtenis nie sou plaasgevind het nie. Dit hou dus in dat 'n huidige werklike vermoëns*om* vergelyk word met 'n hipotetiese huidige vermoëns*om*. Vandaar die benaming: sommeskadeleer."

Die maatstaf vir die berekening van skade en skadevergoeding in deliktuele verband staan as negatiewe interesse bekend: die vasstelling van die bedrag geld wat nodig is om iemand te plaas in die (hipotetiese) posisie waarin hy sou gewees het indien geen delik gepleeg is nie. Die uitdrukking negatiewe interesse kom ook by kontraktuele skadevergoeding voor maar meestal word skade en skadevergoeding daar as positiewe interesse uitgedruk (sien vir meer besonderhede Visser en Potgieter 72 ev; Van Aswegen 1993 *SA Merc LJ* 265).

3 Kommentaar op die funksionering en sekere eienskappe van die vergelykingstoets(e) van die sommeskadeleer

Die kern van die sommeskadeleer se metode is geleë in die vergelyking van die eiser se huidige *werklike* vermoënsposisie met 'n *hipotetiese* vermoënsposisie wat sonder die skadestigtende gebeurtenis sou bestaan het. Die metode aanvaar klaarblyklik dat die huidige vermoënsposisie die gevolg van die skadestigtende gebeurtenis is.

Die sommeskadeleer bied nie (altyd) 'n direkte formule vir die bepaling van vermoënskade nie en is eerder 'n breë raamwerk waarbinne verdere beginsels kan funksioneer (sien bv die berekening van kontraktuele skadevergoeding in sekere stereotipe gevalle as die verskil tussen die markprys en die kontrakprys van 'n prestasie – Joubert 1973 *THRHR* 46).

3 1 Hoe word 'n hipotetiese vermoënsposisie bepaal?

Die omskrywing van die vergelykingstoets soos hierbo aangehaal, openbaar 'n leemte vir sover nie gesê word *hoe* 'n mens die hipotetiese vermoënsposisie vasstel nie. Moet jy byvoorbeeld bloot die *conditio sine qua non*-"kousaliteitstoets" se foutiewe wegdink-metode volg (sien bv Visser 1989 *THRHR* 558 ev) deur (die effek van) die skadestigtende gebeurtenis in jou gedagtes te elimineer? Hierdie metode sou by skadebepaling waarskynlik nog meer onbruikbaar wees as by die vasstelling van feitelike kousaliteit (die blote eliminasie van feite sal naamlik niks bewys wat 'n mens nie reeds op ander gronde vasgestel het nie).

Die enigste werkbare benadering skyn te wees om die skadestigtende gebeurtenis (die kousale faktor) te elimineer en dan, met behoud van alle ander relevante waarskynlike gebeure die waarskynlikste kousale verloop uit te werk en so te bepaal hoe die eiser se finale vermoënsposisie uiteindelik sou ontwikkel het. By 'n delik soos saakbeskadiging kan 'n mens nog die skadestigtende gebeurtenis *elimineer* en met behoud van ander faktore die eiser se hipotetiese vermoënsposisie konstrueer. Maar in sekere ander gevalle kan dit nodig wees om die skadestigtende gebeurtenis deur iets anders te *vervang* (sien ook Van der Walt *Sommeskadeleer* 158 – 159 oor die standpunt van Keuk). In die geval van byvoorbeeld kontrakbreuk sou dit gewoonlik onvoldoende wees om bloot die wanprestasie weg te dink – dit gaan immers oor die vergelyking van die effek van wanprestasie met die effek van behoorlike en betydse prestasie op die vermoë van die eiser. Iets (die hipotetiese prestasie volgens kontrak) moet dus noodwendig in die feitestel *ingedink* word. Dieselfde kan geld waar 'n mens skade weens 'n late of wanvoorstelling of skade in die vorm van winsverlies wil bepaal (sien in die algemeen *Siman and Co (Pty) Ltd v Barclays National Bank Ltd* 1984 2 SA 888 (A); vgl in die algemeen ook Lubbe 1984 *SALJ* 619).

3 2 Hipotetiese been van toets soms onnodig

Voorts blyk dit dat by sekere gevalle van vermoënskade *wat reeds (ten volle) ingetree het*, die sommeskadeleer se hipotetiese been oorbodig is omdat die effek van die skadestigtende gebeurtenis direk bepaal kan word deur die vermoë(nsbestanddeel) voor en na die betrokke gebeurtenis met mekaar te vergelyk (sien *infra* oor die korrekte vergelykingstoets in so 'n geval, nl dat wat *was* vergelyk word met wat *is* en nie met wat *sou gewees het* nie). Hier is die sommeskadeleer se "vergelykingstoets" bloot 'n manier om skade wat reeds deur 'n ander maatstaf bepaal is, op 'n bepaalde manier uit te druk.

3 3 Hipotetiese toets soms wel gepas

Wat *toekomstige skade* (bv verlies van toekomstige wins) en skadevergoeding weens *kontrakbreuk* betref, het die hipotetiese deel van die sommeskadeleer wel besondere betekenis. Toekomstige skade berus naamlik juis op 'n hipotese of waarskynlikheid ten aansien van die toekoms (sien Visser en Potgieter 50 180). By toekomstige skade is die korrekte bewerking egter nie die huidige posisie van die eiser afgetrek van sy hipotetiese (toekomstige) posisie nie, *maar die hipotetiese (toekomstige) posisie met die skadestigtende gebeurtenis afgetrek van die hipotetiese toekomstige posisie sonder die skadestigtende gebeurtenis* (vgl bv die formule by die vasstelling van skade en skadevergoeding weens die beweerde verlies van verdienvermoë in Corbett en Buchanan *Quantum of damages* I (1985) 62; Boberg *The law of delict* (1984) 489). 'n Mens kan dit moontlik ook so formuleer dat die hipotetiese vermoënsposisie van die eiser voor die skadestigtende gebeurtenis (die vermoënsverwagting wat dan bestaan het maar tans irreëel geword het) afgetrek word van die hipotetiese vermoënsposisie (vermoënsverwagting) na die skadestigtende gebeurtenis. By kontraktuele skadevergoeding beteken die bekende en basiese reël dat die skuldeiser in die posisie gestel moet word asof die kontrak behoorlik nagekom is, eintlik dat 'n mens sy huidige werklike posisie (sonder behoorlike en betydse prestasie) aftrek van 'n huidige hipotetiese posisie, naamlik as behoorlike en betydse prestasie plaasgevind het (sien bv *Probert v Baker* 1983 3 SA 229 (D) 234).

4 Voorbeelde oor die werking van die vergelykingsmetode

Die voorafgaande kan soos volg deur middel van voorbeelde van die verskillende vergelykings saamgevat word:

(a) 'n Werklike vermoënsposisie word vergelyk met 'n werklike vermoënsposisie By die beskadiging van X se motor kan 'n mens sy werklike vermoë voor die botsing vergelyk met sy werklike vermoënsposisie na die botsing ('n mens kan hierdie geval natuurlik ook anders formuleer as die hipotetiese uitgawes sonder beskadiging vergelyk met werklike uitgawes na die beskadiging – sien *infra* par 6 oor die konkrete skadeleer).

(b) 'n Werklike vermoënsposisie word vergelyk met 'n hipotetiese vermoënsposisie Voorbeelde hiervan is by kontrakbreuk (bv X se werklike vermoë sonder behoorlike prestasie word vergelyk met sy hipotetiese vermoë met behoorlike prestasie); winsverlies of inkomsteverlies in die verlede (bv X se hipotetiese netto wins sonder beskadiging van sy voertuig wat as taxi gebruik word, word vergelyk met sy werklike netto wins met die beskadiging van die voertuig); uitgawes reeds aangegaan (bv uitgawes wat X werklik weens 'n besering aangegaan het, word vergelyk met die hipotetiese uitgawes wat hy sou aangaan sonder 'n besering); wanvoorstelling (bv X se werklike vermoë na die wanvoorstelling word vergelyk met sy hipotetiese vermoë as die wanvoorstelling nie gemaak is nie of (soms) as 'n ware voorstelling gemaak is).

(c) 'n Hipotetiese vermoënsposisie word vergelyk met 'n ander hipotetiese vermoënsposisie Voorbeelde hiervan is toekomstige uitgawes (bv X se hipotetiese toekomstige vermoë sonder dat hy uitgawes moet aangaan, word vergelyk met sy hipotetiese toekomstige posisie waar hy dit wel moet aangaan); en verlies van toekomstige wins of inkomste (bv X se hipotetiese netto wins sonder die beskadiging van 'n fabrieksmasjien word vergelyk met sy hipotetiese netto wins met sodanige beskadiging, of X se hipotetiese inkomste sonder 'n liggaamlike besering word vergelyk met sy hipotetiese inkomste met so 'n besering).

Uit hierdie oorsig blyk dit ook dat 'n mens in sekere gevalle waar 'n hipotetiese vermoënsposisie ter sprake is met 'n *netto* vermoënsposisie werk, dit wil sê nadat vir bespaarde uitgawes voorsiening gemaak is (sien bv *Coronation Brick (Pty) Ltd v Strachan Construction (Pty) Ltd* 1982 4 SA 371 (D); *Caxton Ltd v Reeva Forman (Pty) Ltd* 1990 3 SA 547 (A)). Alhoewel die bespaarde uitgawes gewoonlik tereg binne die vergelykingstoets van die skadeformule hanteer word (dit wil sê as relevant by skadebepaling), is dit miskien ook moontlik om dit as voordele vir doeleindes van voordeeltoerekening te beskou (sien Visser en Potgieter 66 211).

5 Algemene kritiek op die sommeskadeleer

Die sommeskadeleer is al aan sterk en oortuigende kritiek onderwerp (sien bv Van der Walt *Sommeskadeleer* 183; Reinecke 1988 *De Jure* 224; Visser en Potgieter 67 – 68). Dit is onnodig vir doeleindes van hierdie bydrae om die betrokke kritiek te ontleed aangesien dit hier net gaan oor aspekte van die vergelykingstoets wat ingevolge die betrokke skadeleer funksioneer.

6 Die ontwikkeling van 'n konkrete skadeleer met 'n eiesoortige vergelykingstoets

By die pleidooie vir die verwerping van die sommeskadeleer ('n sogenaamde abstrakte skadeleer) word gewoonlik ook betoog vir die aanvaarding van 'n konkrete skadeleer (sien bv Reinecke 1988 *De Jure* 226).

Waar daar by 'n abstrakte skadeleer gewerk word met die vergelyking van iemand se huidige en sy hipotetiese vermoënsposisie, dui konkrete skade op die daadwerklike onttrekking of verswakking van 'n besondere vermoënsbestanddeel (sien ook in die algemeen Koch *Damages for lost income* (1984) 32). Waar by die abstrakte benadering gewerk word met 'n globale of anonieme rekenkundige som (ten aansien van sowel die vermoë as die skade) aanvaar die konkrete skadeleer individuele skadeposte. Van der Walt *Sommeskadeleer* 284 stel in die lig hiervan 'n ander vergelykingstoets vir die bepaling van vermoënskade voor:

> "Na my mening moet daar vir doeleindes van die vergelyking aangeknoop word by die eiser se individuele vermoënsbestanddele en hulle nuttigheid vir die bevrediging van sy erkende behoeftes volgens sy eie planmatige vermoënsgestalting. Die vergelyking moet onderneem word deur die pasgenoemde nuttigheid van die te ondersoekte vermoënsbestanddeel soos dit voor die plaasvind van die gewraakte gebeurtenis was, te vergelyk met die nuttigheid van daardie vermoënsbestanddeel soos dit na die plaasvind van die gewraakte gebeurtenis is. Wat *was* en wat *is* word dus met mekaar vergelyk."

Veral van belang vir die huidige bespreking is die weglating van 'n hipotetiese element in die vergelykingstoets. Dit hang saam met Van der Walt se basiese uitgangspunt dat in die algemeen slegs afgeslote skadelike gevolge (skadeposte) as skade kwalifiseer en dat 'n hipotese ten aansien van toekomstige skade dus oorbodig is (sien *infra* par 7 waar oor hierdie kwessie standpunt ingeneem word).

Alhoewel die sommeskadeleer (met sy abstrakte vergelyking en gevolglike gebruik van hipoteses) sonder twyfel wel deel van ons skadevergoedingsreg is, word daar in sekere gevalle waarskynlik meer lippediens aan hierdie leer bewys as wat dit werklik toegepas word. So verskaf die appèlafdeling in *Santam Versekeringsmaatskappy Bpk v Byleveldt* 1973 2 SA 146 (A) 150 die volgende skadeformule:

> "Die verskil tussen die vermoënsposisie van die benadeelde voor die onregmatige daad en daarna . . . Skade is die ongunstige verskil wat deur die onregmatige daad ontstaan het."

Hierdie is nie die formulering van die sommeskadeleer nie aangesien daar nie met 'n hipotetiese vermoënsposisie gewerk word nie. Ook die skadetoets wat deur Van der Merwe en Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 180 voorgestel word, wyk van die sommeskadeleer af:

> "Om vas te stel of 'n persoon skade gely het as gevolg van die onregmatige optrede van 'n ander, moet eersgenoemde se vermoënsposisie voor pleging van die delik vergelyk word met die posisie daarna. Indien laasgenoemde posisie die nadeligste is, het die persoon skade gely en staan 'n aksie om skadevergoeding hom tot diens."

7 Vergelykingstoets van die sommeskadeleer of van die konkrete skadeleer?

Reinecke 1988 *De Jure* 226 het reeds sekere voordele van die konkrete skadeleer aangestip. Nogtans is na my mening die beste benadering by die ontwikkeling van 'n skadeleer vir ons reg om slegs die onaanvaarbare eienskappe van die sommeskadeleer te verwerp (bv die anonimiteit van die skadesom, die gebruik van totale vermoënsposisies en die inagneming van alle voordele van die skadestigtende gebeurtenis by skadebepaling – sien vir meer besonderhede Visser en Potgieter 67 – 68). Wat hierdie areas aanbetref, kan die sommeskadeleer gerus

vervang word deur die beginsels van die konkrete skadeleer (wat tog in praktyk reeds toegepas word oa wat betref die pleit van skade deurdat vereis word dat skade in verskillende hoofde ingedeel moet word – sien bv Hooggeregshofreël 18(10)).

In die algemeen sal die aanvaarding van die konkrete skadeleer lei tot die gebruik van 'n skadeformule wat in *sekere gevalle van vermoënskade wat reeds ingetree het* (*damnum emergens*) vir skade toets sonder die gebruik van 'n hipotetiese element (bv by saakbeskadiging). Hier is 'n hipotetiese element onnodig en verwarrend aangesien 'n bepaalde vermoënsbestanddeel voor en na die delik dieselfde (konstante) waarde sou gehad het.

By toekomstige skade en winsverlies (*lucrum cessans*) is, soos reeds hierbo aangedui, 'n vergelyking met 'n hipotetiese element wel gepas aangesien die betrokke skade self hipotetiese elemente bevat; *contra* die standpunt van Van der Walt *Sommeskadeleer* 276 wat meen dat die vraag of toekomstige skade gely is en wat die omvang daarvan is, nie deur 'n vergelykingsprosedure beantwoord kan word nie. Sy siening hieroor is egter nie aanvaarbaar nie, soos onder meer die praktyk in verband met die bepaling van skade en skadevergoeding by verlies van verdienvermoë goed illustreer. Die skadevergoedingsreg moet eenvoudig dikwels van waarskynlike toekomstige gebeure kennis neem en dit noodsaak 'n vergelykingstoets met 'n hipotetiese element. Ook by die berekening van skadevergoeding weens wanvoorstelling en weens kontrakbreuk is 'n hipotetiese been van die vergelykingstoets dikwels relevant.

Na my mening moet 'n te streng dogmatiese of onbuigsame benadering tot die korrekte vergelykingsmaatstaf by skadebepaling vermy word. Ondanks die bewese gebreke van die sommeskadeleer is dit onnodig en onprakties om hierdie metode in die geheel te verwerp. Die gebruik van die sommeskadeleer se vergelykingsmetode, soos in gepaste gevalle gekorrigeer of aangevul deur die toets ingevolge die sogenaamde konkrete skadeleer, blyk dus die aangewese weg vir die toekoms te wees.

PJ VISSER
Universiteit van Pretoria

INTENTION AND THE *ACTIO INIURIARUM*

In our law delictual liability is regulated by general principles (Neethling, Potgieter and Visser (*Law of delict* (1994) 4) and those applicable to the *actio iniuriarum* are well-known: wrongful conduct, *animus iniuriandi* and an impairment of a personality right are required (*Rex v Umfaan* 1908 TS 62 66; *Delange v Costa* 1989 2 SA 857 (A) 861C – F). However, as the practical significance of these principles became evident, these apparently straight-foward criteria produced conflicting results. It is now perhaps apposite for our courts to reflect on how the rules applicable to specific forms of *iniuria* could be co-ordinated. This note concentrates on one aspect only: the intention element.

Intention encompasses all forms of *dolus*, including *dolus eventualis* (*Suid-Afrikaanse Uitsaaikorporasie v O'Malley* 1977 3 SA 394 (A) 402H; *Ramsay v Minister van Polisie* 1981 4 SA 802 (A) 807C; *Bennett v Minister of Police* 1980 3 SA 24 (C) 34E – F; *Barclays National Bank Ltd v Traub*; *Barclays National Bank Ltd v Kalk* 1981 4 SA 291 (W) 297H – 298A). After a number of years of controversy, starting with *Maisel v Van Naeren* 1960 4 SA 836 (C), it is now settled that *dolus* has two components: the intention to achieve a particular result coupled with the knowledge that such conduct is wrongful. At first the notion of consciously wrongful intent was used in defamation cases only (amongst others, *Maisel v Van Naeren supra*; *Nydoo v Vengtas* 1965 1 SA 1 (A); *O'Malley*'s case *supra* 403C – D 405G – H; *Pakendorf v De Flamingh* 1982 3 SA 146 (A) 157E), but the Appellate Division has now accepted that it applies throughout the law of delict. The concept is thus found in *iniuria* cases (*Ramsay*'s case *supra* 807C 818F – G) and in wrongful-arrest cases (*Minister of Justice v Hofmeyr* 1993 3 SA 131 (A) 154E – G; *Tödt v Ipser* 1993 3 SA 577 (A) 586F – I), while in *Dantex Investment Holdings (Pty) Ltd v Brenner* 1989 1 SA 390 (A), a case involving a claim in terms of the *lex Aquilia*, the court said that there was no reason why *dolus* should not comprise all its normal elements, including consciousness that the result would be wrongful (396H).

In our law, as in other jurisdictions, courts have held that policy considerations warrant an interference with the normal elements of liability in certain instances. The most common occurrence is that of strict liability, in other words, instances where courts eliminate the fault element entirely. But there are also other methods for deviating from the norm. In some instances courts create presumptions, in others they manipulate the principles applicable to the onus of proof, and now, by accepting that intention has two components, and by not necessarily requiring that both be present, the Appellate Division has used the intention element in a far more sophisticated manner than a mere simplistic choice between liability based on intention and strict liability.

Two approaches have emerged as to how intention is to be proved. In defamation cases a plaintiff needs to establish damage – the infringement of his or her *fama* – by proving that the defendant published defamatory material referring to the plaintiff. Two rebuttable presumptions then arise, one being that the conduct was wrongful and the other being that the material was published *animo iniuriandi* (*Borgin v Villiers* 1980 3 SA 556 (A) 571E – G; *May v Udwin* 1981 1 SA 1 (A) 10C – G; *Ramsay supra* 807D). However, our courts have held that mass media – broadcasters and newspapers – should pay damages in respect of defamatory material they publish, even where they never intended to defame anyone (the *O'Malley* and *Pakendorf* cases *supra*). Only one presumption, that of wrongfulness, therefore arises.

For other *iniuriae* – the infringement of *corpus* or of *dignitas* – the position is different. In *Foulds v Smith* 1950 1 SA 1 (A) the Appellate Division held that an allegation of an *iniuria* included the allegation of the subjective *animus* element and that it was not necessary to plead *animus* separately. This case seems to have been misinterpreted subsequently (eg *Thompson v Minister of Police* 1971 1 SA 371 (E) 374G – H): *Foulds*'s case is not authority for saying that a presumption of *animus* arises, merely that *animus* need not be alleged separately in the pleadings (but compare the position in malicious-arrest cases, where such an allegation is required (*Tödt v Ipser supra* 586F). There is also

authority that proof of unlawful aggression raises a presumption of *animus* (*Bennett*'s case *supra* 35G – H) and this approach was confirmed in *Delange v Costa supra* where the Appellate Division stated that the first enquiry is into the wrongfulness of the conduct and that once wrongfulness has been determined, *animus* is presumed, which in turn may be rebutted. Only if the first two elements are found to be present, does one proceed to the third requirement that the plaintiff's dignity was impaired (861C – E).

This approach is tautologous, for in the wrongfulness enquiry the court is required to establish whether a legally-recognised interest – *dignitas*, for example – has been infringed contrary to a norm and later, in establishing whether the plaintiff suffered damage, the court again needs to be satisfied that a legally-recognised interest has been infringed. The approach is also clearly inconsistent with that applicable to defamation cases and raises problems relating to pleading. Some examples illustrate the point. It is trite law that conduct may amount to an infringement of *dignitas*, in the form of an insult or of a breach of a person's privacy, even if publication of non-defamatory matter cannot be proved, or if publication to a third person cannot be proved. How does one draft the alternative claims in these instances? Upon whom rests the onus to prove wrongfulness? In mass media cases there is a further issue to consider: are the mass media also strictly liable in respect of the alternative claims? (Burchell (*Principles of delict* (1993) 192) suggests that they are liable, and one is inclined to agree with this view, but our courts have not yet expressed an opinion on this point.) Is a plaintiff assisted by any presumptions when it is alleged that a mass medium has infringed the plaintiff's *dignitas*? It seems not.

Cases involving deprivation of liberty fall into two categories, namely malicious deprivation of liberty, where, by abusing the judicial process, a person causes someone to be arrested and detained by another (Neethling, Potgieter and Visser *op cit* 318) and wrongful deprivation of liberty or wrongful arrest (also known as "false imprisonment"), where a person him- or herself arrests and detains the plaintiff. All the elements of the *actio iniuriarum* apply to the former category (*Thompson v Minister of Police supra* 373F – 375A), but it has for some time been unclear whether these principles also apply to the latter. McKerron (*The law of delict* (1971)), for example, states that the wrong consisted in "the unjustifiable infliction of a restraint upon the personal liberty of another" (159) and, having made no mention of a requirement of intention (except to say that malice is not required), noted that mistake would not amount to a defence (160). Van der Walt (*Delict: principles and cases* (1979) 63) believes that the courts had dispensed with the *animus iniuriandi* requirement in false-imprisonment cases and, more recently, Neethling, Potgieter and Visser (*op cit* 318; see also Neethling *Persoonlikheidsreg* (1991) 116 – 117) are still able to state quite unambiguously that although *animus iniuriandi* should be a requirement for liability, in these instances one is concerned with a form of liability without fault. See also Van der Merwe and Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 550 ff who criticise the trend towards strict liability. These views were held despite some indications to the contrary, especially this clear statement in *Smit v Meyerton Outfitters* 1971 1 SA 137 (T) 139C – E, a wrongful-arrest case:

> "In die geval van die *actio injuriarum* het die skuldbegrip met twee oorwegings te make. Die eerste is dat die verweerder opsetlik (intentionally) gehandel het en die tweede is dat hy geweet het dat die handeling onregmatig is. In die geval van onregmatige arrestasie, hoewel dit uit die *actio injuriarum* ontwikkel het, is die tweede oorweging nie 'n vereiste vir aanspreeklikheid nie."

The best explanation for the apparent contradiction lies in the fact that the position as set out in *Smit v Meyerton Outfitters* was not generally accepted and it was only recently that any doubt about the meaning and nature of intention was removed.

Our courts' initial approach to wrongful-arrest cases stems from *Whittaker v Roos and Bateman*; *Morant v Roos and Bateman* 1912 AD 92 which held that *dolus* was a requirement for liability (122 130 – 131), but that *animus iniuriandi* was presumed once the infringement of the plaintiff's right has been proved (124; see also *Thompson v Minister of Police supra* 374G-H). Although the Appellate Division stated that the presumption was rebuttable (124 – 125), which allowed a defendant to prove lack of *animus*, subsequent developments rendered the position less clear. Statements in a number of cases seemed to justify the academic opinion that the presumption was irrebuttable. It was noted in *Birch v Ring* 1914 TPD 106 that "the mere false imprisonment or illegal arrest gives a right of action to the person arrested" (109); in *Bhika v Minister of Justice* 1965 4 SA 399 (W) that the arrest and detention were "wrongful acts and if any damage resulted from them then the defendants are liable" (400H); in *Donono v Minister of Prisons* 1973 4 SA 259 (C) that a plaintiff need not allege or prove fault, either in the form of *dolus* or *culpa* (262B); and in *Shoba v Minister van Justisie* 1982 2 SA 554 (C) that wrongful arrest is treated as an exception and that a plaintiff need not prove fault on the part of the defendant (559C).

Notwithstanding the *Birch* and *Donono* decisions, some courts continued to follow the *Whittaker* approach. In *Ramsay v Minister van Polisie supra* Jansen JA said that the respondent had not discharged the evidentiary burden in respect of *animus* (814A) and in *Delange v Costa supra* the court noted that *animus* could be rebutted. These cases refer to *iniuriae* in general, but the principle has also been accepted in wrongful-arrest cases (see *Thompson v Minister of Police supra* 374G – H; *Newman v Prinsloo* 1973 1 SA 125 (W) 126H – 127G). However, these cases all state that the defendant rebuts the presumption by showing that the interference was legally justified, and except for the *Ramsay* decision (810F – 815B), they appear not to distinguish between defences against wrongfulness and those against *animus*. In fact, the cases tended to concentrate on questions of unlawfulness (see also *Ingram v Minister of Justice* 1962 3 SA 225 (W)). Thus, even until quite recently, therefore, it was not clear whether, in wrongful-arrest cases, a defendant could show that *animus* was lacking because of, for example, a mistake or something done in jest.

An area in which the law was regarded as being similar to that of deprivation-of-liberty cases involves attachment of property. Malicious attachment requires *animus* (*RL Weir & Co v De Lange* 1970 4 SA 25 (E) 28-29), but it was held in *Trust Bank van Afrika, Bpk v Geregsbode, Middelburg* 1966 3 SA 391 (T) that "neither negligence nor *dolus* need be alleged to make out a cause of action" in a wrongful-attachment case (393F – G). Again Neethling, Potgieter and Visser (*op cit* 332) are satisfied that this was an instance of liability without fault under the *actio iniuriarum*.

The first indication of a general change in the Appellate Division's thinking towards the view expressed in *Smit v Meyerton Outfitters supra* can be found in *Ramsay v Minister van Polisie supra* where Botha AJA noted that, although a component of *dolus*, courts have not regarded consciousness of wrongfulness

as an essential requirement in certain categories of *iniuriae* (818F – 819C). Thereafter in the *Dantex* case *supra* Grosskopf JA confirmed that policy considerations may affect elements of various types of delict and that in some instances plaintiffs need not prove consciousness of wrongfulness (396F – H). In respect of wrongful arrest and wrongful attachment of goods the issue has now been settled. In *Minister of Justice v Hofmeyr supra* 154H – J the court said:

> "It is clear that without *dolus* the action for an *injuria* would lie neither in Roman law nor in Roman-Dutch law . . . It is equally clear, however, that in a limited class of *injuriae* the current of precedent has in modern times flowed strongly in a different direction. In this limited class of delicts *dolus* remains an ingredient of the cause of action, but in a somewhat attenuated form, in the sense that it is no longer necessary for the plaintiff to establish consciousness on the part of the wrongdoer of the wrongful character of his act. Included in this limited class are cases involving false imprisonment and the wrongful attachment of goods."

(This was reiterated in *Tödt v Ipser supra* 588F – G and applied in *Isaacs v Minister van Wet en Orde* case no 1347/89 1993-11-11 (E). It seems that only in a limited category of cases will consciousness of wrongfulness not be required. The decision of *Boswell v Union Club of South Africa (Durban)* 1985 2 SA 162 (D), a case involving the infringement of *dignitas*, is therefore open to question.)

Although the Appellate Division cases appear to place the onus on the plaintiff to prove *animus* ("there may be policy considerations . . . why a plaintiff . . . should not be required to prove consciousness of unlawfulness" (*Dantex supra* 396G-H); "it is no longer necessary for the plaintiff to establish consciousness on the part of the wrongdoer" (*Hofmeyr supra* 154I) and "plaintiff therefore had to prove *animus iniuriandi* on the part of the respondent" (*Tödt v Ipser supra* 584I – J)), these statements are *obiter* and should not be interpreted as departing from the accepted position in false imprisonment cases, namely, that a plaintiff is assisted by a presumption of *animus*.

Another method which courts have used in deviating from the usual legal principles relates to the onus of proof. One way, which is discussed above, is to create a presumption which the defendant then has to rebut. Another is to require either the usual onus of proof on a balance of probabilities or an evidentiary burden, a "weerleggingslas" (cf *Mabaso v Felix* 1981 3 SA 865 (A); *O'Malley*'s case *supra* 403B – D). After the *obiter* statements in *Joubert v Venter* 1985 1 SA 654 (A) 696D – I it seemed that the Appellate Division leaned towards the usual onus, but provincial divisions considered themselves bound by the *O'Malley* approach (*Neethling v Du Preez* case nos 24659/89 and 24969/89 1991-01-29 (W); *Iyman v Natal Witness Printing & Publishing Co (Pty) Ltd* 1991 4 SA 677 (N)). The Appellate Division recently settled the issue in favour of the *Joubert v Venter* approach when the *Neethling* case was taken on appeal (see *Neethling v Du Preez, Neethling v The Weekly Mail* 1994 1 SA 708 (A): it was held that a defendant in a defamation case is encumbered with a full onus of proof in regard to two defences rebutting wrongfulness).

What, then, can we make of our law as regards the *animus* requirement in the *actio iniuriarum*? The most obvious point is that our courts have approached the issue in a casuistic fashion, appropriating different rules to sub-categories of the *actio*, despite the clear trend to standardise the principles applicable to the intention element throughout the law of delict (see *Dantex*'s case *supra*). Our courts, therefore, now have to choose between achieving the desired results within the ambit of the *actio*'s principles, or to do so by moving outside that

framework. In the former instance, courts will have to harmonise the current differences using devices such as shifting the onus by creating presumptions, whether rebuttable or irrebuttable, and where the onus is rebuttable, by determining the nature and extent of that onus. This ensures that the *animus* element remains a requirement: the substantive principles apply to all instances but the procedural approach to the various categories of cases differs. On the other hand, courts may be reluctant to manipulate procedural rules in order to achieve substantive results. This would then necessitate an abandoning of some of the usual criteria, for example, *animus*, to achieve the desired result. But then liability can no longer be said to be assessed in terms of the *actio iniuriarum*. Between these two approaches lies a third option, which calls upon courts to reassess the nature and quality of the *animus* criterion for each sub-category of *iniuriae*. In this instance, intention is required for all *iniuriae*, but the nature of components of the element may differ according to the type of interest infringed or according to the type of defendant. A final option is a combination of any of the above methods.

In defamation cases the Appellate Division has opted for a combination of strict liability (ie, moving outside the framework) and the shifting-of-onus approach. *Animus* contains the usual components, including consciousness of wrongfulness. One assumes that courts will follow a similar approach to infringements of *dignitas*, even though our courts have not shifted the onus in a consistent fashion. In defamation, wrongfulness and *animus* are presumed, while for *iniuriae* generally the plaintiff is assisted by a presumption of *animus* only. In wrongful-arrest and wrongful-attachment-of-goods cases the onus is similar to that in other *iniuria* cases, but the quality of the *animus* element differs. In these instances *animus* consists of a single component only – the intention to achieve a particular result (*Tödt v Ipser supra* 588F – G). *Ramakulukusha v Commander, Venda National Force* 1989 2 SA 813 (V) 837 illustrates some of the contradictions just mentioned; see also *Botha v Lues* 1981 1 SA 687 (O) 689G – 690D on the differences of opinion as to who should prove wrongfulness.

In practice, therefore, parties to an action bear different burdens of proof according to the nature of the right infringed, but there appears to be no reason for making this distinction. Similarly, the requirement that the plaintiff first prove a violation of a personality interest in defamation ought to be reconciled with the requirement in *iniuria* cases that wrongfulness be proved first. It is suggested that, in order to be consistent, the *Delange v Costa* approach should be eschewed in favour of the approach followed in defamation cases, namely, that once a violation of a personality interest has been proved, two presumptions arise, of wrongfulness and of *animus*. It appears that the Appellate Division could find such an approach acceptable, for in *Minister of Justice v Hofmeyr supra* 153E it held that "[o]nce the arrest or imprisonment has been admitted or proved it is for the defendant to allege and prove the existence of grounds in justification of the infraction" (see also *During v Boesak* 1990 3 SA 661 (A) 673G – H).

This does not entirely dispose of the anomalies, however. Defendants are presumed to have intended to commit *iniuriae* knowing that their conduct was wrongful. However, mass media are strictly liable, in other words, fault is not required for liability when an *iniuria* (used here in its widest sense) is committed

by a mass medium. Or could it be that fault remains a requirement, but that publication of defamatory material referring to the plaintiff creates a rebuttable presumption of wrongfulness and an irrebuttable presumption of *animus*? If liability is to be in terms of the *actio iniuriarum*, then the latter approach would be correct in principle, for the former takes liability outside the *actio*'s scope. It will also bring mass media cases in line with the false-imprisonment and wrongful-attachment-of-goods categories. But the latter approach also raises its own conundrums. Since a plaintiff is no longer required to establish consciousness of wrongfulness, is only the attenuated form of *animus* presumed, or are both components presumed, the intention to achieve a particular result being capable of rebuttal, while the consciousness of wrongfulness aspect is irrebuttable? There is authority in our law for this type of approach (*Nasionale Pers, Bpkt v Long* 1930 AD 87 99–100), and it is reconcilable with general principles, but the Appellate Division now favours the former view (*O'Malley supra* 403H).

The Appellate Division's latest approach to *animus* (*Minister of Justice v Hofmeyr supra*) opens up interesting avenues to explore when it comes to defences. We know that defendants may raise defences relating to wrongfulness and to intention, but that mass media are limited to the former category only. What defences are now available to a defendant in a wrongful-arrest case? Following the *Delange* approach, a plaintiff would have to allege and prove that his or her right has been unlawfully infringed. A defendant may therefore raise any defence relating to wrongfulness. If unsuccessful, a presumption of *animus* arises, which for policy reasons, consists only of one of the normal components, namely the intention to achieve a particular result (see also *Tödt v Ipser supra* 586F–I). However, it seems that, in contrast to the mass media's position, a defendant may raise defences which negate this aspect of the intention element, but cannot raise any defences which attempt to show that consciousness of wrongfulness is absent. In other words, a policeman can show that he never intended to arrest a person, or that a detention was done in jest, but not that he thought that he was legally justified to do so in terms of what later proved to be an invalid warrant of arrest, or that he believed he had reasonable suspicion which a court later finds not to have been reasonable.

As our law now stands, the only instance of strict liability in *iniuria*-type cases involves mass media. This has given rise to concern and calls for legislative intervention (Edmunds "Some reflections on public policy and the strict liability of the press" 1988 *THRHR* 87; Burchell *The law of defamation in South Africa* (1985) ch 15). However, at the time when the Appellate Division articulated the law relating to mass media the approach which culminated in the *Hofmeyr* judgment was still in its infancy. One wonders, therefore, whether the modern view of *animus* cannot serve as reason to rethink the principles applicable to mass media. Is one's right to *fama* more important than one's right to liberty? Are the respective rights of the defendants – freedom of speech and the administration of justice – comparable? Is it any less difficult to prove intent in false imprisonment cases than in defamation-by-mass-media cases? Are the power imbalances any different? Is the risk of or potential for harm more serious in mass media cases than in wrongful-arrest cases? Should the media be more careful in their activities than those who arrest people? It may be that policy considerations still favour strict liability for the mass media, but the trend evident in our law warrants consideration of a different approach. With the tools

currently available to our courts, the problems raised by the *Pakendorf* judgment could be addressed differently.

Crystal balls are fragile and predictions hazardous. But I venture to suggest that the *animus* element has lost none of its dynamism which has made it controversial for so long. We have not seen the end of the polemic.

JR MIDGLEY
Rhodes University

STRAF- EN PRIVAATREGTELIKE AANSPREEKLIKHEID INGEVOLGE DIE WET OP SEEVISSERY 12 VAN 1988

1 Inleiding

Daar is twee algemene bepalings in die Wet op Seevissery 12 van 1988 (hierna die wet) betreffende strafregtelike en privaatregtelike aanspreeklikheid respektiewelik. Artikel 50(5) bepaal:

> "By 'n vervolging weens 'n misdryf ingevolge hierdie Wet is dit geen verweer dat die beskuldigde nie van die een of ander feit kennis gedra het nie, of nie opsetlik opgetree het nie."

Met betrekking tot siviele aanspreeklikheid, bepaal artikel 51(1):

> "Die Staat, die Minister, 'n lid van die raad of 'n persoon in diens van die Staat is nie aanspreeklik nie uit hoofde van enigiets wat te goeder trou kragtens die bepalings van hierdie Wet gedoen is."

Die strafregtelike bepaling vestig die aandag op persone wat oortredings van die wet begaan. Die doel van die artikel is vermoedelik om skuldlose aanspreeklikheid te skep ten aansien van enige oortreding van verbodsbepalings in die wet (of in regulasies ingevolge die wet). Die algemene vereiste van *mens rea* in die strafreg sou nie 'n noodsaaklike element vir misdrywe ingevolge die wet wees nie. (Ek het vantevore reeds tot die gevolgtrekking gekom dat alle misdrywe ingevolge die wet misdrywe gegrond op skuldlose aanspreeklikheid is: sien "Some observations on the criminal law regime of the Sea Fishery Act 1988" 1989 *SA Publiekreg* 40 – 41.)

Die privaatregtelike bepaling vestig die aandag op persone wat ingevolge die wet optree, dit wil sê meestal amptenare. Die doel van die artikel is vermoedelik om in sekere omstandighede sodanige persone van siviele aanspreeklikheid vry te stel teenoor persone wat hulle beseer of vermoënsregtelik benadeel het. (Sien Devine "Civil law aspects of the Sea Fishery Act 1988" 1989 *TSAR* 125 – 127 oor die omvang van hierdie vrystelling.)

Twee 1993-hofsake het baie belangrike gevolgtrekkings vir vermelde twee bepalings. Die aard van oortredings wat deur die wet geskep word, is in *S v Adams* 1993 1 *SASV* 230 (K) onder die loep geneem. Die omvang van siviele aanspreeklikheid ingevolge 'n gelykluidende wetsbepaling (a 87 van die Boswet

122 van 1984) is weer in *Simon's Town Municipality v Dews* 1993 1 SA 180 (A) behandel. Die doel van hierdie aantekening is om die betekenis van die twee bepalings in die lig van die beslissings te bespreek.

2 Aard van misdrywe ingevolge die wet

Die mening is tevore uitgespreek dat artikel 50(5) eenvoudig weggedoen het met *mens rea* as 'n noodsaaklike element van die betrokke misdrywe (Devine 1989 *SA Publiekreg* 40 – 41). Die feite in die *Adams*-saak *supra* was eenvoudig. Die beskuldigdes was in besit van meer as die toelaatbare 15 klipmossels per persoon (541 mossels) sonder dat hulle by wyse van 'n permit gemagtig was. Hulle het beweer dat hulle nie geweet het dat dit 'n oortreding was om meer as 'n voorgeskrewe aantal klipmossels in hulle besit te hê nie. In werklikheid het die beskuldigdes hulle op regsonkunde of regsdwaling beroep. Regter Conradie beslis dat dit wel 'n verweersgrond kan wees (333 – 334):

> "Die Wetgewer handel in art 50(5) met *mens rea*, dus met sake rakende die skuld van die oortreder. Die skuldbegrip bestaan egter uit verskeie elemente; dit is nie noodwendig so dat die Wetgewer in art 50(5) elkeen van die skuldelemente aangespreek of tot dieselfde mate gemodifiseer het nie. Volgens Snyman *Strafreg* op 213 word onder "opset" in ons regstaal verstaan '. . . wilsgerigtheid (die opset om die handeling te verrig) plus kennis van die bestaan van die omstandighede gemeld in die verbodsbeskrywing asook wederregtelikheidsbewussyn . . .'
>
> Die feite, kennis waarvan die beskuldigde ingevolge art 50(5) nie toegelaat word om te ontken nie, behoort tot die tweede van *Snyman* se ontleding. Die oortreder mag regtens nie ontken dat hy presies geweet het wat hy doen nie. As daar bewys word dat hy 'n bepaalde soort vis gevang (of besit of vervoer) het, sal hy byvoorbeeld nie kan beweer dat hy nie geweet het tot watter spesies daardie vis behoort nie . . .
>
> Die Wetgewer kon met die woord 'opsetlik' een van twee begrippe in gedagte gehad het. Hy kon in gedagte gehad het wilsgerigtheid, die oogmerk om 'n bepaalde handeling te verrig (die sogenaamde 'kleurlose opset') of hy kon in gedagte gehad het die wil wat op 'n handeling gerig word in die wete dat die handeling regtens ongeoorloof is, dit wil sê, daardie soort opset waarvan wederregtelikheidsbewussyn 'n bestanddeel is . . .
>
> Myns insiens slaan die sinsnede '. . . dat hy nie opsetlik opgetree het nie', in art 50(5) slegs op die wilsgerigtheid van 'n oortreder. Ek sê dit omdat die uitdrukking vir meer as een uitleg vatbaar is. Dit is geykte reg dat in 'n strafmaatreël soos hierdie die uitleg gevolg behoort te word wat die onderdaan die minste beswaar. Ek het reeds na die tersaaklike gesag verwys.
>
> Dit is nie verbasend dat art 50(5) niks oor wederregtelikheidsbewussyn sê nie. Die bepalings van hierdie subartikel is woordeliks oorgeneem uit art 18(5) van die Wet op Seevisserye 58 van 1973. In 1973 sou die Wetgewer nog nie gedink het aan 'n verweersgrond soos afwesigheid van wederregtelikheidsbewussyn nie. *S v De Blom (infra)* is eers in 1977 beslis. Voor dit was elke burger veronderstel om die reg te ken."

Hierdie uitleg van artikel 50(5) het tot gevolg dat net een van die subjektiewe elemente van *mens rea* uitgesluit word, naamlik die opset om die handeling te verrig. Die subartikel sluit egter nie die tweede element van *mens rea* uit nie, te wete sogenaamde wederregtelikheidsbewussyn. Daarom is dit 'n verweersgrond waarop 'n beskuldigde hom kan beroep: regsonkunde kan dus wel 'n verweer wees.

'n Mens het hier te doen met 'n baie restriktiewe uitleg van artikel 50(5). Die hof het sy uitleg gebaseer op die vermoede van uitleg dat in 'n strafmaatreël die uitleg gevolg behoort te word wat die onderdaan die minste beswaar.

Die hof het ook die geskiedenis van die bepaling bespreek en verduidelik hoekom die bepaling oënskynlik net een van die elemente van *mens rea* uitsluit:

die bepaling is woordeliks uit artikel 18(5) van die Visseryewet 58 van 1973 oorgeneem. In 1973 was regsonkunde of regsdwaling geen verweersgrond in die strafreg nie. Dit het eers in *S v De Blom* 1977 3 SA 513 (A) 'n verweersgrond geword. As die wetgewer van voorneme was om *mens rea* geheel en al uit te sluit en dus misdade van skuldlose aanspreeklikheid te skep, sou hy die verandering van die gemenereg wat in 1977 plaasgevind het, in ag geneem het, en nie die bepalings van die 1973-wet woordeliks oorgeneem het nie.

Ten slotte: as die wetgewer nog steeds alle oortredings ingevolge die wet tot misdade van skuldlose aanspreeklikheid wil omvorm, kan hy 'n wysiging soos die volgende aanneem (die voorgestelde wysiging in die subartikel word gekursiveer):

> "By 'n vervolging weens 'n misdryf ingevolge hierdie Wet is dit geen verweer dat die beskuldigde nie van die een of ander feit kennis gedra het nie, nie opsetlik opgetree het nie, *of geen wederregtelikheidsbewussyn gehad het nie*."

3 Omvang van privaatregtelike aanspreeklikheid ingevolge die wet

Soos ek aangestip het, het die *Simon's Town*-saak 'n gelykluidende wetsbepaling in die Boswet 112 van 1984 uitgelê. Daarom is hierdie beslissing regstreeks ter sake wat die Wet op Seevissery betref. (Inderdaad is dit ook regstreeks van toepassing op enige ander wet met gelykluidende bepalings, bv die Doeane- en Aksynswet 91 van 1964 – a 109(2); Verdedigings Wet 44 van 1957 – a 149*bis*; Polisiewet 7 van 1958 – a 31, 32*bis*; Wet op die Voorkoming en Bestryding van Besoedeling van die See deur Olie 6 van 1981 – a 10(4)(6).)

Artikel 87 van die Boswet van 1984 bepaal:

> "Niemand, met inbegrip van die Staat, is aanspreeklik nie ten opsigte van enigiets wat te goeder trou gedoen is by die uitoefening van 'n bevoegdheid of die uitvoering van 'n plig wat by of kragtens hierdie Wet verleen of opgedra word."

In die *Simon's Town*-saak het die werknemers van die munisipaliteit 'n vuurstrook op munisipale grond op nalatige wyse opgeruim. As gevolg daarvan het 'n vuur versprei en huise in die omgewing beskadig. Die vraag was of artikel 87 van die Boswet die siviele aanspreeklikheid van beide die werknemers en die munisipaliteit vir hulle onregmatige daad uitgesluit het. Hoofregter Corbett lê die betrokke artikel soos volg uit (196–197):

> "In my opinion, the section postulates two requirements for legal immunity: (a) the act in question must have been done in good faith, and (b) the act in question must have been done in the exercise of a power or duty under the Act. It is common cause that the person seeking to rely on s 87 bears the *onus* of establishing that his conduct falls within the ambit of the section.
>
> 'Good faith' here relates to the subjective state of mind of the repository of the power and, broadly speaking, requires that in exercising the power he should have acted *bona fide*, honestly and without ulterior motive . . .
>
> As to (b), it seems that the section is clear. The person sought to be held liable must show that he acted within the authority conferred by the power in question. It necessarily follows that if, owing to a failure to exercise due care or to take reasonable precautions, he exceeded that power and acted without authority, he will be unable to establish requirement (b) and his reliance on s 87 must fail."

Die slotsom van die beslissing is dat iemand wat gemagtig is om statutêre bevoegdhede uit te oefen, buite sy gesag optree indien hy die bevoegdhede nalatig uitoefen. Daarom sal die vrystelling in artikel 87 nie sy siviele aanspreeklikheid uitsluit nie.

Brei hierdie uitleg van artikel 87 die gemenereg uit? Die advokaat vir die appellant was van mening dat die uitleg niks aan die gemenereg toegevoeg het nie. Hoofregter Corbett meen egter dat dit wel iets bygevoeg het, maar indien dit nie die geval was nie, dit nie die eerste keer sou wees dat 'n wetsbepaling verklarend van die gemenereg is nie:

> "It was submitted by appellant's counsel that if s 87 be interpreted in this way, it in effect adds nothing to the common law and is redundant. This would suggest that this was not the legislative intent. I do not think that this argument is sound. As I have indicated, a party relying on statutory authority as a defence must first establish that the statutory enactment under which he acted authorises interference with or the infringement of the rights or interests of others. This is a matter of interpretation. The effect of s 87 is to dispense with any such enquiry as far as powers or duties conferred or imposed by or under the Act are concerned. At the same time s 87 introduces as a positive element the requirement of good faith, the *onus* of establishing which would be on the party claiming immunity. It is thus not correct to say that the interpretation which has been placed on s 87 renders it redundant. But even if it does, this would not be the first time that a legislative provision was declaratory of the common laws or was inserted *ex abundanti cautela*."

Om te beslis of artikel 87 (of artikel 51(1) van die Wet op Seevissery) iets aan die gemenereg toevoeg, is dit insiggewend om verskillende scenarios te oorweeg om te bepaal op wie die bepalings toepaslik kan wees. Omdat ek hier die Wet op Seevissery behandel, sal ek voorbeelde met betrekking tot dié wet bespreek.

(a) Eerste scenario

Die bedoeling is om 'n statutêre bevoegdheid uit te oefen, byvoorbeeld om 'n onwettige hengelaar aan boord van 'n boot te arresteer (a 47(1) en 53(2) van Wet 12 van 1988). Miskien is dit in die omstandighede nie moontlik om die persoon te arresteer sonder om die boot op die een of ander manier te beskadig nie (die boot is byvoorbeeld besig om te vlug en die gesagvoerder gee geen gehoor aan voorgeskrewe tekens om die boot tot stilstand te bring nie (a 53(1)(e) van die wet). In sy poging om die arrestasie uit te voer, besef die offisier dat dit onvermydelik is dat die boot op die een of ander manier beskadig sal word. 'n Mens kan dus sê dat die betrokke offisier "opsetlik" optree wat betref die skade aan die boot. Nietemin is daar in hierdie geval na my mening geen gemeenregtelike aanspreeklikheid vir skadevergoeding nie. Die offisier wat arresteer, het geen verpligting om nie die boot te beskadig nie. Hier sluit die statutêre mag wederregtelikheid uit. Daar is ook geen aanspreeklikheid ingevolge artikel 51(1) van die wet nie. Die gedrag van die offisier is te goeder trou en boonop die uitoefening van 'n bevoegdheid ingevolge die wet (a 47(1) en 53(2)).

(b) Tweede scenario

Hier is die bedoeling weer om 'n statutêre bevoegdheid uit te oefen, byvoorbeeld om 'n onwettige hengelaar aan boord van 'n boot te arresteer. In die betrokke omstandighede is dit moontlik om die hengelaar te arresteer sonder om die boot te beskadig. Die offisier gebruik egter meer geweld as wat nodig is. Hy doen dit óf opsetlik óf roekeloos en beskadig die boot. Volgens die gemenereg is hy aanspreeklik. Die gebruik van meer geweld as wat nodig is, is wederregtelik. *Dolus* is ook teenwoordig met betrekking tot die skade aan die boot. Waar die offisier roekeloos opgetree het, is *dolus eventualis* aanwesig. Ook ingevolge artikel 51(1) van die wet is daar aanspreeklikheid aangesien

die offisier klaarblyklik buite sy statutêre magte opgetree het. Dit is voorts duidelik dat hy nie *bona fide* was soos deur artikel 51(1) voorgeskryf word nie.

(c) Derde scenario

Weer eens is die bedoeling om 'n statutêre bevoegdheid uit te oefen, naamlik om 'n onwettige hengelaar aan boord van 'n boot te arresteer. In die besondere omstandighede kan die offisier dit met minimale oortuigingskrag doen, byvoorbeeld deur 'n waarskuwing deur middel van 'n skoot oor die boeg van die skip te gee. Die geweerskut skiet egter nalatig en beseer iemand op die boot. In die gemenereg is daar hier aanspreeklikheid wat op *culpa* gebaseer word. Die posisie is dieselfde ingevolge artikel 51(1). In die *Simon's Town*-saak word beslis dat as statutêre bevoegdhede nalatig beoefen word, die betrokke artikel nie aanspreeklikheid kan uitsluit nie.

In die lig van voorafgaande bespreking blyk dit dat artikel 51(1) van die wet inderdaad oorbodig is. Dit voeg niks by die gemenereg nie. In die woorde van hoofregter Corbett is die bepaling waarlik "declaratory of the common law or was inserted *ex abundanti cautela*".

Die rede waarom die hof in die *Simon's Town*-saak geweier het om nalatige gedrag van siviele aanspreekliklikheid vry te stel, was dat

> "the alternative interpretation which would create a general licence for carelessness and indifference to the interests of others would conflict with the very purpose of the statute" (197).

As die wetgewer steeds wil hê dat die nalatige amptenaar van aanspreeklikheid vrygestel moet word maar dat die amptenaar wat *mala fide* of met *dolus* optree, altyd aanspreeklik moet wees, sal dit nodig wees om die subartikel (en alle gelykluidende subartikels in ander wette as dit wenslik beskou word) te wysig. Die volgende wysiging kan oorweeg word (die voorgestelde wysiging in die subartikel word gekursiveer):

> "Die Staat, die Minister, 'n lid van die raad of 'n persoon in diens van die Staat is nie aanspreeklik nie uit hoofde van enigiets wat te goeder trou kragtens die bepalings van hierdie wet gedoen is, *en nieteenstaande die feit dat dit nalatig gedoen is*."

As 'n mens glo dat hierdie vrystelling van aanspreeklikheid te wyd sou wees en dat dit (in die woorde van hoofregter Corbett) "a general licence for carelessness and indifference to the interests of others" sou skep, kan ander oplossings oorweeg word. Daar kan byvoorbeeld bepaal word dat *verregaande of growwe* nalatigheid in die uitoefening van bevoegdhede of in die uitvoering van verpligtings nie aanspreeklikheid uitskakel nie. Die vraag is dan of dit wenslik is om met verskillende grade van nalatigheid te werk en of daar werklik 'n onderskeid tussen verregaande of growwe nalatigheid en roekeloosheid (en self *dolus eventualis*) is.

Natuurlik kan daar geen sprake van vrystelling van aanspreeklikheid wees in die geval van 'n amptenaar wat met *dolus*, insluitend *dolus eventualis*, optree nie. Om praktiese redes behoort daar waarskynlik nie tussen nalatigheid en verregaande (of growwe) nalatigheid onderskei te word nie. Sodoende kan 'n mens 'n moeilike evaluasie van verskillende grade van nalatigheid vermy.

4 Slotopmerkings

Oortredings ingevolge die wet is nie skuldlose misdade nie aangesien een van die elemente van *mens rea* nie uitgesluit word nie; regsonkunde of regsdwaling

kan 'n verweer wees omdat die beskuldigde geen wederregtelikheidsbewussyn het nie. Om misdade van skuldlose aanspreeklikheid te skep, sal artikel 50(5) gewysig moet word.

Artikel 51(1) van die wet wat met vrystelling van siviele aanspreeklikheid handel, is eintlik oorbodig. Dit voeg niks by die gemenereg nie. As dit wenslik sou wees om die nalatige amptenaar wat *bona fide* optree van aanspreeklikheid vry te stel, sal hierdie subartikel gewysig moet word. Dit geld ook vir soortgelyke bepalings in verskeie ander wette waarna vroeër verwys is en wat dieselfde beleidsprobleem kan oplewer.

DJ DEVINE
Instituut vir Seereg, Universiteit van Kaapstad

LIMITING ORAL ARGUMENT IN APPEALS – THE FUTURE OF SCREENING

1 Introduction

Consider the scene: a court of appeal at the seat of one of our busy provincial divisions; counsel for appellant is addressing the bench on the *minutiae* of the record; the latter, flagging somewhat in following counsel's thorough but repetitive examination of the evidence, poses to counsel the same legal difficulties that faced the court *a quo*; in reply, counsel unblushingly concedes that he can take the matter no further. Opposing counsel is not called upon. The appeal is dismissed.

What has been achieved by this empty charade, one wonders? The bench would probably have been exasperated at least by the sterility of the exercise, if not also by its administrative wastefulness. Can the appellant be said to have benefited by anything other than an expensive confirmation of what was already plain and evident before the appeal was launched? As for the other party, now facing the prospect of being hauled through the courts for a second round of litigation where the outcome is as predictable as it is futile, the needless expense must surely be outweighed only by the senselessness of the entire manoeuvre. I would venture that this is not a fanciful example or an infrequent occurrence in our courts of appeal, particularly at the provincial level. It does no credit to our legal system.

2 Oral argument in the courts

Woven as it was with the populist institution of the jury system, Anglo-American legal culture set great store by the techniques of forensic oratory and emotive speeches, beloved still by television scriptwriters and dramatists today. Sir Edward Marshall Hall KC, the celebrated English barrister (1858 – 1927) once said:

> "My profession and that of an actor are somewhat akin, except that I have no scenes to help me, and no words are written for me to say. There is no backcloth to increase

> the illusion. There is no curtain. But, out of the vivid, living dream of somebody else's life, I have to create an atmosphere – for that is advocacy" (Marjoribanks *Famous trials of Marshall Hall* 9).

Reverence for such verbal pyrotechnics has not always kept pace with the growth of litigation, however, or with the needs of modern court procedure. Attempts to improve the efficiency of, for example, appeal procedures have therefore focused occasionally on the question of orality – do the courts in fact need appeals to be physically conducted in the presence of, and with the assistance of oral argument by, the parties or their counsel?

Appellate practice in England was completely oral until the introduction in 1983 of the filing of written "skeleton arguments", similar in form to our own system of settling heads of argument, as a means of increasing the productivity of the courts:

> "[C]ounsel should submit, four working days before the hearing, four copies of a typed note tabulating the propositions on which it is sought to rely" (*A guide to proceedings in the Court of Appeal Criminal Division* 77 CrAppR 138, issued by the Registrar of Criminal Appeals).

This voluntary practice became mandatory in 1989, thus curtailing to an extent the pre-eminence of oral argument (*R v Miller The Times* 1992-04-08 CA, Platto C (ed) *Civil appeal procedures worldwide* (1990) 155).

The United States, on the other hand, has an appellate procedure that is more evenly balanced between the written and oral components. Full written briefs are filed prior to the hearing and form the basis for subsequent oral argument in court (Pound *Appellate procedure in civil cases* (1941) 198; Martineau "The value of appellate oral argument" 1986 *Iowa LR* 1). The rapid growth in the appeal caseload, however, necessitated a variety of remedies. One of the foremost involved shortening the time allowed to counsel for their speeches; another, restricting the availability of the oral portion of the appeal: only in certain instances will a matter in fact be argued before the appeal bench. The decision to allow oral argument in the supreme court, for example, has been discretionary since 1954; and where allowed, it is accompanied by a thirty-minute, one-counsel limitation.

South Africa inherited the British legal tradition, and oral argument is therefore unlimited in terms of the time allowed to the parties for the presentation of their respective cases (in principle, of course: in practice counsel may be reminded by the bench that relevance and brevity are the sterling virtues of advocacy). A great portion of legal resources is none the less consumed by this practice. Recourse to statistics may shed some light on the scale of this issue. The number of appeals heard in the Appellate Division, for example, grew from 183 in the period 1981/1982 to 243 during 1991/1992, an increase of 33 per cent (see the annual reports of the Department of Justice for those years – figures include both civil and criminal matters), while the appellate bench grew from 18 to 21, an increase of only 17 per cent. A similar pattern is discernible in the number of appeals pending, which experienced a growth of 34 per cent over the same time period. Is unlimited oral argument a luxury which we can still afford? Any reduction in these numbers would certainly be reflected in sizeable savings both in the cost of administering justice and in the cost to appellants.

Has oral argument, however, become such an indispensable part of the appellate process, such a guarantee of procedural rights, that our system of justice would suffer irreparable harm were it to be limited to the truly appealable cases

only – or has the appeal become merely a professional ritual to be endured for the sake of tradition, a formal re-statement of a previously determined issue, to be numbly essayed once more before judges who have, quite justifiably, already made up their minds? The issue explored in this note therefore is whether the number of appeals could be sensibly managed by screening out of the appellate system those cases which could fairly be disposed of by written submissions alone. It is not suggested that oral argument in South African courts be dispensed with in all appeal cases. Such a proposal would, at the very least, need to be based upon an irrefutable position that there is nothing to be achieved by means of speeches that could not be done by way of written argument. Albeit an intriguing idea, particularly in an age when the flourishes of rhetorical skill are frowned upon in our austere and jury-free courtrooms, many advocates would none the less bristle at the bleak prospect of having to shuffle paper arguments instead of jousting eloquently in courtroom combat.

3 The retention of orality

Compelling arguments in favour of retaining a tradition of orality, although varied, are not hard to find (see eg Bright "The power of the spoken word" 1986 *Iowa LR* 35). In the present South African context they take on an added dimension when regard is had to the battering to which the system of justice has recently been subjected: the need for institutional openness and visibly balanced adjudication (which are laudable characteristics of the oral tradition) has probably never been more acute.

These arguments assert, first of all, the needs of the legal system itself for publicity. By having lawyers argue cases on their feet, in public courtrooms, before judges who pepper them with questions, justice will be seen to be done. A system of appellate adjudication that relied only upon written submissions might be equally good at disposing of cases fairly, but would suffer the bureaucratic facelessness of a licensing department, instead of embodying and expressing the lively human drama implicit in the very word "appeal". Secondly, appellants need to feel that they are truly participants in the system, with a right to a public hearing and to their "day in court". In a non-oral system of appeals, a perception that the mechanism for disposing of appeals is other than transparently legal would swiftly take root. To the extent that the appeal is a last ditch stand in a battle with often devastating personal consequences if lost, every appellant must be satisfied that his or her matter has been dealt with openly and fairly, in other words with the accessibility of appellate justice. Thirdly, the bench itself may need oral argument to be presented. In difficult cases, and occasionally where the written submissions are unclear or incomplete, the dynamic process of question and answer can lead to a speedier resolution of some matters.

Arguments of this nature buttress the proposition that the oral appeal should be retained as a prominent feature of our procedural law. Such arguments are also partly reflected in a conclusion drawn by the Hoexter commission of enquiry into the structure and functioning of the courts:

> "[T]he easing of the workload of the Supreme Court should not outweigh the established institution in our legal system of an untrammeled right of appeal from lower courts" (RP78/1983 Fifth and Final Report Part A III par 2 1 2 4).

4 Screening of appeals

The pertinent question to be answered, none the less, is whether full and unlimited oral argument, besides the previously filed written submissions that are presently required, is really necessary in all appeal cases. It cannot be doubted that some appeals are indeed, *ex post facto*, found to be a waste of effort for bench, bar and appellant alike because of a lack of legal merit. As was discovered by the Hoexter commission from a sample of criminal appeals taken over an eight month period, "the percentage . . . in which the judgment of the lower courts was disturbed was 39 per cent" (par 2 1 2 3 3).

Fully 61 per cent were therefore without sufficient merit. Of course there is a difference between a case that is "appealable" although ultimately unsuccessful, and a case that is doomed from the start. None the less, it is probably true that a significantly large proportion of that 61 per cent had little or no prospect of success. Can there be sufficient justification then for cumbersome and wasteful tradition, which generally permits all, including the patently frivolous or hopeless appeal (with the exceptions outlined below), to proceed expensively to a further level of adjudication?

Oral argument, it is suggested, should be curtailed in some cases so that it can be better used in others. By differentiating between, or screening, appeals, it should be possible to dispose of some of them by way of written submissions alone, while allowing more deserving matters to use the limited resources (particularly in terms of time and personnel) of our appeal courts for full written and oral presentations.

The criteria suggested here would sift out those cases in which no useful purpose could be served by allowing oral rather than written argument. Thus the first group to be restricted in this way would be those matters in which the legal issue has already been traversed by an authoritative decision of that division. The appellant would therefore be restricted to submitting written argument unless the appeal court had formed the view that a particular case would be a suitable vehicle for orally arguing, for example, the necessity for a change in the law.

A second group would be formed from cases in which the facts were quite simple, and there was no legal issue at stake: beyond restating the evidence as contained in the record, could any useful purpose be served by extensive oral argument? It is suggested that the written brief would suffice equally well.

Thirdly, where an appeal leaned towards the frivolous, it should not proceed except by way of written submissions, if at all. This last ground would clearly not apply to either civil or criminal appeals from the provincial to the Appellate Division. In terms of, on the one hand, sections 21 and 24 of the Supreme Court Act 59 of 1959 or, on the other, section 316(1) of the Criminal Procedure Act 51 of 1977, access to a court of appeal is made through the mechanism of an application to the court *a quo* for leave to appeal. Since the test for granting such applications is whether there is a reasonable prospect of success on appeal, frivolous appeals would be excluded by definition.

In the lower courts, appellants in civil and criminal matters enjoy an automatic right of appeal in terms of section 83 of the Magistrates' Courts Act 32 of 1944 and section 309(1)(a) of Act 51 of 1977, respectively. The magistracy therefore lacks the statutory power to employ the "application for leave to appeal" mechanism in order to put a brake on the number of unworthy appeals

emanating from their courts. If the sheer volume of such cases is perturbing, as was found by the Hoexter commission (par 2 1 2 3 2), the screening criteria outlined above could serve to trim, if not their number, at least the amount of work and expense occasioned by the need to prepare and present oral argument. As for the number of civil appeals from the lower courts, the Hoexter commission found this to be insignificant (par 2 1 3 1) – a situation which has not altered to any significant degree since the report was completed.

A fourth factor would similarly eliminate oral argument in appeals emanating from the lower courts that were simply of "intellectual or academic interest" (as discussed in *African Guarantee & Indemnity v Van Schalkwyk* 1956 1 SA 326 (A) 329; *Castel NO v Metal and Allied Workers Union* 1987 4 SA 795 (A) 804).

None of these criteria should, however, be permitted to affect the individual's sacrosanct right of appeal. It would not be just or proper to make it more difficult for an appellant to pursue the appeal itself. Risks to the already fragile credibility of the judicial system could be lessened, where necessary, by allowing for exceptions to be made for hearing oral argument. In appeals that would otherwise proceed by written submissions only, oral argument could none the less be mandated in either (a) matters of compelling public interest, or (b) cases in which the appellant is not represented at court through lack of means, but wishes to pursue his case in person.

Provided that the written argument is largely maintained in its present form, namely a settling of the grounds of appeal with sufficient particularity to enable the court and the respondent to identify clearly the matters relied upon (see eg rule 8 of the Rules of Court for the Appellate Division, which calls for main heads of argument to be filed), this suggestion should not result in the written brief exploding, in C Northcote Parkinson fashion, to fill the void created by the act of disposing with oral argument. Limits would have to be retained on the extent of the submissions to avoid excesses such as occurred, for example, in *Van der Westhuizen v UDF* 1989 2 SA 242 (A), where the court held that only twenty of the 85 filed pages of appellant's heads of argument were necessary. One result of limiting the right to present oral argument on appeal would be a more efficient use of resources through a reduction in the number of time-consuming but nevertheless hopeless cases that have to be heard. If appeals were to be disposed of more speedily, this would also bring about greater productivity on the part of the appeal courts. A further advantage would lie in a greater degree of cost-effectiveness, through the reduction of, on the one hand, the administrative costs borne by the Department of Justice and, on the other, of the legal fees borne by appellant. What is perhaps more important, such savings would allow a better opportunity for the appeal courts to fulfil their creative legal functions. By concentrating on cases that have a greater potential impact upon the law, such courts might avoid becoming immersed in the routine decisional role that the administration of mundane and predictable cases imposes: all without impairing the quality of justice dispensed by our appeal courts.

GRAHAME GERTSCH
Vista University

ENKELE OPMERKINGS OOR DIE BEVOEGDHEDE VAN DIE HOOGGEREGSHOF AS OPPERVOOG VAN MINDERJARIGES OM IN TE MENG MET OUERLIKE GESAG

1 Inleiding

Die gemeenregtelike oppervoogdy van die hooggeregshof het in die moderne Suid-Afrikaanse reg behoue gebly. Uit hoofde van hierdie oppervoogdy het die hooggeregshof die bevoegdheid om in te meng met die uitoefening van ouerlike gesag waar die belange van die kind dit verg (Barnard, Cronjé en Olivier *Die Suid-Afrikaanse persone- en familiereg* (1990) 380; Boberg *The law of persons and the family* (1977) 412 – 413; Van der Vyver en Joubert *Persone- en familiereg* (1991) 620 – 623).

Die hooggeregshof gebruik vandag selde sy gemeenregtelike bevoegdheid om met ouerlike gesag in te meng omdat daar tans wetgewing bestaan wat 'n groot deel van hierdie gebied dek (Cronjé en Heaton *Vonnisbundel oor die persone- en familiereg* (1990) 68; Lee en Honoré *Family, things and succession* (1983) par 154 vn 2; Spiro *Law of parent and child* (1985) 259).

Die doel van hierdie aantekening is om ondersoek in te stel na die omvang van die oppervoogdy op grond waarvan die hooggeregshof mag inmeng met ouerlike gesag en die omstandighede waarin die hof as oppervoog met ouerlike gesag sal inmeng.

2 Statutêre bepalings

Hierbo is reeds daarop gewys dat die hooggeregshof vandag selde sy gemeenregtelike bevoegdheid om met ouerlike gesag in te meng, gebruik as gevolg van die feit dat hierdie gebied grootliks deur wetgewing gereël word. Hieronder volg 'n kort uiteensetting van statutêre bepalings ingevolge waarvan die hof met ouerlike gesag mag inmeng.

2 1 Die Wet op Huweliksaangeleenthede 37 van 1953

Artikel 5(1) van hierdie wet magtig die hof om op aansoek van een of albei ouers van 'n binne-egtelike minderjarige kind die bevel te gee met betrekking tot die bewaring van, voogdy oor of toegang tot die kind wat die hof goedvind. Die hof het hierdie bevoegdheid as die kind se ouers reeds geskei is, of nog getroud is maar apart woon. Die hof is ook bevoeg om aan enige van die ouers uitsluitlike voogdy of uitsluitlike bewaring toe te ken as so 'n bevel na die oordeel van die hof in die kind se belang sal wees. By sodanige bevele is die beste belang van die kind die deurslaggewende maatstaf (*Fortune v Fortune* 1955 3 SA 348 (A)).

2 2 Die Huwelikswet 25 van 1961

Artikel 25(4) van hierdie wet magtig die hof om toe te stem tot die huwelik van 'n minderjarige kind in gevalle waar die ouer, voog of Kommissaris van

Kindersorg sonder voldoende rede en strydig met die kind se belang toestemming weier. Die hof sal nie die ouer of voog se weiering om tot die huwelik van die minderjarige kind toe te stem, ligtelik omverwerp nie; ernstige oorweging sal geskenk word aan die besware van die ouers (*Allcock v Allcock* 1969 1 SA 427 (N) 429E – 430B; *Kruger v Fourie* 1969 4 SA 469 (O) 473A – B). Die twee vereistes in artikel 25(4) is komplementêr en moet saam oorweeg word; voorts moet die hof al die omstandighede in ag neem (*B v B* 1983 1 SA 496 (N) 501).

2 3 Die Wet op Egskeiding 70 van 1979

Artikel 6(3) van hierdie wet magtig 'n hof wat 'n egskeiding verleen om die bevel te gee wat hy goedvind ten aansien van die onderhoud van, voogdy oor, toegang tot en bewaring van die kinders. 'n Egskeiding word nie verleen voordat die hof oortuig is dat die reëlings wat vir die welsyn van die kinders getref is, bevredigend is of die beste is wat in die omstandighede bewerkstellig kan word, en voordat die hof die verslag en aanbevelings van die gesinsadvokaat, indien enige, oorweeg het nie (a 6(1)). Hoewel die algemene beginsel, naamlik dat daar alleen na die beste belang van die kind gekyk moet word by egskeiding, nie uitdruklik in die wet gestel word nie, spreek dit vanself uit die bewoording van artikel 6(1) (Barnard, Cronjé en Olivier 355).

2 4 Die Wet op Kindersorg 74 van 1983

Artikels 11, 12 en 13 van die Wet op Kindersorg maak voorsiening vir die verwydering van kinders na veiligheidsplekke hangende 'n ondersoek deur die kinderhof. Die kinderhof moet tydens hierdie ondersoek besluit of die kind geen ouer of voog het nie, of 'n ouer of voog het wat nie opgespoor kan word nie, of in die sorg is van 'n ouer, voog of ander persoon wat nie geskik is om bewaring van die kind te hê nie (a 14(4)(a) en (b)). Die wet skryf voor in watter omstandighede 'n ouer of voog nie geskik is om bewaring van 'n kind te hê nie (a 14(4)(b)), en watter bevele die hof mag maak as hy bevind dat die kind nie 'n ouer of voog het nie, of 'n ouer of voog het wat nie opgespoor kan word nie, of in die sorg is van 'n ouer, voog of ander persoon wat nie geskik is om bewaring van die kind te hê nie. Die hof mag onder andere beveel dat die kind in die bewaring van 'n geskikte pleegouer geplaas of na 'n kinderhuis verwys word (a 15(1)).

(Terloops kan gemeld word dat die bevoegdheid om ingevolge artikel 39 van die Wet op Kindersorg af te sien van ouerlike toestemming tot mediese behandeling, ook as inmenging met ouerlike gesag beskou kan word. Artikel 39(1) maak voorsiening vir die vervanging van ouerlike toestemming tot 'n operasie of mediese behandeling in gevalle waar die ouer of voog nie opgespoor kan word nie, of geestesongesteld of oorlede is, of toestemming weier. Die artikel bepaal dat 'n geneesheer wat van oordeel is dat dit nodig is dat 'n kind in sodanige omstandighede 'n operasie moet ondergaan, of dat hy behandeling moet ondergaan wat nie sonder ouerlike toestemming uitgevoer mag word nie, die aangeleentheid aan die minister moet rapporteer. Die minister kan dan toestemming verleen in die plek van die ouer of voog indien hy oortuig is dat die operasie of behandeling noodsaaklik is. Insgelyks maak artikel 39(2) daarvoor voorsiening dat die mediese superintendent van 'n hospitaal toestemming mag verleen tot 'n operasie of mediese behandeling op 'n kind. Hy mag dit doen as hy van oordeel is dat die operasie of behandeling noodsaaklik is om 'n kind se lewe

te red of hom van ernstige liggaamlike letsel of gebrek te vrywaar en dat dit so dringend noodsaaklik is dat dit geen uitstel gedoog om eers die ouer of voog se toestemming te verkry nie.)

Voorts kan die bevoegdheid van die kinderhof om af te sien van ouerlike toestemming by aanneming, as inmenging met ouerlike gesag beskou word. Artikel 19 van die Wet op Kindersorg magtig die hof om in sekere gevalle af te sien van ouerlike toestemming by aanneming, onder andere waar die ouer die kind verlaat het en sy verblyfplek onbekend is, of waar die ouer sy toestemming onredelik weerhou. Heaton toon aan dat die wetgewer in hierdie gevalle poog om 'n balans te bewerkstellig tussen die regte en belange van die ouer en die belange van die kind (*The meaning of the concept "best interests of the child" as applied in adoption applications in South Africa* (LLM-verhandeling, Unisa 1988) 184 – 185).

3 Omvang van die hof se bevoegdhede as oppervoog om in te meng met ouerlike gesag

As gevolg van die feit dat inmenging met ouerlike gesag tans grootliks deur wetgewing gereël word (sien par 2), word die hooggeregshof se gemeenregtelike bevoegdheid gewoonlik net uitgeoefen in gevalle waar die howe met buite-egtelike kinders te doen kry, of met binne-egtelike kinders wat net een oorlewende ouer het, of waar die kind se ouers steeds saamwoon ten spyte van uitsonderlike omstandighede (Lee en Honoré par 154; Boberg 420).

Die gemeenregtelike bevoegdheid van die hooggeregshof word ook soms gebruik om in te meng met 'n spesifieke besluit van die ouer, byvoorbeeld 'n besluit om nie sy of haar kind te onderwerp aan die neem van bloedmonsters om vaderskap vas te stel nie. Die bevele wat die hooggeregshof uit hoofde van sy gemeenregtelike bevoegdheid as oppervoog mag maak, sluit onder andere die volgende in.

3 1 Voogdy

Die hof het gemeenregtelik die bevoegdheid om die natuurlike voog van 'n kind van sy of haar voogdy te ontneem en dit aan 'n ander toe te ken. So mag die hof die moeder van 'n buite-egtelike kind haar voogdy ontneem en dit aan die vader toeken (*Ex parte Van Dam* 1973 2 SA 182 (W) 184H – 185B), of die vader van 'n binne-egtelike kind sy voogdy ontneem en dit aan die moeder toeken (*Ex parte Powrie* 1963 1 SA 299 (W) 303A – B). In hierdie saak was die kind se vader in 'n langdurige koma na 'n motorongeluk. Daar word beslis dat dit nie 'n geval is van partye wat "apart woon" vir doeleindes van artikel 5(1) van die Wet op Huweliksaangeleenthede 37 van 1953 nie en die hof ken voogdy oor die minderjarige kinders aan die moeder vir die duur van hierdie onbevoegdheid toe.

Die hof as oppervoog het ook die bevoegdheid om 'n voog aan te stel vir 'n kind wat geen voog het nie (*Wehmeyer v Nel* 1976 4 SA 966 (W) 969D).

In 'n onlangse beslissing het regter Van Zyl gesamentlike voogdy toegestaan aan die moeder van 'n buite-egtelike kind en haar werkgeefster (*Ex parte Kedar* 1993 1 SA 242 (W)). Die reëls van die skool waar hulle die kind wou inskryf, het bepaal dat die kind se ouer of voog eiendom in die skool se nabyheid moes besit voordat die kind daar toegelaat kan word. Om dit vir die applikante

moontlik te maak om die kind by die skool in te skryf, word gesamentlike voogdy aan hulle verleen.

3 2 Bewaring

Die hof is bevoeg om 'n kind uit een of albei sy ouers se bewaring te neem en aan 'n derde toe te vertrou (*September v Karriem* 1959 3 SA 687 (K) 689A; *Ex parte Kommissaris van Kindersorg, Krugersdorp: In re JB* 1973 2 SA 699 (T) 707C – D). Hierdie bevele sal egter net in uitsonderlike omstandighede toegestaan word (*Blume v Van Zyl and Farrell* 1945 CPD 48 50; *Van der Westhuizen v Van Wyk* 1952 2 SA 119 (G) 120H; *Short v Naisby* 1955 3 SA 572 (D) 575B – C; *Horsford v De Jager* 1959 2 SA 152 (N) 154B – C). Sodanige uitsonderlike omstandighede was waarskynlik aanwesig in *Ex parte Sakota* 1964 3 SA 8 (W), waar die bewaring en voogdy van 'n kind wie se vader tronkstraf uitgedien het nadat hy die kind se moeder vermoor het, aan die kind se oom toegeken is.

Die hof mag natuurlik ook 'n ouer van bewaring van 'n kind ontneem ten gunste van die ander ouer, maar hierdie bevoegdheid word selde ingevolge die gemenereg uitgeoefen aangesien wetgewing hierdie gebied grootliks reël. Die Wet op Huweliksaangeleenthede 37 van 1953 reël hierdie bevoegdheid in gevalle waar die gades reeds geskei is, of nog getroud is maar apart woon (a 5(1)), en die Wet op Egskeiding 70 van 1979 reël die hof se bevoegdheid tydens egskeiding, of hangende die afhandeling van 'n egskeidingsgeding (a 6(3)).

3 3 Tersydestelling van aannemingsbevele

Die hof mag uit hoofde van sy gemeenregtelike bevoegdheid as oppervoog van minderjarige kinders 'n verklarende bevel uitreik dat 'n aannemingsbevel as gevolg van die een of ander gebrek nietig is (*Ex parte Kommissaris van Kindersorg, Krugersdorp: In re JB supra*).

3 4 Toegang tot buite-egtelike kinders deur vader

Die huidige regsposisie is dat die vader van 'n buite-egtelike kind nie ouerlike gesag oor daardie kind verkry nie en dus geen *prima facie* toegangsreg tot die kind het nie (*F v L* 1987 4 SA 525 (W); *S v S* 1993 2 SA 200 (W); *B v S* 1993 2 SA 211 (W)). Die vader kan egter soos enige ander persoon aansoek doen om 'n bevel wat aan hom 'n reg op redelike toegang tot daardie kind verleen. By sodanige bevele is die beste belang van die kind die deurslaggewende oorweging (*B v P* 1991 4 SA 113 (T) 117C). Hierdie bevoegdheid word ook uitgeoefen uit hoofde van die hof se oppervoogdy oor minderjarige kinders (Van der Vyver en Joubert 622; Goldberg "The right of access of a father of an extramarital child: visited again" 1993 *SALJ* 264).

Volledigheidshalwe kan daarop gewys word dat die Suid-Afrikaanse Regskommissie onlangs die vader se regte ten opsigte van sy buite-egtelike kind oorweeg het (*'n Vader se regte ten opsigte van sy buite-egtelike kind* Werkstuk 44 Projek 79 (1993)). Die kommissie het twee konsepwetsontwerpe voorgestel waarvan die eerste die huidige regsposisie behou. Dit bepaal dat die vader van 'n buite-egtelike kind redelike toegang tot die kind kan verkry deur 'n aansoek tot die hooggeregshof te rig (kl 1(1)), welke aansoek nie toegestaan sal word nie tensy die hof oortuig is dat dit in die beste belang van die kind is (kl 1(2)). Die tweede konsepwetsontwerp maak voorsiening vir 'n inherente toegangsreg vir die vader

van 'n buite-egtelike kind (kl 1(1)). Daardie inherente toegangsreg kan egter deur die hof weggeneem word en sodanige geskil word beslis ooreenkomstig die beste belang van die kind (kl 1(1) en 1(3)).

Dit is duidelik dat die omvang van die hooggeregshof se gemeenregtelike oppervoogdy in die toekoms nog meer beperk gaan word ongeag watter een van die voorgestelde twee wetsontwerpe aanvaar word.

3 5 Spesifieke besluite van die ouers

Die hooggeregshof mag ook in gepaste gevalle met die uitoefening van ouerlike gesag inmeng en bepaalde besluite van die ouer tersyde stel. Daarna mag die hof 'n gepaste bevel uitreik (Van der Vyver en Joubert 622).

Hierdie bevoegdheid van die hooggeregshof het die afgelope aantal jare veral ter sprake gekom waar die hof genader is om in te meng met 'n besluit van die ouer van 'n kind om nie sy kind te onderwerp aan die neem van bloedmonsters om vaderskap te bewys nie. In *Seetal v Pravitha* 1983 3 SA 827 (D) is beslis dat die hooggeregshof as oppervoog die bevoegdheid het om te beveel dat 'n kind bloedtoetse ondergaan om vaderskap te bewys ten spyte van enige beswaar deur die kind se ouer (862C – 863A). In sodanige aansoeke moet die hof ag slaan op wat in die kind se belang is en niks anders in ag neem nie (864A – B). Hierdie uitspraak is in *M v R* 1989 1 SA 416 (O) nagevolg hoewel die hof nie saamgestem het met regter Didcott se bevinding dat die hof as oppervoog net op die kind se onmiddellike omstandighede en op niks anders nie moet let as die belang van die kind oorweeg word (420D – 421G). Ook in *O v O* 1992 4 SA 137 (K) is in navolging van *Seetal v Pravitha supra* en *M v R supra* beslis dat die hof as oppervoog bloedtoetse op 'n minderjarige mag magtig ten spyte van die ouer se weiering (139H – I).

'n Volbank van die Oos-Kaapse Provinsiale Afdeling het egter in *S v L* 1992 3 SA 713 (OK) 'n ander houding ingeneem. Regter Mullins sê met verwysing na *Seetal v Pravitha supra*:

> "I must take the risk of being labelled an iconoclast in questioning whether the Court can 'simply . . . supply its own consent' in its capacity of upper guardian of minors" (720C).

Die hof is van oordeel dat die stelling in *Seetal v Pravitha supra* bevraagteken kan word dat die hof as oppervoog die ouer van 'n kind se weiering om toe te stem tot die neem van bloedmonsters mag omverwerp (720I). Die hof verwys met goedkeuring na *Coetzee v Meintjies* 1976 1 SA 257 (T) waar beslis is dat die hof net as oppervoog van minderjariges mag optree as die kind geen voog het nie, of as die voog sy verpligtinge versuim, of waar die ouers nie oor die beste belang van die kind kan ooreenkom nie. Regter Mullins kom tot die gevolgtrekking dat die bevoegdhede van die hof as oppervoog nie onbeperk is nie, maar beperk is tot gevalle waar die voog nie in staat is om sy funksies behoorlik te vervul nie. Die hof as oppervoog mag nie met 'n ouer se besluit inmeng net omdat hy met die ouer verskil nie en die hof weier gevolglik om met die voog se besluit in te meng (721E – J). Regter Mullins voeg darem as 'n nagedagte by dat die aangevraagde regshulp in elk geval nie in die kind se belang is nie (722C). (Hieronder sal verder kommentaar gelewer word oor hierdie beslissing: sien par 4 3.)

4 Omstandighede waarin die hof as oppervoog mag inmeng met die uitoefening van ouerlike gesag

4 1 Die reël in Calitz v Calitz *1939 AD 56*

In *Calitz v Calitz* het die appèlhof beslis dat hy net op spesiale gronde 'n vader van sy bewaring van sy kind mag ontneem in gevalle waar geen egskeiding of geregtelike skeiding verleen is nie. Hierdie spesiale gronde sluit byvoorbeeld gevaar vir die kind se lewe, gesondheid of sedes in (63).

Ten spyte van die appèlhof se beslissing dat die toets in *Calitz v Calitz* beperk is tot gevalle waar die gades wettig getroud is en die vrou haar man verlaat het (*Bam v Bhabha* 1947 4 SA 798 (A) 806; Spiro 259), is die toets later toegepas in gevalle waar die kind net een ouer gehad het en die hof moes besluit oor die toekenning van bewaring van die kind aan 'n derde (*Van der Westhuizen v Van Wyk supra* 120H; *Short v Naisby supra* 575B – C).

Die *Calitz*-reël is later deur die howe gekwalifiseer deurdat daar beslis is dat hulle met ouerlike gesag mag inmeng as daar spesiale gronde bestaan, maar dat hierdie spesiale gronde nie beperk is tot gevalle waar daar gevaar vir die kind se lewe, gesondheid of sedes is nie. Die gronde wat in *Calitz v Calitz* genoem word, is dus net voorbeelde van sodanige spesiale gronde en elke geval moet op eie meriete beoordeel word (*Short v Naisby supra* 575B – C; *Horsford v De Jager supra* 154C; *September v Karriem supra* 689E; *Ex parte Van Dam supra* 183H; *Petersen v Kruger* 1975 4 SA 171 (K) 174A – C). Spesiale gronde is volgens die howe aanwesig wanneer die belange van die kind die inmenging vereis (*Horsford v De Jager supra* 154C – D; *September v Karriem supra* 689H; *Ex parte Van Dam supra* 185D; *Petersen v Kruger supra* 174B).

Die Wet op Huweliksaangeleenthede 37 van 1953 verleen aan die hof die bevoegdheid om 'n bevel oor voogdy, bewaring of toegang te maak waar die kind se ouers reeds geskei is of apart woon. Die wetgewer se bedoeling met die gedeelte van die bepaling wat handel oor gades wat apart woon, is om aan die hof daardie diskresie te verleen om in te meng met ouerlike gesag

> "which *Calitz v Calitz, supra*, held it had not got, namely jurisdiction to deprive the father of the custody of his minor child if it be in the interests of the minor to do so, notwithstanding the absence of any legal warrant . . . for making a separate home" (*Hassan v Hassan* 1955 4 SA 388 (D) 393C – E).

Die *Calitz*-reël het heelwat van sy betekenis ingeboet sedert die inwerkingtreding van Wet 37 van 1953, maar bly steeds die enigste basis vir die toekenning van ouerlike gesag aan iemand anders as die kind se ouer.

4 2 Toepassing van die reël in Calitz v Calitz *waar toegangsbevoegdhede van die vader van die buite-egtelike kind ter sprake is*

Die reël is tot onlangs ook toegepas in gevalle waar die howe gevra is om in te meng met die moeder van die buite-egtelike kind se ouerlike gesag deur aan die vader 'n reg op redelike toegang toe te ken.

In *F v B* 1988 3 SA 948 (D) beslis regter Kriek dat toegang net aan 'n vader van 'n buite-egtelike kind verleen sal word

> "in *exceptional cases* in which considerations relating to the interests of the child *compel it to do so*" (950F – G; my kursivering).

Hierdeur word die Zimbabwiese beslissing in *Douglas v Mayers* 1987 1 SA 910 (Z) nagevolg waar regter Muchechetere beslis het dat 'n vader nie 'n inherente

toegangsreg tot sy buite-egtelike kind het nie, maar dat hy aansoek mag doen om toegang en dat dit nie verleen sal word nie "unless there is *some very strong ground compelling* [the court] to do so" (914E; my kursivering).

Beide bogenoemde toetse spruit blykbaar uit die *Calitz*-beslissing voort (*B v P supra* 115G – H). Die gebruik van die toets in *Calitz v Calitz* op die terrein van die toegangsregte van die vader van die buite-egtelike kind is wyd gekritiseer. Daar is aangedui dat die benadering in *Calitz* heeltemal uit voeling is met moderne uitgangspunte (Boberg "The sins of the fathers – and the law's retribution" 1988 *BML* 38). Die gebruik van hierdie toets het ook tot gevolg dat die howe net met 'n moeder se ouerlike gesag sal inmeng (en aan die vader van die buite-egtelike kind toegang sal verleen) as die moeder 'n onbevoegde ouer is (Eckard "Toegangsregte tot buite-egtelike kinders – behoort die wetgewer in te gryp?" 1992 *TSAR* 131). Dit is voor die hand liggend dat hierdie toets van "buitengewone omstandighede" die beste belang van die kind as deurslaggewende kriterium onnodig beperk (Sonnekus en Van Westing "Faktore vir die erkenning van 'n sogenaamde reg van toegang vir die vader van 'n buite-egtelike kind" 1992 *TSAR* 237 – 238 vn 36). Daarbenewens beoog die applikant in aansoeke van hierdie aard nie om die moeder te *ontneem* van haar gesagsregte nie, maar dit gaan om die *aanvulling* van die kind se behoefte aan 'n vader (Eckard 1992 *TSAR* 131).

In *B v P supra* het regter Kirk-Cohen dus heeltemal tereg beslis dat die appèlhof in *Calitz v Calitz* die bewaring van 'n binne-egtelike kind oorweeg het in die geval waar daar nog geen egskeidingsbevel verleen is nie. Daar is geen regverdiging vir die toepassing van die benadering in *Calitz* waar dit gaan om toegang van 'n vader tot sy buite-egtelike kind nie (115G – J). Regter Kirk-Cohen beslis dat die beste belang van die kind die deurslaggewende ("paramount") oorweging is en dat die applikant op 'n oorwig van waarskynlikheid moet bewys dat die aangevraagde regshulp nie onbehoorlik met die moeder se bewaringsregte sal inmeng nie (117C).

Dit is derhalwe teleurstellend dat regter Spoelstra onlangs in *B v S supra* (nadat hy homself gebonde verklaar het aan *B v P supra*), met goedkeuring na bogenoemde aanhaling uit *Douglas v Mayers* verwys het (214E – F). Die indruk word gewek dat hierdie aanhaling ongekwalifiseerd in *B v P supra* nagevolg is. Hierdie indruk word versterk deur regter Spoelstra se stelling dat die applikant hom daarvan moet oortuig dat

> "there is a *very strong and compelling ground* to find that his access to the child would be in its best interests" (214G; my kursivering).

4 3 Bloedtoetse om vaderskap vas te stel

Hierbo is reeds daarop gewys dat die howe in hierdie gevalle wel sal inmeng met die ouer se besluit om nie sy kind aan bloedtoetse te onderwerp nie as sodanige inmenging in die kind se belang is (sien par 3 5). In hierdie verband is die standpunt van regter Kotze in *M v R supra* te verkies, naamlik dat die belang van die kind die deurslaggewende oorweging is waarteenoor alle ander oorwegings 'n ondergeskikte rol speel, en dat die belang van die kind nie die enigste faktor is wat in ag geneem word nie (421B – G). Om die toets te formuleer met verwysing na die bevoegdheid van die ouer om sy ouerlike gesag uit te oefen, soos wat in *S v L supra* (met verwysing na *Coetzee v Meintjies supra*) gedoen is, is myns insiens verkeerd omdat so 'n toepassing van die gemeenregtelike

inmengingsbevoegdheid nie altyd in die kind se belang sal wees nie. By sodanige aansoeke behoort die kind, en nie die ouer nie, die vertrekpunt te wees. Daarbenewens het dit in die *Coetzee*-saak nie gegaan oor die gemeenregtelike oppervoogdy van die hooggeregshof nie. Die hof is in daardie beslissing gevra om op te tree as 'n geregshof wat ingryp om 'n onregmatige handeling te verbied, en nie as oppervoog van minderjariges nie (261G).

5 Gevolgtrekking

Hoewel die hooggeregshof vandag selde sy gemeenregtelike bevoegdheid om in te meng met ouerlike gesag gebruik, kan die belang van hierdie bevoegdheid nouliks onderskat word. Hierdie feit word geïllustreer deur die hoeveelheid sake waarin die hooggeregshof die afgelope aantal jare gevra is om hierdie gemeenregtelike bevoegdheid uit te oefen, veral op die gebied van die toegangsregte van vaders van buite-egtelike kinders en bloedtoetse om vaderskap te bewys.

Die howe se kwalifisering van die streng toets in *Calitz v Calitz supra* in gevalle waar daar met die ouer se bewaring of voogdy ingemeng moet word, kan verwelkom word. Sodanige inmenging behoort nie beperk te word tot gevalle waar die uitoefening van die ouerlike gesag deur die ouer gevaar vir die kind se lewe, gesondheid of sedes inhou nie. Soos die howe tereg aangetoon het, is hierdie omstandighede net voorbeelde van feite wat die hof daartoe kan beweeg om met ouerlike gesag in te meng. Enige grond wat op die belang van die kind betrekking het, kan as rede vir inmenging dien. Spesiale omstandighede moet aanwesig wees voordat die hof mag inmeng met die uitoefening van ouerlike gesag. Appèlregter Fannin toon in *Horsford v De Jager supra* oortuigend aan wat met spesiale omstandighede bedoel word:

> "[T]he question which . . . I must ask myself, is whether the interests of the children demand that I should vary the order of Court in the applicant's favour, deprive her of the custody of the children and leave them where they are. That, in my opinion, would amount to good cause or 'special grounds'" (154C – D).

Ook in *Ex parte Kedar supra* dui regter Van Zyl aan dat dit gevestigde reg is dat die hooggeregshof die oppervoog van alle minderjariges is en dat die beste belang van die kind die primêre oorweging is wanneer die hof moet besluit aan wie voogdy of bewaring van die kind toegeken moet word (244E).

Die howe mag met 'n ouer se besluit om nie sy kind aan die neem van bloedmonsters te onderwerp nie, inmeng as sodanige inmenging in die kind se belang is. Die beste belang van die kind is die deurslaggewende oorweging soos tereg in *M v R supra* aangetoon is. Die bevoegdheid van die ouer om sy ouerlike gesag behoorlik uit te oefen, behoort nie die vertrekpunt te wees wanneer die hof besluit of hy met ouerlike gesag mag inmeng nie, maar die beste belang van die kind wel.

Die verwerping in *B v P supra* van die reël in *Calitz v Calitz supra* by aansoeke om toegangsbevele deur vaders van buite-egtelike kinders, is eweneens te verwelkom. Ook hier is die beste belang van die kind die deurslaggewende ("paramount") oorweging wanneer die hof moet besluit of hy mag inmeng met die ouerlike gesag van die kind se moeder (*B v P supra* 117C).

JM KRUGER
Universiteit van Suid-Afrika

VONNISSE

SKADEVERGOEDING VIR GEBRUIKSVERLIES: 'N WELKOME NUWE ONTWIKKELING

Kellerman v South African Transport Services 1993 4 SA 872 (K)

Belang van die uitspraak

Die belang van die uitspraak van regter Marais (met wie regter King saamgestem het) is dat ons reg nou skadevergoeding toeken ook vir die gebruiksverlies van 'n beskadigde saak wat vir *nie-besigheidsdoeleindes*, dit wil sê vir ander doeleindes as vir die verdien van inkomste, aangewend word. Die regsposisie tot en met hierdie uitspraak was dat daar geen gesag vir sodanige toekenning bestaan het nie. Ons reg was trouens onderontwikkeld wat hierdie tipe skadevergoeding betref (sien in die algemeen Visser en Potgieter *Skadevergoedingsreg* (1993) 345 vn 45; Stoll en Visser "Some thoughs on delictual damages for the loss of use of property in terms of South African and German law" 1990 *De Jure* 354).

Feite, regsvraag en beslissing

Die eiser (appellant) se motorvoertuig is weens die nalatige optrede van 'n werknemer van die verweerder beskadig. Die eiser het die betrokke voertuig hoofsaaklik aan sy vrou beskikbaar gestel om werk toe en terug te ry, inkopies te doen en hulle kind soms by die skool te gaan haal. Terwyl die voertuig herstel is, het die eiser 'n vervangende voertuig vir gebruik deur sy vrou gehuur teen 'n koste van R1 674,97.

Die geskilpunt was of die verweerder ook vir hierdie bykomende koste aanspreeklik gehou kon word waar die voertuig nie vir besigheidsdoeleindes deur die eiser gebruik is nie. (Dit is gemeensaak dat skadevergoeding in die algemeen verhaalbaar is waar 'n beskadigde saak deur 'n eiser gebruik word om geld te verdien: *Kellerman* 876C – D 877B ev; *Shrog v Valentine* 1949 3 SA 1228 (T); *Modern Engineering Works v Jacobs* 1949 3 SA 191 (T); *Modimogale v Zweni* 1990 4 SA 122 (B); *Zweni v Modimogale* 1993 2 SA 192 (BA).) Daar moet op gelet word dat die probleem *in casu* nie was of skadevergoeding verhaalbaar is vir ongerief of ongemak wat deur die beskadiging van 'n saak veroorsaak word nie: dit is duidelik dat die Aquiliese aksie nie in so 'n geval beskikbaar is nie (*Kellerman* 877I – J; *Monumental Art Co v Kenston Pharmacy (Pty) Ltd* 1976 2 SA 111 (K) 124H; Visser en Potgieter 159 – 160).

Ondanks 'n gebrek aan spesifieke gesag, staan regter Marais die eis toe met die volgende motivering (879C – E):

> "Once it is accepted, as I think it must be, that ownership of a *res* embraces the right to use it for the functional purpose for which it was designed, that its availability for such use has an economic value reflected in the prevailing rate of hire of such a *res*, and that a deprivation of use, occurring at a time when the owner reasonably desired to use the *res*, has resulted in the owner incurring expense to which he otherwise would not have been put in obtaining the temporary use of a substitute, it seems to me to be entirely in accord with the principles of Aquilian liability that the third party whose negligence caused the loss of use of the owner's own *res* should have to compensate the owner for expense so incurred."

Onses insiens is hierdie bevinding ongetwyfeld korrek – daar is tog geen beginselonderskeid ter sprake waar eiendom gebruik word om (geldelike) wins te maak, en waar dit aangewend word om bepaalde (geldelike) uitgawes te vermy nie. Enkele aspekte van die uitspraak verdien verdere kommentaar.

Gesag vir die hof se standpunt

Regter Marais wys daarop dat daar geen bindende gesag ten aansien van die toestaan of afwys van die eis *in casu* is nie (877H). Hy ondersoek derhalwe die probleem op grond van algemene beginsels. Die regter kon natuurlik verwys het na talle akademiese skrywers wat die standpunt propageer dat vergoeding vir gebruiksverlies ook in 'n geval soos die onderhawige verhaalbaar behoort te wees. (Sien wat die Suid-Afrikaanse reg betref bv Lee en Honore *The South African law of obligations* (1978) 251 – 252; Boberg *Law of delict I: Aquilian liability* (1984) 627; Stoll en Visser 354; Visser en Potgieter 345 vn 45; vgl ook Van der Walt *Die sommeskadeleer en die "once and for all"-reël* (LLD-proefskrif Unisa 1977) 18 116 – 117). Vir regsvergelykende doeleindes kan onder meer die volgende bronne geraadpleeg word: *International encyclopedia of comparative law* 10 (1983) hfst 10 15-29; McGregor *McGregor on damages* (1988) 777 – 796; Bloembergen *Schadevergoeding bij onrechmatige daad* (1965) 72 – 94; Lange *Schadenersatz* (1979) 184 – 189; die uitspraak van die BGH in 1986 *NJW* 2038.)

Die hof se basiese argument

Die hof se basiese argument, waarmee akkoord gegaan kan word, is soos volg (877J – 878B):

> "Where the deprivation of use of such a [damaged] *res* occurs in circumstances and at a time which make it entirely reasonable for the owner of the *res* to make use of a temporary substitute and he suffers patrimonial loss as a consequence, I see no good reason why the defendant should not have to compensate him for that. That is not compensating him purely to assuage his sense of annoyance or vexation at having temporarily lost the use of the *res*. It is compensating him for expense reasonably incurred in actually averting the loss of use to which he was entitled. He will of course not be entitled to an additional sum to compensate him for the inconvenience to which he has been put by having to hire a substitute."

Bepaalde vereistes vir 'n eis weens gebruiksverlies vir nie-besigheidsdoeleindes

Uit sowel die twee aanhalings hierbo as die res van die uitspraak blyk die volgende besondere vereistes (benewens die normale deliktuele aanspreeklikheidsvereistes) alvorens 'n eis vir gebruiksverlies vir "nie-besigheidsdoeleindes" sal slaag:

(a) Die eiser moet 'n reghebbende van die beskadigde saak wees

Alhoewel die hof weens die feite van die saak telkens net na die eis van 'n eienaar verwys, kon dit kwalik die bedoeling gewees het om die eis tot so 'n tipe

reghebbende te beperk. 'n Mens moet gevolglik aanneem dat 'n eis deur ander tipes reghebbendes, soos 'n huurkoper of 'n huurder, ook moontlik is (sien in die algemeen Visser en Potgieter 227 – 228).

(b) Die reghebbende moet inderdaad 'n vervangende saak gehuur en koste aangegaan het

Hier (879D – E) gaan byvoorbeeld die Duitse reg verder en oorweeg 'n eis vir "abstrakte" skadevergoeding soos waar 'n plaasvervangende saak *nie* gehuur is nie (Stoll en Visser 351 – 352). In die lig van regter Marais se benadering (879C – D, hierbo aangehaal) dat die beskikbaarheid vir gebruik van 'n saak ekonomiese waarde het (nl die redelike huurwaarde), behoort ons reg ook so te ontwikkel dat daar in gepaste gevalle afgesien kan word van die vereiste dat 'n vervangende saak werklik gehuur moet gewees het. 'n Voorbeeld van so 'n geval is waar X, wat sy beskadigde voertuig uitsluitlik gebruik het om te gaan gholf speel, na die beskadiging van die voertuig nie 'n vervangende voertuig huur nie maar te voet gholfbaan toe gaan. 'n Probleem met die toekenning van vergoeding in so 'n geval is dat die betrokke skade as nie-vermoënskade aangesien kan word waarvoor vergoeding met die Aquiliese aksie vanselfsprekend nie kan plaasvind nie. Ten aansien van die Duitse reg word daar betoog dat hierdie tipe nadeel 'n nuwe skadevorm daarstel wat tussen "ware" vermoënskade en nie-vermoënskade lê en waar die persoonlike ekonomiese sfeer van 'n regsubjek versteur word (Stoll en Visser 353). Hierdie aangeleentheid verg natuurlik verdere navorsing en besinning.

(c) Kousaliteit

Die eiser moet aantoon dat hy die koste aangegaan het om 'n plaasvervangende saak te bekom *juis as gevolg van die beskadiging van sy saak* (878C – D). Hierdie vereiste spreek vanself en hou verband met die vereiste wat in (d) hieronder bespreek word. Die kousaliteitsvereiste sal moontlik in die volgende voorbeeld 'n eis uitsluit: X stamp sy eie voertuig op 1 Maart en moet die motor op 3 Maart aan 'n paneelklopper oorhandig vir herstelwerk wat twee weke sal duur. Op 2 Maart stamp Y op nalatige wyse ook X se motor welke stamp ook tydens die tydperk van twee weke herstel sal word. Indien X 'n vervangende motor vir die volgende twee weke huur, kan 'n mens straks argumenteer dat Y nie vir die koste van die gebruiksverlies aanspreeklik gehou kan word nie aangesien X in elk geval 'n vervangende voertuig moes huur (sien egter Visser en Potgieter 80 ev oor hipotetiese kousaliteit).

(d) Die reghebbende moet redelikerwys bedoel het om die beskadigde saak gedurende die relevante tyd te gebruik

Hierdie vereiste (878D) raak die bestaan van vermoënskade en spreek ook vanself (sien ook (c) hierbo). Dit kan teoreties verklaar word aan die hand van die sogenaamde subjektiewe benadering tot vermoënskade ingevolge waarvan daar net skade is vir sover 'n eiser persoonlik deur die inwerking op 'n vermoënsbestanddeel geraak word (*ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 4 SA 1 (A) 5; Visser en Potgieter 60 345 vn 46). ('n Soortgelyke vereiste word in die Duitse reg gestel (sien 1987 *JZ* 306; Stoll en Visser 350), maar Van der Walt 287 wil hierdie vereiste beperk tot die eis van 'n eienaar en dit nie vir eise van nie-eienaars laat geld nie.)

In verband met hierdie vereiste voeg die regter ook by (879F) dat selfs as die eiser bedoel het om die saak gedurende die relevante tydperk te gebruik, hy net 'n eis sal hê indien 'n mens boonop *nie redelikerwys van hom kon verwag het* om sy gebruik uit te stel nie. Die hof illustreer hierdie beginsel met die volgende voorbeeld (878F):

> "If my negligently damaged lawnmower will be at the repairer on Wednesday when I usually mow my lawn, but I will have it back on Thursday and can just as conveniently mow the lawn on Thursday, it would be unreasonable for me to insist upon hiring a lawnmower so that I can mow my lawn on Wednesday simply because that is my normal routine."

Vanselfsprekend is hierdie beginsel korrek maar dit gaan hier waarskynlik eerder oor die mitigasieplig ingevolge waarvan die verweerder 'n bewyslas het om aan te toon dat die eiser sy skade kon beperk of vermy het deur die doen van redelike stappe (sien *Kellerman* 880E – F en in die algemeen Visser en Potgieter 237 – 242). (Die kwessie van die *gerieflikheid* daarvan om die gras op 'n bepaalde dag te sny, kan natuurlik 'n probleem skep aangesien dit skynbaar 'n nievermoënselement by die proses betrek.)

Oor die kwessie van *gebruik* bied *Kellerman* 'n gevorderde voorbeeld aangesien die eiser nie bedoel het om die voertuig self te gebruik nie (sy werkgewer het nl 'n voertuig vir persoonlike gebruik aan hom beskikbaar gestel – 875D); die gebruiksverlies *in casu* was die verlies van die eiser se vermoë om sy voertuig aan sy *vrou* vir gebruik beskikbaar te stel (878G – H). Die feit dat die hof die eis in hierdie omstandighede toegestaan het – wat klaarblyklik die korrekte benadering was – bring natuurlik mee dat 'n mens die voorneme om die beskadigde saak redelikerwys te gebruik nie bloot tot iemand soos die eiser *in casu* kan beperk nie: ook die "fisiese" of werklike gebruiker van die saak moet redelikerwys beoog het om dit aan te wend. In die onderhawige geval is daar aan hierdie vereiste voldoen aangesien die eiser se gade inderdaad die oogmerk gehad het om die motor te gebruik om werk toe te gaan, inkopies te doen en, indien nodig, haar kind wat aan asma ly, by die skool te gaan haal.

Wat hierdie vereiste betref, blyk dit ten slotte dat die eiser moet bedoel het om die saak te gebruik *vir die doel waarvoor dit bestem is* (879C – D).

(e) Redelikheid

Die hof verwys telkens in sy uitspraak na redelikheid en daar kan aangeneem word dat die redelikheidsvereiste by verskillende kwessies ter sprake kom. In die algemeen kan die vereiste gestel word dat die koste van 'n vervangende saak slegs verhaalbaar is as die eiser redelik opgetree het (vgl weer eens die hof se voorbeeld van die beskadigde grassnyer hierbo). Die vraag of daar redelik opgetree is, hang af van 'n waardeoordeel wat telkens in die lig van die omstandighede van elke besondere geval uitgespreek moet word. 'n Algemene kriterium wat die hof in hierdie verband opper, is dat die *herstelkoste* van 'n beskadigde saak teen die *huurprys* van 'n plaasvervangende saak opgeweeg moet word (879G – H):

> "To hire a car for a day (that being the minimum period of hire available) simply because one's own car will not be available for an hour while a negligently damaged number plate is being replaced, is unlikely to be regarded as reasonable conduct."

Redelikheid kom natuurlik ook ter sprake by die eiser se mitigasieplig waar die verweerder kan aantoon dat die eiser redelikerwys stappe moet gedoen het om sy skade te beperk of te voorkom. *In casu* het die hof byvoorbeeld bevind

dat die eiser nie onredelik gehandel het nie deur 'n voertuig te huur en aan sy vrou beskikbaar te stel in die lig van die afwesigheid van openbare vervoer na en van die naaste spoorwegstasie. Na ons mening kan die beskikbaarheid van openbare vervoer wel in bepaalde gevalle 'n rol speel om die redelikheid van die eiser se huur van 'n vervangende voertuig te evalueer, maar dit sou verkeerd wees om 'n vaste beginsel neer te lê dat iemand wat normaalweg van privaatvervoer gebruik maak, noodwendig na openbare vervoer moet oorskakel indien laasgenoemde beskikbaar is. Baie faktore kan in hierdie omstandighede by die bepaling van redelikheid 'n rol speel. Sowel die persoonlike omstandighede en gewoontes van die eiser as die koste ter sprake moet onder meer oorweeg word.

In *Kellerman* is die hof nie versoek om hom uit te laat oor die huur van 'n vervangende saak in die plek van 'n beskadigde saak wat slegs vir luukse doeleindes gebruik word nie. In die Duitse reg is skadevergoeding byvoorbeeld geweier weens die gebruiksverlies wat spruit uit die beskadiging van 'n motorboot en 'n private jag (Stoll en Visser 351). Hierdie problematiese kwessie sal ook ingevolge die redelikheidskriterium opgelos moet word in die lig van die plaaslike regsgevoel en heersende sosio-ekonomiese omstandighede.

'n Laaste geval waar redelikheid ter sprake kom maar wat die hof nie nodig gevind het om te oorweeg nie, handel oor die *koste* van die tydelike verkryging van 'n vervangende saak. In die eerste plek moet 'n vervangende saak teen redelike koste (wat normaalweg volgens markwaarde vasgestel word) verkry word. Tweedens moet die vervangende saak ook 'n redelike ekwivalent van die beskadigde een wees. Dit spreek vanself dat X byvoorbeeld in die algemeen nie 'n luukse motor kan huur in die plek van sy beskadigde ekonomieseklas-motor nie.

(f) Moontlike besparing van koste weens die gebruik van die vervangende saak moet in ag geneem word

Alhoewel die hof hierdie vereiste stel (880D), is dit nie duidelik of dit by die skadeformule ter bepaling van skade, of by voordeeltoerekening in die finale berekening van skadevergoeding ter sprake kom nie (sien ook *Hendricks v President Insurance Co Ltd* 1993 3 SA 158 (K) 163 waarvolgens besparing van uitgawes deur die eiser in ag geneem moet word by die berekening van sy skade). Hierdie onderskeid kan onder meer van belang by die bewyslas wees aangesien 'n eiser sy skade moet bewys terwyl dit waarskynlik die verweerder is wat die vermindering van die skadevergoedingsbedrag op grond van voordeeltoerekening moet aantoon (Visser en Potgieter 215).

Evaluering

Die *Kellerman*-uitspraak verteenwoordig 'n belangrike voorwaartse stap in die ontwikkeling van ons skadevergoedingsreg en bring dit meer in ooreenstemming met die posisie in belangrike vergelykbare regstelsels. Soos uit die voorgaande bespreking blyk, is daar egter nog sekere praktiese vrae waaroor uitsluitsel gegee sal moet word. So kan dit betwyfel word of daar in alle omstandighede aangedring moet word dat die reghebbende van 'n beskadigde saak inderdaad 'n vervangende saak moet gehuur het alvorens sy eis weens gebruiksverlies suksesvol kan wees (sien oor die sg abstrakte skadevergoeding in dergelike gevalle in die Duitse reg, Stoll en Visser 351). Ook die probleme in verband met aanspreeklikheidsbegrensing (of juridiese kousaliteit) kan hier ter sake wees.

In *Kellerman* het die hof daarin geslaag om aanspreeklikheid in 'n verdienstelike geval uit te brei sonder om die tradisionele beperking van die Aquiliese aksie tot die verhaal van vermoënskade geweld aan te doen. Alhoewel die skade deur gebruiksverlies van 'n saak wat nie vir besigheidsdoeleindes aangewend word nie (bv die ongerief en ongemak wat die onttrekking van die saak meebring), in wese *nie*-vermoënskade uitmaak, kom die huurkoste van 'n vervangende saak – die gebruik waarvan die betrokke nie-vermoënskade neutraliseer – inderdaad op vermoënskade neer. Net soos die toekenning van vergoeding vir mediese koste weens liggaamlike beserings ook nie-vermoënskade help uitskakel (vgl bv *Administrator-General, SWA v Kriel* 1988 3 SA 275 (A)), kom direkte vergoeding van vermoënskade by gebruiksverlies in die tipe gevalle onder oorweging waarskynlik ook op die indirekte vergoeding van nie-vermoënskade neer.

PJ VISSER
Universiteit van Pretoria

JM POTGIETER
Universiteit van Suid-Afrika

'N GROOT TREE NADER AAN FINALITEIT OOR INTERLOKUTORE BESLISSINGS EN DIE ONDERSKEID TUSSEN APPELLEERBARE EN NIE-APPELLEERBARE HOFBESLISSINGS

Zweni v Minister of Law and Order 1993 1 SA 523 (A)

1 'n Skadevergoedingsaksie met 'n aansoek om die verrigtinge te splits ingevolge Reël 33(4)

In hierdie uitspraak het die appèlafdeling vir die soveelste keer die geleentheid gekry om oor die appelleerbaarheid van sekere tipes hofbeslissings uitspraak te gee. Die eiser, Zweni, het skadevergoeding van die verweerder geëis op grond daarvan dat 'n polisieman hom sou aangerand het en hy as gevolg daarvan 'n parapleeg geword het. Die kwessie van die Minister van Wet en Orde se aanspreeklikheid asook die *quantum* was in die hof *a quo* voor regter Goldstein in geskil. Die verrigtinge word toe op die eiser se aansoek ingevolge Reël 33(4) en met die verweerder se instemming geskei in 'n aanspreeklikheidsgedeelte en 'n *quantum*-gedeelte (*Zweni v Minister of Law and Order* 1991 4 SA 166 (W)).

In hierdie bespreking word eintlik op 'n verdere aspek van die eiser se aansoek kommentaar gelewer. Die eiser se aansoek het naamlik verder ten doel gehad om die verweerder te dwing om die inhoud van 'n sekere polisielêer wat in die verweerder se blootleggingsverklaring verskyn het, vir insae deur die eiser en die maak van afskrifte deur hom aan laasgenoemde beskikbaar te stel. 'n Kostebevel is ook gevra indien die verweerder die aansoek sou teenstaan. Die hof *a quo* besluit dat dit hier oor 'n interlokutore kwessie handel (sien 170F – G).

In die loop van hierdie bespreking word voorgestel dat die tyd aangebreek het om vir die Engelse "ruling" die Afrikaanse uitdrukking "reëling" gangbaar te maak. Daar kan geen rede wees waarom nie tot hierdie stap oorgegaan kan word nie.

2 'n Tussentydse aansoek deur die eiser om blootlegging van sekere dokumente faal met koste

Dit het dus in die *Zweni*-saak gehandel oor blootlegging van die inhoud van 'n polisielêer waarin getuieverklarings en sekere notas gehou was, welke verklarings deur die verweerder as geprivilegieerde dokumente bestempel is. Die rede vir die beweerde status van die polisielêer se inhoud sou wees dat dit getuieverklarings en notas met die oog op vervolging bevat het en dat dit in die openbare belang sou wees om nie die inhoud daarvan bloot te lê nie. Die verweerder het ontken dat daardie dokumente hoegenaamd geprivilegieerd was. Aanvanklik is op grond van die lang tydsverloop waarbinne nog geen vervolging ingestel is nie (20 maande), aangevoer dat daar aanvaar kan word dat geen bedoeling meer bestaan het om 'n vervolging in te stel nie, met die gevolg dat die privilegie verval het. Uiteindelik was die argument egter dat die privilegie wat kennelik ten opsigte van polisielêers bestaan, verval wanneer strafverrigtinge afgeloop het, of selfs in 'n vroeër stadium, naamlik wanneer dit blyk dat dit onwaarskynlik is dat enige vervolging ingestel gaan word, tensy die staat kan aantoon dat dit in die besondere omstandighede van die geval in die openbare belang is dat die privilegie bly voortbestaan. *In casu* sou die lang tydsverloop volgens die eiser aandui dat daar waarskynlik geen vervolging meer ingestel gaan word nie. Verder is volgens die eiser nie aangetoon dat dit in die openbare belang sou wees dat die inhoud van die polisielêer nie blootgelê word nie. Die hof *a quo* weier om te gelas dat die verweerder die inhoud van die polisielêer moet blootlê. Die hof baseer sy bevinding op die siening dat die betrokke inhoud van die polisielêer geprivilegieerd was – en die *ratio* dat 'n dokument wat eenmaal geprivilegieerd is, geprivilegieerd bly (169B – F). Die hof *a quo* ken aan die verweerder die koste van sy teenstand teen hierdie gedeelte van die eiser se aansoek toe (170E).

3 Die appelleerbaarheid van die interlokutore beslissing

Waarom die hof *a quo* verlof tot appèl geweier het, is nie direk bekend nie. Volgens waarnemende appèlregter Harms is die verlof tot appèl geweier aangesien die interlokutore beslissing volgens die hof *a quo* se vertolking van vorige uitsprake waaraan hy gebonde was, nie vir appèl vatbaar is nie. Regter Harms verklaar dat regter Goldstein wel twyfel uitgespreek het oor die korrektheid van daardie presedente (530J – 531A).

3 1 Die vereistes vir die appelleerbaarheid van beslissings in siviele sake wat in eerste instansie deur 'n provinsiale of plaaslike afdeling verhoor is

- Die betrokke beslissing moet 'n "uitspraak of bevel" wees (ingevolge a 20(1) van die Wet op die Hooggeregshof 59 van 1959).
- Verlof tot appèl moet van die hof *a quo* verkry gewees het of, as dit geweier is, van die appèlafdeling. Sodanige verlof word toegestaan as daar 'n redelike kans is dat die appèl sal slaag. Het die gewraakte beslissing egter nie alle geskilpunte

tussen die partye besleg nie, moet vasgestel word of die appèl waarvoor verlof gevra word, sal meebring dat die eintlike geskilpunt tussen die partye redelik vinnig en regverdig besleg kan word (''the balance of convenience must, in addition, favour the piecemeal consideration of the case'' (531C – E).

3 2 Die betrokke regsbeginsels volgens die regspraak

Waarnemende appèlregter Harms bied 'n kort uiteensetting en kritiese ontleding van 'n aantal van die jongste uitsprake ten einde die hele aangeleentheid in perspektief te stel. Sy kritiese ingesteldheid blyk reeds daaruit dat hy uitwys dat in vorige uitsprake (''and sometimes loosely'') (531H) allerlei sienings as algemeen geldende standpunte aangebied is. Sy opsomming van die stand van die reg oor die appelleerbaarheid van hofbeslissings (531I – 533F) word vervolgens in 'n verwerkte vorm weergegee:

(a) Die oorweging dat beslissings van 'n voorlopige of prosessuele aard nie appelleerbaar is nie, het dikwels 'n rol gespeel. Voorheen is dit veral gesê sodat stuksgewyse afhandeling van geskille ontmoedig sou word. Tans val die klem op die vraag of die appèl tot 'n spoediger en koste-effektiewer finale beslegting van die hoofgeskilpunt sal lei.

(b) Om oormatige appèlle te ontmoedig, is verskillende wetgewende tegnieke gebruik, soos om verlof tot appèl te vereis, asook deurdat die howe vereis dat die hofbeslissing die uitwerking van 'n finale uitspraak moet gehad het. Hofbeslissings wat nie sodanige uitwerking gehad het nie, word dan as ''rulings'' getipeer. ''Rulings'' word deur Hiemstra en Gonin met ''beslissings'' vertaal. Hierdie vertaling kan myns insiens egter groter verwarring veroorsaak as wat dit kan help oplos (sien Van der Walt ''Die appelleerbaarheid van interlokutore hofbeslissings steeds verduister deur 'n warboel terme en bedenklike vertalings?'' 1992 *THRHR* 624). In hierdie bespreking word ''rulings'' kortweg *reëlings* vir *interlokutore beslissings sonder die uitwerking van finale uitspraak/bevel* genoem. Die woord ''interlokutore'' in die uitdrukking ''interlokutore beslissing'' slaan dan net op die feit dat dit 'n beslissing is wat uit 'n tydsoogpunt (tydens) in die loop van die hofverrigtinge gelewer word. Hierdie feit het egter met die vraag of sodanige beslissings appelleerbaar is, niks meer te make nie. *Reëlings* is konsekwent deur die howe as nie-appelleerbaar bestempel. Wat alles as reëlings aangemerk moet word, is egter steeds nie baie duidelik nie.

(c) Die woorde ''uitspraak of bevel'' in artikel 20(1) van die Wet op die Hooggeregshof 59 van 1959 dra 'n spesiale, bykans tegniese betekenis; nie alle beslissings wat in die loop van die beregting van 'n geskil gelewer word, val daaronder nie.

(d) Onder ''uitspraak'' (''judgment'') moet twee dinge verstaan word, te wete die regter se beredenering (''opinion'') en die vonnis (''pronouncement of the disposition''). In artikel 20(1) gaan dit eintlik net oor die vonnisgedeelte. Waar aansoekprosedure gebruik is, word dit die bevel (''order'') genoem. Regter Harms verklaar dat die onderskeid tussen uitspraak en bevel uitgedien is en mee weggedoen kan word (532F). Hiermee kan saamgestem word.

(e) Die onderskeid wat nou ingevolge artikel 20(1) gemaak word, is dié tussen *uitsprake of bevele wat met verlof appelleerbaar is* en *hofbeslissings wat nie uitsprake of bevele is nie.* Die onderskeid is dus nie meer tussen *uitsprake of bevele* enersyds en *interlokutore beslissings* andersyds nie (532G).

(f) Of gewone interlokutore beslissings, dit wil sê dié sonder finale uitwerking, wat oor *insidente* in die loop van die verrigtinge of ter bevordering van die verrigtinge gelewer word, *uitsprake/bevele* of *reëlings* is, is nog nie uitgemaak nie (532H).

(g) Om te bepaal wat die aard en uitwerking van 'n hofbeslissing is, moet nie net na die vorm daarvan gekyk word nie, maar – en veral – na die effek daarvan.

(h) 'n *Uitspraak of bevel* het gewoonlik drie eienskappe: dit moet finale effek hê en nie deur die hof *a quo* verander kan word nie; dit moet die partye se regsposisies vasstel; of anders gestel, dit moet bepaalde ("definite") en doelgerigte ("distinct") regshulp verleen het; en dit moet ten minste 'n betekenisvolle gedeelte van die regshulp wat in die hoofverrigtinge aangevra is, afhandel.

(i) Die feit dat 'n hofbeslissing vir 'n party self in die voer van sy saak ongerief kan meebring of hom kan benadeel op 'n wyse wat slegs deur 'n appèl reggestel kan word, bly buite beskouing as oor die appelleerbaarheid daarvan besluit moet word (*South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 3 SA 534 (A) 550D – H). Die maatstaf van *gravamen irreparabile* van die Romeins-Hollandse reg word dus vertolk as *die onomkeerbare vooruitloop van regshulp wat in die hoofsaak verleen sou of kon geword het*. Deur hierdie vertolking word twee dinge bereik: (1) Die wye, soepel gemeenregtelike maatstaf word skerper omlyn; en (2) die maatstaf van die Romeins-Hollandse reg word gelykgestel aan die Engelsregtelike vereiste van *die finale beslegting van die hoofgeskil, of 'n aspek daarvan, tussen die partye*. Die gevolg van die gelykstelling van die Romeins-Hollandse en Engelse benaderings (bv deur Schreiner AR in *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 1 SA 839 (A) 870) is hierin duidelik aanwesig (sien 1993 *THRHR* 357).

3 3 Die beredenering deur die appèlafdeling

Die appèlafdeling wys op die standpunt ingeneem in van ons uitsprake (*South African Druggists Ltd v Beecham Group plc* 1987 4 SA 876 (T) 880B – C; *Sistag Maschinenfabrik Sidler Stalder AG v Insamcor (Pty) Ltd* 1989 1 SA 406 (T) 408D – F (albei volbankbeslissings); *Elida Gibbs (Pty) Ltd v Colgate Palmolive (Pty) Ltd (2)* 1988 2 SA 360 (W); *Petz Products (Pty) Ltd Commercial Electrical Contractors (Pty) Ltd* 1990 4 SA 196 (K) 211G – 212E) dat 'n interlokutore beslissing wat nie 'n finale en bepalende uitwerking op die hoofgeskil het nie, nie 'n "uitspraak of bevel" ingevolge artikel 20(1) is nie en aan 'n "reëling" gelykgestel kan word (533G). Hulle is dus nie appelleerbaar nie. Daarteenoor wys waarnemende appèlregter Harms op die standpunt gestel in *Government Mining Engineer v National Union of Mineworkers* 1990 4 SA 692 (W) 704G – 705G, *Zweni v Minister of Law and Order (2)* 1991 4 SA 183 (W) 184F en *Priday t/a Pride Paving v Rubin* 1992 3 SA 542 (K), asook die bydrae van Erasmus in 1992 *SALJ* 496, wat die korrektheid van daardie siening betwyfel. Die betoog van die kritici kom daarop neer dat, aangesien gewone interlokutore bevele, soos die onderhawige een, voorheen met verlof appelleerbaar was en die omskrywing van "uitspraak of bevel" in artikel 20(1) nie deur Wet 105 van 1982 gewysig is nie, sodanige beslissings steeds gewone interlokutore beslissings bly en gevolglik appelleerbaar is. Hiermee verskil regter Harms. Volgens hom is die effek van Wet 105 van 1982 dat die betekenisvolle onderskeid

nou dié is tussen "uitsprake of bevel" (wat appelleerbaar is) en "reëlings" (wat nie is nie). Hy sê:

> "It is no longer conducive to clear thinking to consider, in this context, whether a decision is a simple interlocutory order" (534C – D).

Daarbenewens wys hy daarop dat nie uit die vroeëre appelleerbaarheid, met verlof, van gewone interlokutore beslissings afgelei kan word dat hulle as "uitsprake of bevele" aan te merk is nie. Dit is so omdat sodanige gewone interlokutore beslissings die wesenlike eienskap van 'n uitspraak of bevel ontbeer, naamlik dat dit 'n finale en bepalende uitwerking het.

Namens die appellant is aanknoping gesoek by die stellings in *Dickenson v Fisher's Executors* 1914 AD 424 427 429 dat die hof pertinent om 'n beslissing gevra moet gewees het alvorens daar van 'n uitspraak of bevel sprake kan wees. Hieruit lei die appellant af (a) dat die beslissing wat op 'n formele versoek om regshulp volg, noodwendig 'n uitspraak of bevel daarstel; (b) dat 'n beslissing wat gelewer word wanneer die verrigtinge eers aan die gang is, noodwendig 'n reëling is en (c) dat blootleggingsbevele nie reëlings is nie.

Waarnemende appèlregter Harms wys al drie genoemde submissies van die hand. In die eerste plek, sê hy, is net gesê dat daar *gewoonlik* 'n formele aansoek gerig word maar nie dat waar daar wel 'n formele aansoek gerig was, die gevolglike bevel noodwendig 'n uitspraak of bevel daarstel nie. Hierdie redenasie lyk vir my geforseerd aangesien daar eintlik net in die *Dickenson*-saak gesê is dat 'n mosie of petisie nie noodwendig vereis word nie – die hof het egter geen twyfel daaroor gelaat dat die hof uitdruklik om die betrokke regshulp gevra moet gewees het nie.

Tweedens meen regter Harms dat die uitdrukking "in die loop van die verrigtinge" nie omskryf is nie en kan die verwysing na beslissings gelewer *in die loop van die verrigtinge* dus selfs slaan op beslissings gelewer te eniger tyd *voor* die aanhangigmaking van die litigasie. Ek twyfel of so 'n betekenis by die uitdrukking "during the progress of a suit" ingelees kan word. Sal dit nie beter wees om in verband met die kwessie van appelleerbaarheid nie soveel klem te plaas op die tydstip waarop 'n beslissing gelewer is nie? Dit is immers in ooreenstemming met regter Harms se gestelde standpunt oor die sinvolheid van die onderskeid tussen begrippe soos "uitspraak/bevel", "reëling" en "interlokutore beslissing" dat dit die *uitwerking* van 'n beslissing is wat die deurslag ten opsigte van appelleerbaarheid gee en nie die vorm of, kan bygevoeg word, *tydstip* nie.

Dan wys regter Harms daarop dat, al sou die appellant se eerste twee submissies geldig wees, dit tog vreemd is dat geen hof in die byna 80 jaar wat sedert die *Dickenson*-saak verloop het, dit so opgeneem het nie. Hy wys daarop dat in 'n aantal sake beslissings as reëlings bestempel is ten spyte van die feit dat dit gelewer is nadat die howe formeel om sodanige regshulp gevra is. As voorbeelde verwys hy na *Nxaba v Nxaba* 1926 AD 392, *Pfizer Inc v South African Druggists Ltd* 1987 1 SA 259 (T), *Government Mining Engineer v National Union of Mine Workers* 1990 4 SA 692 (W) 701G – I en *Priday t/a Pride Paving v Rubin* 1992 3 SA 542 (K). Myns insiens kan hierop soos volg gereageer word: as die verregaande gebrek aan enige duidelike beginsels en gevolglike kasuïsme in ons regspraak op hierdie gebied in die verlede in gedagte gehou word (sien 1993 *THRHR* 357), kan hierdie argument van regter Harms nie as deurslaggewend beskou word nie.

Laastens bestempel waarnemende appèlregter Harms die stelling in die *Dickenson*-saak dat 'n blootleggingsbevel nie 'n reëling is nie, as *obiter* en een wat, inaggenome die feit dat gewone interlokutore beslissings (byvoorbeeld blootleggingsbevele) ingevolge die destydse wetgewing met verlof appelleerbaar was, nie te ernstig opgeneem kan word nie. Ander gevalle waar appèlle teen blootleggingsbevele wel aangehoor is, soos *United Tobacco Companies (South) Ltd v International Tobacco Co of SA Ltd* 1953 1 SA 66 (T), *Lenz Township Co (Pty) Ltd v Munnick* 1959 4 SA 567 (T) en *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 1 SA 556 (N), is volgens regter Harms ook in die lig van die destydse stand van die wetgewing verklaarbaar. Met hierdie stelling kan nie veel fout gevind word nie al is dit natuurlik 'n *petitio principii*, want as eenmaal gesê is dat blootleggingsbevele gewone interlokutore bevele is, val dit reeds buite die vraagstelling na die appelleerbaarheid van daardie groep interlokutore bevele wat iewers tussen gewone interlokutore bevele en uitsprake/bevele lê.

'n Verdere vraag kan ook oor so 'n benadering gevra word: is dit goed dat 'n kategorie beslissings, soos blootleggingsbevele in hierdie geval, sonder meer as onappelleerbaar getipeer word? Moet die vraag nie eerder wees wat die uitwerking van die betrokke beslissing in die omstandighede van die saak was nie? By die beantwoording van dié vraag speel die tipe, vorm, tydstip – om net 'n paar eienskappe van die beslissing te noem – dan nie 'n deurslaggewende rol nie.

3 4 Die kriteria vir appelleerbaarheid volgens die Zweni*-saak*

Waarnemende appèlregter Harms vat vervolgens die kriteria saam wat al deur die howe aangewend is om uit te maak of 'n beslissing op 'n reëling neerkom (sien 1993 *THRHR* 366–367 374–376 vir weergawes van die groot aantal kriteria wat al deur ons howe aangewend is). Die eerste kriterium wat regter Harms samevattenderwys stel, is of die beslissing finaliteit gebring het. Hieronder word verstaan dat dit *res judicata* tussen die partye moet laat ontstaan het en nie weer deur die verhoorhof heroorweeg sou kon word nie. Indien nie hieraan voldoen is nie, is die beslissing 'n reëling. Hiervoor beroep regter Harms hom op *Union Government (Minister of the Interior) and Registrar of Asiatics v Naidoo* 1916 AD 50, *Hutton & Pearson NNO v Hitzeroth* 1967 1 SA 111 (OK) 114D–115B, *Pfizer Inc v South African Druggists Ltd* 1987 1 SA 259 (T) 263, *Constantia Insurance Co Ltd v Nohamba* 1986 3 SA 27 (A) 36H–F en *Government Mining Engineer v National Union of Mineworkers* 1990 4 SA 692 (W) 698A–701E.

'n Verdere kriterium is volgens regter Harms of 'n appèl voortydig sou wees omdat die verhoorhof nog in sy finale beslissing ten gunste van die voornemende appellant sou kon besluit (met verwysing na *Dickenson v Fisher's Executors* 1914 AD 424 428; *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd* 1987 2 SA 1 (A) 41). Dit kom vir regter Harms op dieselfde neer as die geval waar 'n beslissing nie die regshulp wat in die hoofgeding gevra is, raak ("affect") nie (met verwysing na *Nxaba v Nxaba* 1926 AD 392, *Heyman v Yorkshire Insurance Co Ltd* 1964 1 SA 487 (A) 490H–491C en *Holland v Deysel* 1970 1 SA 90 (A) 93A–C), of waar geen regshulp in antwoord op die hoofeis toegestaan is nie (met verwysing na *Union Government (Minister of the Interior) and Registrar of Asiatics v Naidoo* 1916 AD 50 en *Levco Investments (Pty) Ltd Standard Bank of SA Ltd* 1983 4 SA 921 (A) 928). Uit die konteks blyk dat dit kan wees dat

onder die woord "affect", soos regter Harms dit hier gebruik, verstaan moet word dat 'n beslissing wat nie die regshulp wat aangevra is geheel of gedeeltelik toestaan of weier of andersins vooruitloop nie, nie appelleerbaar is nie.

Of dit goed is dat hier steeds so 'n wye begrip soos "affect" gebruik word, is te betwyfel. Die probleem is immers nie dat 'n beslissing 'n latere moontlike beslissing raak in die sin dat eersgenoemde laasgenoemde bloot vooruitloop nie, maar dat eersgenoemde laasgenoemde vooruitloop op 'n wyse wat die voer en voltooiing van die saak in die hoofgeding benadeel of kan benadeel. Hierbo is reeds daarop gewys dat regter Harms (met verwysing na *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 3 SA 534 (A) 550D – H) verklaar dat die feit dat 'n beslissing *vir die voornemende appellant* persoonlik ongerief in die voer van sy saak teweegbring, of *hom* in die voer van sy saak sodanig benadeel dat slegs 'n appèl dit sal kan regstel, buite rekening gelaat moet word as dit gaan oor die vraag of daardie beslissing appelleerbaar is. Daar is aangetoon dat dit daar tereg gaan oor die vraag of die beslissing die uitwerking het dat dit *die eis(e) in die hoofgeskil* onherstelbaar vooruitloop *of die regshulp wat gegee sou of kon word*, by voorbaat uitsluit. In hierdie opsig sou dit dus beter gewees het as regter Harms maar by die gemeenregtelike maatstaf van *gravamen irreparabile* gebly het. Dan weet almal voortaan dat dit by "affect" gaan oor 'n uitwerking van die gewraakte beslissing op die saak van die voornemende appellant, wat sy saak in hoof benadeel of kan benadeel. Die gesag waarop appèlregter Corbett hom in die *South Cape*-saak (550D – H) beroep, laat geen twyfel dat dit is wat hy in gedagte gehad het nie. Hy verwys naamlik na appèlregter Wessels se uitspraak in *Globe and Phoenix GM Company v Rhodesian Corporation* 1932 AD 146 155 en *Mears v Nederlandsche Suid-Afrikaanse Hypotheek Bank Ltd* 1908 TS 1147 1151 (sien 1993 *THRHR* 363 – 364). In die mate wat die samevatting deur regter Harms hierdie punt beklemtoon, moet dit verwelkom word. Hy stel dit so:

> "In the light of these tests and in view of the fact that a ruling is the antithesis of a judgment or order, it appears to me that, generally speaking, a non-appealable decision (ruling) is a decision which is not final (because the Court of first instance is entitled to alter it), nor definitive of the rights of the parties nor has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings" (536B – C).

Waarnemende appèlregter Harms sê dat die uitwerking van hierdie uitspraak sal wees dat beslissings wat voorheen as appelleerbaar beskou sou word, nie meer appelleerbaar sal wees nie. Hy meen egter dat dit in pas is met die wetgewer se bedoeling met die invoer van Wet 105 van 1982 en nie strydig is met die uitspraak in *Van Streepen and Germs (Pty) Ltd v Transvaal Provincial Administration* 1987 4 SA 569 (A) nie. Die aansoek om verlof om te appelleer word dus met koste van die hand gewys. Die hof kan dus nie die kwessie of die polisielêer geprivilegieerd is, in die betrokke fase van gedingvoering tussen die partye oorweeg nie.

4 Slotsom

4 1 Ons reg het nou 'n sintese van die Romeins-Hollands- en Engelsregtelike benaderingswyses bereik

Dit sou dalk te veel gevra wees om te verwag dat die gestoei rondom terme wat oor bykans 90 jaar ons regspraak oor die appelleerbaarheid van sekere interlokutore beslissings gekenmerk het, sommerso sal verdwyn. Dit gaan immers

hier oor 'n kwessie waaroor reeds in 1458 (*Groot Placaatboek III* 643) in Nederland, en veral sedert 1864 hier te lande, wetgewing aanvaar is – en wat steeds ook in Engeland aan regslui hoofbrekens besorg (sien 1993 *THRHR* 357). Alles dui egter daarop dat die gelykstelling van die Engelsregtelike benadering tot appelleerbaarheid (kortweg: "was dit 'n finale beslissing?") met die Romeins-Hollandse benadering (kortweg: "het die beslissing *gravamen irreparabile* vir die voornemende appellant se saak veroorsaak?"), wat al in *Bell v Bell* 1908 TS 887 892 (*per* Innes HR) en in *Globe and Phoenix GM Company v Rhodesian Corporation* 1932 AD 146 163 (*per Curlewis* AR) "voltrek" is (sien 1993 *THRHR* 363 vn 22 368 – 370), inderdaad nou tot 'n sintese gegroei het. Hiervan bied waarnemende appèlregter Harms se samevatting bewys.

4 2 Die opsomming van kriteria wat in Zweni *aangebied word, is te beperk om al die lospunte uit die vorige regspraak vas te maak*

Die twee kategorieë waarin waarnemende appèlregter Harms die kriteria wat in vorige sake aangewend is, vaslê, selfs soos dit uitgebrei is deur die aantal "anders gestel"-kriteria wat hy tereg as gelykluidendes bestempel, omvat nie die groot aantal kriteria (meer as 25 kan onderskei word) wat geblyk het uit 'n onlangse ondersoek oor die onderwerp nie (sien 1993 *THRHR* 366 – 367 374 – 376, 'n bydrae wat op 1992-08-04 gelewer en daarna vir publikasie in die *THRHR* aanvaar is lank voordat die *Zweni*-saak gerapporteer is (in *Die Suid-Afrikaanse Hofverslae* van Maart 1993), maar eers verskyn het (in *THRHR* van Augustus 1993) lank nadat die uitspraak in *Zweni* gelewer was (1992-11-20)). Dit is gevolglik te verstane dat daar nie in genoemde bydrae van regter Harms se uitspraak in die *Zweni*-saak kennis geneem kon gewees het nie; en ook waarom die regter nie van die bydrae in die *THRHR* kon geweet het nie.

'n Verdere fase van ontwikkeling sal waarskynlik nodig wees voordat ook die ander kriteria wat ongelukkig steeds "op goeie gesag" aangevoer kan word, behoorlik ingepas sal wees by die sintese waarna ons reg ook oor hierdie kriteria op pad is.

4 3 Voorstel: dat 'n interlokutore beslissing sonder die uitwerking van 'n uitspraak of bevel, in Afrikaans 'n "reëling" genoem word

Terwyl dit so is dat dit tans minder belangrik is om tussen 'n uitspraak en 'n bevel te onderskei (532E – F), moet met die oog op die kwessie van appelleerbaarheid steeds onderskei word tussen uitsprake of bevele enersyds, en "rulings" andersyds. Die voorstel wat hierin gemaak word, kom daarop neer dat "ruling" met "reëling" vertaal word. Daar bestaan geen rede om te volhard met 'n groot aantal begrippe of langer omskrywings net omdat niemand die knoop wil deurhak en 'n enkele benaming voorstel vir daardie kategorie beslissings wat nie vir appèl vatbaar is nie. Die woord "reëling" dui aan dat dit 'n beslissing is wat nie meer doen nie as om sake te orden sodat daar 'n gladde aanvang of voortgang van die hofverrigtinge tot by 'n uitspraak of bevel kan wees. Elders is reeds 'n pleidooi gelewer vir die vereenvoudiging van die terme wat op die onderhawige terrein reeds so lank onnodige verwarring (soms ook spraakverwarring) veroorsaak (sien 1992 *THRHR* 624). Hierdie voorstel is 'n poging om daardie oogmerk beter te bereik.

CFC VAN DER WALT
Potchefstroomse Universiteit vir CHO

MISTAKE AND SUPERVENING IMPOSSIBILITY OF PERFORMANCE

Kok v Osborne 1993 4 SA 788 (SEC)

1 Introduction

This decision has three interesting aspects:

(a) It is a good example of a case where *error in persona* was regarded as a material mistake.

(b) The blameworthiness of the parties was taken into account in the application of the *justus error* approach to mistake.

(c) The court applied the English law of frustration to supervening impossibility of performance.

2 Relevant facts

The defendant sold a plot to one Hobson-Jones for R47 000. The purchase price was paid with three post-dated cheques. Hobson-Jones borrowed money from the plaintiff on a number of occasions. When he failed to pay back one of the loans she insisted that he either repay her immediately or that she be replaced as the purchaser of the plot which Hobson-Jones had purchased from the defendant. Hobson-Jones falsely told the plaintiff that the purchase price had been fully paid in cash.

Consequently Hobson-Jones misrepresented to defendant that he and plaintiff purchased the land together in a joint venture and that plaintiff wanted the security of the agreement of sale in her name, because she was to advance the funds for a building to be erected on the plot. His payment of the purchase price was, however, to stand. Defendant had no objection to the replacement of the plaintiff as purchaser and as far as he was concerned, he was contracting with both Hobson-Jones and the plaintiff as purchaser, under the plaintiff's name. Plaintiff arranged for her attorneys to prepare a cancellation of the existing contract and to draft a new deed of sale which was subsequently signed by both plaintiff and defendant. The new agreement stated that the purchase price had been paid in full and that the plaintiff was the purchaser. Hobson-Jones was used throughout as a messenger (and not as agent of one of the parties) between the plaintiff and defendant and at no stage did the two parties communicate directly with each other.

Since the purchase price had not been paid, Hobson-Jones was in a predicament and to solve this he falsely told defendant that the joint venture was no longer to proceed; that the sale of the plot had therefore fallen through and consequently that there were no funds to meet the cheques. Hobson-Jones drafted an undated document to record the cancellation of the contract. Although defendant signed this document the plaintiff did not.

Hobson-Jones acted of his own accord throughout and both parties were misled by his conduct. Defendant regarded the sale as cancelled and resold the property

to a third party. Hereupon the plaintiff sought an interdict restraining the defendant from transferring the property to the third party. However, the litigants agreed that the purchase price in the second sale was to be held in trust pending the outcome of the application for a declaratory order concerning the question which party was entitled to this money.

The plaintiff based her case squarely on the contract that she concluded with the defendant while the main defence raised was that this contract was invalid for lack of consensus.

3 Decision

The court held that the defendant was entitled to retain the proceeds of the sale of the erf and based its decision on two grounds: first, that the contract was void for mistake and, secondly, that the contract between the litigants hinged on the assumption that Hobson-Jones had indeed paid the defendant, which in fact never came to pass, and that the contract thus failed due to supervening impossibility of performance.

4 Mistake

The court found that the defendant laboured under a unilateral mistake as to the identity of the other party with whom he was contracting. He intended to contract with the "joint venture" consisting of Hobson-Jones and the plaintiff, and he would not have signed the contract had he known that the was contracting with the plaintiff only (797G – I 799B – D). In this regard it may be mentioned that examples of a material *error in persona* in the case law are few and far between. This case is a good illustration of an instance where error as to the identity of a party was material. It is generally accepted amongst writers that this form of error is only material if the identity of the parties is of essential importance to the mistaken party (Van der Merwe, Van Huyssteen, Reinecke, Lubbe and Lotz *Contract: General principles* (1993) 17; Kerr *The principles of the law of contract* (1989) 42 – 50; Christie *The law of contract in South Africa* (1991) 384; see, however, Joubert *General principles of the law of contract* (1989) 77; De Wet and Van Wyk *Kontraktereg en handelsreg* vol 1 (1002) 25 – 26).

The court then proceeded to apply the *justus error* approach and to determine whether the defendant acted reasonably in the circumstances and whether his mistake was *justus* (799D). It therefore weighed up the conduct of the parties as a whole *vis-à-vis* each other as well as with regard to the fact that the error was caused by the misrepresentations of a third party, namely Hobson-Jones (800H).

Jones J found that the defendant's *bona fide* acceptance of Hobson-Jones's misrepresentations was not unreasonable in the circumstances of this case (799E – 800D). The reading of the contract would not have alerted the defendant to the possibility of the mistake: the contract was in accordance with the misrepresentations of Hobson-Jones (799E – G). It was also not unreasonable to trust Hobson-Jones as there was nothing to alert defendant to the possibility that Hobson-Jones's statements were false (799J – 800B). Thus Jones J concluded: "In my view, Osborne's [defendant's] conduct in this transaction comes nowhere near to being negligent, or blameworthy, or unreasonable" (880D).

Regarding the conduct of the plaintiff Jones J found that while she was probably also a victim of Hobson-Jones's dishonesty, her conduct in allowing

Hobson-Jones to do everything on her behalf lulled the defendant into a false sense of security (800D – E). The court regarded this as a further element indicating that defendant's error was *justus*. Ultimately the court based its decision on the equities of the case (see 800H).

Jones J did not refer to or apply the direct reliance approach of *Sonap Petroleum (formerly known as Sonarep) (SA) (Pty) Ltd v Pappadogianis* 1992 3 SA 234 (A), but simply used the *justus error* approach. The direct reliance test was set out by Harms AJA in the *Sonap* case as follows:

> "[D]id the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man to believe that his declared intention represented his actual intention?" (239I).

The *justus error* approach is an indirect form of reliance protection; according to this approach a party to an ostensible contract raises a mistake to escape contractual liability by proving that his mistake is not only material but also reasonable (Van der Merwe *et al* 33). The *Kok* case shows that the courts may use both the direct and the indirect approaches to reliance protection. This is in fact the effect of the decision in the *Sonap* case (Floyd and Pretorius 1992 *THRHR* 671).

Although the Appellate Division expressly rejected the fault principle in the *Sonap* case (240B – I), Jones J found that the conduct of the defendant was not negligent. It is uncertain what Jones J meant when he stated that the defendant's conduct was not negligent or blameworthy or unreasonable. It seems as if he regarded negligence and blameworthiness as part of the requirement that the error must be reasonable. This appears to be in direct conflict with the rejection of the fault principle in the *Sonap* case. As to the exact meaning of the rejection of the fault principle, Van der Merwe and Van Huyssteen (1993 *TSAR* 496) opine that fault was not discarded outright and that it can still play a useful role as one of the factors indicating reasonability of the misrepresentation made by a party as to his real intention. On the other hand, Grové (1993 *De Jure* 183 186) is of opinion that fault does not play a role.

Blameworthiness in the form of fault or the creation of risk should in our opinion be taken into consideration in applying the direct reliance theory or the *justus error* approach. There are at least three instances where blameworthiness has a role to play:

(a) First of all, where the party who creates the reliance did so by means of an intentional misrepresentation and the other party was actually misled thereby, but a reasonable man would not have been misled.

(b) Secondly, where the mistake is created by a third party not acting as an agent or in collusion with any one of the parties to the contract. The garbled telegramme is an example.

(c) Thirdly, where a misrepresentation made by a third party not acting as an agent or in collusion with any of the parties to a contract causes the mistake (see further Floyd and Pretorius 1992 *THRHR* 672 – 673).

The case under discussion is an example of the second and third instances. If the test in the *Sonap* case had been applied to the facts of this case, the defendant would have been held bound to the apparent contract, because by signing the contract he misled the defendant reasonably to believe that the apparent contract reflected his actual intention. On the other hand, if the *justus error*

approach is applied some interesting aspects come to light. Traditionally a material error was only regarded as reasonable if it was caused by the misrepresentation of the other party, or if the other party was aware or foresaw the possibility that the party who wanted to resile from the contract laboured under some form of material mistake (*George v Fairmead (Pty) Ltd* 1958 2 SA 465 (A) 471B – D; *National and Overseas Distributors Co (Pty) Ltd v Potato Board* 1958 2 SA 473 (A) 479G – H; *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 4 SA 164 (D) 168G – 169F; *Du Toit v Atkinson's Motors Bpk* 1985 2 SA 893 (A) 903F – 906E). The position where the misrepresentation was made by a third party is unclear. There are only two reported cases dealing with this situation. In *Musgrove & Watson v Rotta* 1978 3 SA 656 (RAD) the third party misrepresented the nature of the contract to one party; the court found that no contract came into existence, but strangely enough, that this was not due to a *justus error*. In *Standard Credit Corporation Ltd v Naicker* 1987 2 SA 49 (N) the court found in a similar situation that the mistake was not *justus* because the party who wished to resile, had been negligent in signing the contract without reading it. Jones J stated, without referring to these two cases, that he could in principle see no reason why the party who wishes to resile, may only rely on his *bona fide* and reasonable mistake where it is caused by the misrepresentation of the other party (801A – C). Therefore he took Hobson-Jones's misrepresentations into account in determining the reasonability of the defendant's error. This is the correct approach as all relevant circumstances should be taken into consideration when determining the question of reasonability.

It is clear from an analysis of the examination by Jones J of the conduct of the parties (800E – 801I), that he correctly took the blameworthiness of the parties into account in determining the question whether defendant's mistake was *justus*. On the facts neither party was negligent; both were misled by the misrepresentations of Hobson-Jones. The plaintiff, however, used Hobson-Jones as messenger and thereby created the risk that Hobson-Jones could misrepresent the intention of the plaintiff to the defendant. The creation of risk is thus the form of blameworthiness that swayed the equities in favour of the defendant. Although Jones J did not specifically indicate that he had the creation of risk in mind, this is the only plausible explanation for taking into account the fact that the plaintiff used Hobson-Jones as messenger.

5 Supervening impossibility

Jones J acknowledged that writers have warned that the English law of frustration and the South African law on supervening impossibility are not the same (802A – B). He was, however, of the opinion that South African law recognises commercial impossibility or frustration of the common purpose of the contract as a form of supervening impossibility just as the English law does (802A – G). In this regard he in fact followed Kerr's (403 *et seq*) exposition of the law. The majority of writers hold a different view and do not regard commercial impossibility as part of our law (Lubbe and Murray *Farlam and Hathaway: Contract: cases materials and commentary* (1988) 773 – 774; Christie 563 – 565; Ramsden *Supervening impossibility of performance in the South African law of contract* (1985) 68 – 75).

Jones J in fact equated assumption (or supposition) with supervening impossibility of performance. This is clear from the fact that he found that the parties

contracted on the assumption that Hobson-Jones had already paid the defendant the purchase price (801F). He also relied on three cases which actually dealt with assumptions related to a future event. These decisions are *Williams v Evans* 1978 1 SA 1170 (C), *Bischofberger v Van Eyk* 1981 2 SA 607 (W) and *Rossouw v Haumann* 1949 4 SA 796 (C). It can be conceded that the court in the latter two decisions dealt with assumptions under the mantle of supervening impossibility of performance (De Wet and Van Wyk 154 – 155). This is, however, incorrect as the legal consequences of the failure of an assumption and supervening impossibility of performance differ. In the case of an assumption the contract is void *ab initio* and no obligations arise (Van der Merwe *et al* 202; De Wet and Van Wyk 154), while in the instance of supervening impossibility, the contract does give rise to obligations which are extinguished *ex nunc* (Van der Merwe *et al* 383 – 384).

The court should have decided this aspect purely on the principles relating to suppositions. In this regard it should be noted that the validity and legal construction of a supposition with a future effect is unclear in our law (Van der Merwe *et al* 202 – 203; Christie 400 – 401).

C-J PRETORIUS
TB FLOYD
University of South Africa

ASPEKTE VAN PRIVILEGIE AS VERWEER BY LASTER

Herselman v Botha 1994 1 SA 28 (A)
Couldridge v Eskom 1994 1 SA 91 (SOK)

In albei hierdie sake het die verweer van privilegie (of bevoorregte geleentheid) by laster ter sprake gekom. In die *Herselman*-saak het die appellant, eksekuteur van die oorlede eiser (J) se boedel, 'n lasteraksie teen die respondent (R) aanhangig gemaak. J en R was lede van die stadsraad van Uitenhage se komitee vir finansies en algemene sake. B, 'n werknemer van die stadsraad, is skuldig bevind aan die besit van pornografiese materiaal en 'n vergadering van die komitee moes 'n aanbeveling maak oor B se voortgesette diens by die stadsraad. Tydens die vergadering het R woorde geuiter wat volgens J die lasterlike *innuendo* gehad het dat J op korrupte wyse te min betaal het vir dienste wat B namens die munisipaliteit aan J gelewer het. (B was in beheer van die stadsraad se reinigingsdepartement wat dienste aan sowel raadslede as lede van die publiek teen vasgestelde tariewe gelewer het.) Vir ons doeleindes is van belang die geskilpunt of J bewys het dat die gewraakte woorde relevant was tot die onderwerp onder bespreking, oftewel of hulle binne die perke van die bevoorregte geleentheid geuiter is.

Die verkorte feite van die *Couldridge*-saak is soos volg: Die eiser het 'n lasteraksie teen die verweerder, sy voormalige werknemer, ingestel op grond van 'n

beweerde lasterlike verklaring aangaande die eiser se karakter aan 'n potensiële toekomstige werkgewer van die eiser. Alhoewel die hof die verweer van waarheid en openbare belang behandel en ten aansien daarvan van mening is dat "[t]he publication of defamatory matter that is only partly true can never be in the public interest. A lie can never be applied for public benefit" (103D), is vir doeleindes van ons bespreking net die verweer van privilegie, meer in besonder die rol van onbehoorlike motief, van belang.

In albei sake word uitgegaan van die nou reeds gevestigde praktyk dat die publikasie van lasterlike bewerings twee vermoedens laat ontstaan: 'n vermoede dat die lasterlike publikasie onregmatig is en 'n vermoede dat dit met opset of *animo iniuriandi* geskied het (sien *Herselman* 35C – F; *Couldridge* 97F – 98A; sien ook *SAUK v O'Malley* 1977 3 SA 394 (A) 401 – 402; *May v Udwin* 1981 1 SA 1 (A) 10; *Marais v Richard* 1981 1 SA 1157 (A) 1166 – 1167; *Borgin v De Villiers* 1980 3 SA 556 (A) 571; Neethling, Potgieter en Visser *Law of delict* (1994) 323; Neethling *Persoonlikheidsreg* (1991) 139). In die *Herselman*-saak stel appèlregter Joubert dit soos volg (35C – F):

> "Wanneer die publikasie van lasterlike woorde betreffende 'n bepaalde persoon bewys word, ontstaan daar twee vermoedens, nl dat die woorde opsetlik (*animo injuriandi*) met wederregtelikheidsbewussyn gepubliseer is en dat die publikasie wederregtelik of onregmatig is . . . Dit is gebruiklik om die verwere wat 'n verweerder teen 'n lasteraksie kan opper veral in twee groepe in te deel, nl (1) skulduitsluitingsgronde (defences directed against the subjective element) wat teen die *animus injuriandi* as die subjektiewe element of skuldelement van laster gerig is, bv die afwesigheid van wederregtelikheidsbewussyn, afwesigheid van *animus injuriandi, rixa* (woede), skerts, dwaling, ens . . .; en (2) onregmatigheidsuitsluitingsgronde of regverdigingsgronde wat teen wederregtelikheid as objektiewe element van laster gerig is, bv privilegie, waarheid in die openbare belang, billike kommentaar, toestemming, ens . . ."

In die *Couldridge*-saak (98A – E) word die tot nog toe oënskynlik gevestigde standpunt aanvaar dat daar 'n *weerleggingslas*, en nie 'n volle *bewyslas* nie, op die verweerder rus om vermelde vermoedens te weerlê (sien bv die *Borgin*-saak *supra* 571; *Iyman v Natal Witness Printing & Publishing Co (Pty) Ltd* 1991 4 SA 677 (N) 684 686; die *O'Malley*-saak *supra* 401 – 403; vgl egter *Joubert v Venter* 1985 1 SA 654 (A) 696 – 697). Alhoewel regter Joubert hom nie in *Herselman* spesifiek oor hierdie aangeleentheid uitlaat nie, bring die jongste standpunt van die appèlhof 'n besliste ommekeer van die tradisionele standpunt teweeg. In *Neethling v Du Preez, Neethling v The Weekly Mail* 1994 1 SA 708 (A) 770H – J verklaar appèlregter Hoexter nou soos volg:

> "For all the foregoing reasons I conclude that in our law a defendant in a defamation action is encumbered with a full *onus* in regard to the defences of truth in the public benefit and of qualified privilege. Such defences can be sustained by nothing less than proof on a balance of probabilities . . . In my respectful view the Court *a quo* erred in holding that the respondents were burdened with no more than an evidentiary burden."

Om nou terug te keer tot die verweer van privilegie, en wel in die vorm van die nakoming van 'n plig of die waarneming van 'n belang (sien in die algemeen Neethling 141 – 146; Neethling, Potgieter en Visser 324 – 325; Burchell *The law of defamation in South Africa* (1985) 244 – 249; *Principles of delict* (1993) 180): Hierdie vorm van privilegie kom voor waar 'n persoon 'n regs-, morele of sosiale plig of 'n geregverdigde belang het om lasterlike bewerings te maak aan 'n ander wat 'n ooreenstemmende plig of belang het om van die bewerings te verneem. Staan dit vas dat 'n ooreenstemmende plig of belang by albei aanwesig is (dit wil sê dat 'n bevoorregte geleentheid bestaan het), moet die verweerder voorts

aantoon dat hy binne die perke of grense van die privilegie opgetree het. Om dit te doen, moet hy bewys dat die lasterlike bewerings relevant was tot, of redelikerwys verband gehou het met, die nakoming van die plig of die waarneming van die belang. Deur sodanige bewys verkry die verweerder egter nog nie volkome nie, maar slegs voorlopige beskerming. Die *eiser* kan naamlik steeds aantoon dat die verweerder inderdaad die perke van die privilegie oorskry het omdat hy met 'n onbehoorlike motief ("malice") opgetree het.

In die *Herselman*-saak was, soos gesê is, die geskilpunt of R bewys het dat die gewraakte woorde relevant tot die onderwerp onder bespreking was, naamlik die aanbeveling of B as werknemer geskors moet word of nie. "Anders gestel, kom dit daarop neer of die gewraakte woorde *binne* die perke van die bevoorregte geleentheid gepubliseer is of nie" (*per* Joubert AR 35H). Wat die toets vir relevansie betref, kan volgens regter Joubert twee benaderings onderskei word, naamlik 'n objektiewe en 'n subjektiewe toets (36A ev). Met verwysing na die Engelse beslissing *Adam v Ward* [1917] AC 309 HL 319 321 is die gewraakte bewering volgens die objektiewe toets onder meer relevant indien dit "germane and reasonably appropriate to the occasion", of "part and parcel of the privileged statement and relevant to the discussion", of "reasonably necessary to protect the interest or discharge the duty" was. Hierteenoor omvat die subjektiewe toets volgens die regter die vraag of die verweerder "might have honestly and on reasonable grounds believed that what he wrote or said was true and necessary for the purpose of his vindication".

Tot dusver, soos appèlregter Joubert self aantoon (36G), het die appèlhof nog nie vir een van die twee benaderings kant gekies nie (sien *Molepo v Achterberg* 1943 AD 85 99; *Rhodes University College v Field* 1947 3 SA 437 (A) 464; sien ook Neethling 144 vn 165). *In casu* hou die regter insgelyks steeds met albei toetse rekening en kom tot die bevinding dat R nie daarin geslaag het om die relevansie van die gewraakte woorde te bewys nie. Derhalwe bly die vermoede dat die publikasie onregmatig is, onweerlê staan.

Na ons mening behoort die vraag na relevansie of tersaaklikheid *objektief* volgens die *redelikheidsmaatstaf* beoordeel te word (soos oënskynlik beslis is in *Blumenthal v Shore* 1948 3 SA 671 (A) 681 – 682; sien ook Neethling 144). Per slot van rekening gaan dit hier om die onregmatigheid al dan nie van die lasterlike publikasie. Die subjektiewe toets betrek die geloof of geestesgesteldheid van die verweerder, naamlik of hy op redelike gronde *geglo* het dat die gewraakte woorde relevant was. Die verweerder se geloof – op redelike gronde al dan nie – speel in die reël geen rol by die vraag na onregmatigheid nie maar is wel van direkte belang by die vraag na sy skuld (opset). Sodanige dwaling kan hoogstens op afwesigheid van *animus iniuriandi* dui (Neethling 163 – 164). Wat wel waar is, is dat die feit dat die verweerder *nie* in die relevansie van die bewerings geglo het nie, op *malice* of onbehoorlike motief kan neerkom. So gesien, kan die verweerder se *ongeloof* in die relevansie wel die onregmatigheidsvraag beïnvloed.

Dit bring 'n mens juis by die hof se benadering in die *Couldridge*-saak. Die volgende opmerking van regter Jansen verg in hierdie verband kritiese kommentaar (1031 – 104B):

> "In the present case I am of the opinion that the defence of qualified privilege was ligitimately raised. The occasion was a privileged one. Upon proof of such an occasion, the absence of *animus injuriandi* is presumed. The *onus* is then on the plaintiff to rebut that presumption by proving that the defendant abused the privileged occasion with the subjective intention to hurt him, ie *animo injuriandi* . . . The inference that the

statement was published *animo injuriandi* may be drawn from the fact that the defendant did not believe that the facts stated by him were true, or that he stated facts which he did not know to be true, reckless of whether it was true or false. The intent necessary as an element in *animus injuriandi* includes *dolus eventualis*."

In eerste instansie, soos duidelik uit die aangehaalde *dictum* van appèlregter Joubert in *Herselman* en ons opmerkings oor privilegie hierbo blyk, verskaf die bewys van die bestaan van 'n bevoorregte geleentheid en die feit dat die bewerings relevant was, voorlopige beskerming aan die verweerder en dui dit onses insiens eerder op die afwesigheid van onregmatigheid as van *animus iniuriandi*, soos regter Jansen dit wil hê. Die *onus* is dan op die eiser om te bewys dat die verweerder desnieteenstaande onregmatig gehandel het deurdat hy die perke van die privilegie weens 'n *onbehoorlike motief* oorskry het. In hierdie verband verwar regter Jansen klaarblyklik onbehoorlike motief met *animus iniuriandi*. In hierdie stadium is *animus iniuriandi* nog nie ter sprake nie aangesien die fokus nog op die onregmatigheidsvraag val. Die regspraak dui daarop dat "malice" (onbehoorlike motief), en nie *animus iniuriandi* nie, hier afgelei word uit die feit dat die verweerder nie in die waarheid van die gewraakte bewerings geglo het nie of roekeloos was betreffende die waarheid al dan nie daarvan. In byvoorbeeld *Borgin v De Villiers supra* 578 verklaar appèlregter Corbett dat "proof that the defendant did not believe that the facts stated by him were true, may give rise to the inference that he was actuated by express malice . . ." (vgl ook die sake in Neethling 146 vn 174). Daar moet beklemtoon word dat *animus iniuriandi* of opset eers ter sprake kom indien die onregmatigheid van die verweerder se optrede vasstaan, dit wil sê wanneer daar nie 'n bevoorregte geleentheid aanwesig is nie, of, indien wel, die perke daarvan deur irrelevante bewerings of 'n onbehoorlike motief oorskry is.

Motief moet dus sorgvuldig van *animus iniuriandi* of opset onderskei word. Motief dui op die beweegrede vir iemand se optrede en kan by die onregmatigheidsvraag 'n rol speel; opset as skuldvorm daarenteen omvat gewilde optrede wat volgens die bewussyn van die dader onregmatig is (Neethling 59 – 60; Neethling, Potgieter en Visser 120 – 121).

J NEETHLING
JM POTGIETER
Universiteit van Suid-Afrika

MISTAKEN PAYMENTS BY A BANK ON A COUNTERMANDED OR DISHONOURED CHEQUE – THE *CONDICTIO SINE CAUSA* AND *CONDICTIO INDEBITI*

Saambou Bank Ltd v Essa 1993 4 SA 62 (N)

1 Introduction

The matter of mistaken payment on a countermanded cheque by the bank on which it was drawn, has to date been entertained by our courts in only three reported decisions. In *Natal Bank Ltd v Roorda* 1903 TH 298 the court held

that the bank had, in principle, an enrichment claim based on the principles of the *condictio indebiti*, while in *Govender v Standard Bank of South Africa Ltd* 1984 4 SA 392 (C) the court found that the bank's claim was actually based on the *condictio sine causa*, but held that the claim must fail because the defendant had not been enriched by the bank's inadvertent payment. Then again in the recent decision of *First National Bank of SA Ltd v B & H Engineering* 1993 2 SA 41 (T) the court agreed that the *condictio sine causa* was the appropriate action in these circumstances but proceeded to rule in favour of the bank. The legal issues involved in these decisions have sparked some lively academic debate (see eg Oelofse 1981 *MB* 120; Malan and De Beer *Wisselreg en tjekreg* (1981) 308 *et seq*; Stassen and Oelofse 1983 *MB* 137; Cowen 1983 *CILSA* 1; Sinclair and Visser 1984 *Annual Survey* 383 *et seq*; Stassen 1985 *MB* 15; Joubert 1993 *De Jure* 76; Nagel and Roestoff 1993 *THRHR* 486).

Not a completely dissimilar situation presented itself in the recent matter of *Saambou Bank Ltd v Essa* where a bank inadvertently paid out money to its own client pursuant to a cheque being dishonoured which the latter had paid into his account with the bank. This decision has added a further dimension to the controversy indicated above, since the *condictio indebiti* was considered the appropriate action in these circumstances, yet the bank will almost never succeed in satisfying all its requirements.

2 Facts

Saambou Bank instituted an enrichment claim against the defendant for the recovery of moneys which it had mistakenly credited to the defendant's savings account and subsequently paid out to him. The defendant, a businessman, sold goods to one M. M had paid with a cheque in the amount of R85 000 drawn on First National Bank, Umtata, in favour of the defendant. The arrangement was that the defendant would telephone M once the cheque had been cleared so that the goods could be collected. It was the plaintiff's policy to allow a client to draw against the amount of a cheque thus deposited after the expiry of 14 days if the cheque was not dishonoured within this period. After the lapse of this period the defendant withdrew a total of R87 000 from his account. Due to a strike at First National Bank, Umtata, the plaintiff was only informed some two months after the cheque had been deposited, that it had been dishonoured.

The plaintiff originally based its claim on the *condictio indebiti* and, alternatively, the *condictio sine causa*, but at the outset counsel for the plaintiff abandoned reliance on the former. On the face of it, the court was presented with a difficult decision to make since the legal position where a bank pays out money inadvertently due to some or other mistake is all but settled.

Where a bank pays out the amount of a countermanded cheque, *Govender* and *First National Bank* present conflicting decisions in the Transvaal and Cape. As to the appropriate action in this instance, the weight of academic authority indicates the *condictio sine causa* (see eg the authorities referred to in the *First National Bank* case 44H – I) and both these cases were judged on that basis (*contra* the decision in *Roorda*). Not so certain is whether the bank is indeed entitled to reclaim its money by way of an enrichment action from the recipient.

3 *Govender v Standard Bank of SA Ltd*

In the *Govender* decision Rose-Innes J denied the bank's action, *inter alia* because the payment was not *sine causa* (it had extinguished a debt owed to

the recipient by the drawer of the cheque); furthermore the recipient had not been enriched (he had performed or had been willing and able to perform a contractual obligation which was *prima facie* counterbalanced by the bank's payment (Swart 1985 *MB* 3)). In this regard Rose-Innes J concluded as follows (406D – G):

> "Two consequences flow from these considerations. The first is that the payment of the cheque was not a payment *sine causa* because, as is clear from the formulation of *Grotius* quoted above, the *condictio sine causa* lies where anything comes to a defendant 'without payment discharging a debt' ('zonder geven betalen of beloven'). The *condictio* fails where money came into the hands of the defendant by way of payment discharging a debt due to him since it is then not *sine causa*. The second consequence is that the defendant who has performed, or held himself ready and willing to perform, a contractual obligation, here the hiring out of the bus, is *prima facie* not unjustifiably enriched by the receipt of a payment in consideration for the hire of the bus, since his performance or his holding himself in readiness to render performance should be taken into account in assessing whether he has been enriched and, in the absence of any other evidence, the value of his performance may be regarded as being the value placed upon it when agreement was reached as to the price or charge due to him in terms of the contract. When he receives payment of that amount in return for his fulfilling his side of the contract he cannot be held to have been unjustifiably enriched by such payment since the payment *prima facie* is balanced out by his performance."

In deciding that the defendant had not been enriched, Rose-Innes J (404D – E) relied heavily on a statement by De Vos (*Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg* (1971) 290 – 291 (now (1987) 333 – 334)):

> "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 juridies relevante verband met die verryking staan . . .*'."

This raises the interesting aspect that the bank may be saddled with an especially onerous task if it wishes to show that the value of the defendant's performance or attempted performance was less than the value of the cheque mistakenly paid out so that the defendant remains enriched to some degree. Stassen (17) touches on this when he says the following with reference to this decision:

> "*In casu* the value of the payee's performance was taken to be identical to the value of the cheque and thus to the amount received from the drawee. From the court's reasoning quoted above it is clear that this could be done only because the point was not canvassed in evidence or argument. One can expect that in a future case the plaintiff will specifically place in issue the real value of the actual performance by the recipient of payment. If the approach of the court in the present case is accepted as the basis for determining whether defendant was enriched, one can further expect that the diminution of his estate caused by his performance or the fact that he tried to perform will be found to be less than the face value of the cheque."

Thus the bank will institute action on the basis of the *condictio sine causa* and allege the elements of this action. The defendant may then deny the element of enrichment on the basis of its performance to the drawer. To rebut this evidence, the plaintiff will place in issue the real value of the defendant's actual performance or even deny that a valid contract existed between the defendant and the drawer of the cheque, but since it has no direct knowledge of the contractual relationship between the defendant and the drawer, the bank may have problems in seriously disputing the defendant's evidence. This is crucial, for

if the defendant's version is accepted by the court, the action must fail for lack of proof of this element.

The unenviable position in which the bank finds itself in such cases, may be illustrated with an example: A and C conclude an oral contract in terms of which C must lay concrete paving at A's residence for a remuneration of R10 000. In terms of the contract, A must and does pay C a deposit of R3 000. A week later C completes the work and demands the balance. A pays with a cheque for R7 000 drawn on B bank. Within two weeks the paving begins to crack and break up. C's performance is eventually useless to A but C refuses to redo the work. A timeously stops payment of the cheque for R7 000, cancels the contract on the basis of C's positive malperformance and institutes action against C to recover the R3 000 paid as deposit. Notwithstanding the countermand, B pays out the amount of the cheque to C. C defends A's action and contends that the paving was damaged by A himself, who, contrary to C's instructions, had used the paving before the concrete had dried properly. B has paid its own money to C and is thus clearly impoverished. To reclaim the R7 000 or a part thereof from C on the basis of the *Govender* decision, B must necessarily become indirectly embroiled in the contractual dispute between A and C, and show that C's performance has no value and that C is not willing and able to perform properly (to reclaim the full R7 000), or in the alternative, that the actual value of C's performance was less than the amount of the cheque (to reclaim a portion of the R7 000). To discharge its task B may have to present evidence of a technical nature to dispute the value of C's performance and indicate the extent of C's malperformance which will probably turn out to be no easy task. The risk involved, and time and effort expended in often expensive litigation might convince the bank to bear its own loss. In this regard the words of Cowen (4), *inter alia* with regard to mistaken payments of this nature, seem to ring true:

> "Inasmuch as *bona fide* but mistaken payments of this kind are tending to become an occupational hazard in modern banking, it is therefore of concern to the banks to know whether in such cases they may recover from the recipient of the payment or whether they have to bear the loss. It is, of course, a facile over-simplification to say 'let the banks bear the loss which they can afford to insure against'; for the cost of insurance would be passed on to the public, to inflate still further an already very costly payment service." (See also Stassen 17 – 20 regarding the element of enrichment in this case.)

4 *First National Bank of SA Ltd v B & H Engineering*

In the *First National Bank* decision Preiss J was not convinced by the *ratio* in the *Govender* case and declined to follow it. He concluded that payment by a bank on a countermanded cheque was not payment effected in its capacity as the drawer's agent (47J – 48D; see in this regard Joubert 81 – 83), and furthermore that the performance rendered by the defendant to the drawer of the cheque was not juridically connected to its receipt of the money (48E – F). In reaching these conclusions the judge regarded the following analysis of Cowen (37) as incontrovertible:

> "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 the 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 recipient, the receipt of the payment is *sine causa* and recoverable by the bank" (47G–J).

Preiss J also approved the opinion of Sinclair (385) who states that the contractual entitlement of the recipient against the drawer is irrelevant, once again, because the bank was not purporting to discharge this debt; its mistaken purpose was merely to obey a mandate which had been cancelled (45D–H).

Ultimately and apart from anything else, in determining whether the recipient's performance was juridically connected with its receipt of the bank's money, the court may have to take policy considerations into account. The fact that a contract existed between the recipient and drawer of the cheque does not automatically mean that this is juridically relevant as far as the bank's enrichment claim against the recipient is concerned. The question is: what policy considerations may sway a court to prefer one of these conflicting decisions above the other?

(For a more detailed discussion and comparison of the *Govender* and *First National Bank* decisions, see Nagel and Roestoff *supra*.)

5 *Natal Bank v Roorda, Govender v Standard Bank of SA Ltd* and *First National Bank of SA Ltd v B & H Engineering* distinguished

In the *Saambou* case Broome DJP was able to avoid the controversy, briefly referred to above, by distinguishing the facts in the *Roorda, Govender* and *First National Bank* decisions. The basis of this distinction he explained as follows (65I–66D):

> "This brings me back to the facts of this case which, as I will endeavour to demonstrate, are distinguishable from these three cases. The present case involves a claim by a bank against its customer. Defendant operated a savings account which prior to the deposit of the Mjali cheque for R85 000 (for some reason it was shown in the account statement exh E11 as R87 000) was in credit to an amount of R301,46. It is reasonable to suppose that defendant could have demanded payment of that R301,46 and that plaintiff would have been obliged to pay it. There was this banker/customer relationship. After the Mjali cheque had been deposited, and after the 14-day period had elapsed, plaintiff believed that it was obliged to pay on demand any withdrawal sought by defendant up to the amount of the credit standing in his account. And defendant believed he was entitled to any such payment. This relationship is quite different from that between plaintiff and defendant in the three cases quoted above. In fact, as explained lucidly by Rose-Innes J, there was no prior relationship and no contractual relationship between the plaintiff bank and the defendant payee of a cheque drawn by the bank's customer in favour of the defendant payee. Indeed the payee could not have sued the bank. The bank's obligation was owed to its customer, the drawer, and not to the payee who was a stranger. In those cases when the payment was made to the payee, there could be no suggestion that the bank was paying a *debitum*."

This being so, he was not inclined to follow one of these previous decisions.

6 Appropriate action

In determining which enrichment action was suited to the facts in the *Saambou* case, Broome DJP was influenced by the following exposition of Rose-Innes J

in the *Govender* case (400D – G) on the distinction between the *condictio sine causa* and *condictio indebiti* (67F – I):

> "The claim appears, thus, to be a claim for recovery of money which has come into the hands of the defendant for no justifiable cause. In the *condictio sine causa* situation there often is error causing payment to defendant, but error is not an essential requirement of the *condictio sine causa*. For example, if an executor pays my legacy to you to whom no legacy is payable, I can recover it from you by the *condictio sine causa* although I was under no error of fact at all and the error was entirely that of the executor, and the same applies to the other payments by third parties where the person whose money it rightly is, is not party to any error. The *condictio sine causa* is brought where plaintiff's money is in defendant's hands without cause, there need be no erroneous belief that the money was owing to the defendant, as is the case under the *condictio indebiti*. It is necessary for a *condictio indebiti* to show reasonable mistake of the plaintiff, but a *condictio sine causa* lies whether the money is in the hands of the defendant without cause, whether due to mistake of the plaintiff, or not. It is therefore a defence to the *condictio indebiti* that the mistake was not reasonable but negligent, but it would not seem to be a defence to the *condictio sine causa* since no error need be proved, whether reasonable or unreasonable."

He therefore concluded that while the *Roorda, Govender* and *First National Bank* cases dealt with an enrichment claim based on the inadvertent payment of a countermanded cheque, to which the principles of the *condictio sine causa* were suited, the present case dealt with the mistaken payment by a bank to its customer of the amount of a cheque deposited in the customer's account but not paid by the drawee bank (67J – 68B). Since the bank, in the latter instance, intended to pay a *debitum* it was precluded from relying on the *condictio sine causa*. The appropriate enrichment action could then only be the *condictio indebiti* (68C). However, since the plaintiff had abandoned reliance on this action Broome DJP had little difficulty in granting judgment in favour of the defendant with costs (68H). He stated *obiter* that he would nevertheless have had little hesitation in branding the plaintiff's conduct as inexcusable and would thus have denied the *condictio indebiti* at any rate (68E – G).

7 Conclusion

In the *Saambou* case the court unfortunately allowed an opportunity to comment on some of the contentious issues raised in the *Govender* and *First National Bank* decisions to slip by. Although Broome DJP concluded that the *condictio indebiti* was the appropriate action in the circumstances and not the *condictio sine causa*, in contrast to the position in the two latter cases, the principles that needed comment are common ground to both actions (see the *Govender* case 404B – D; Nagel and Roestoff 1993 *THRHR* 489). In particular, it would have been interesting to see whether the court would, for the purposes of determining the enrichment of the defendant, have regarded the inadvertent payment to the defendant as being juridically connected to the contractual relationship between the defendant and M, or not.

More important, this case illustrates that some of the individual enrichment actions, in this instance the *condictio indebiti*, are still so cluttered with formal paraphernalia that their purpose is at times completely defeated thereby. Inadvertent payments by banks on countermanded and dishonoured cheques, may be regarded as *species* of the same *genus*, the *genus* being inadvertent payments by a bank caused by some mistake or other on the part of the bank. In both instances the bank has paid out its own money due to some mistake or oversight on its part and it should, in principle, have an enrichment claim. If the

facts indicate an application of the *condictio sine causa* the bank may claim (at least in the Transvaal at present) regardless of negligence or an otherwise inexcusable mistake on its part. Yet, if the *condictio indebiti* is the appropriate action the bank is prevented from successful condiction if its mistake is inexcusable. To make matters worse, one can hardly think of an instance where, in the circumstances of the *Saambou* case, the bank's error will not be considered inexcusable. Only if the bank's mistake was induced by misrepresentation will its conduct probably be regarded as excusable in certain instances. Banks in particular might be hard pressed to see any logic in the difference between the requirements for respectively the *condictio indebiti* and *condictio sine causa* in such circumstances. The facts may indicate one or the other but should the bank bear a heavier *onus* in regard to the former? Is payment on a countermanded cheque any more or less excusable than payment on a cheque deposited in the customer's account but not paid by the drawee bank? For the moment, there seems to be no solution to this problem since the Appellate Division has opted to retain the element of excusability for successful condiction based on the *condictio indebiti* (see *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 4 SA 202 (A) and Visser's criticism of this aspect of the court's decision in 1992 *SALJ* 182 – 185).

It seems then that the decision in *Saambou Bank Ltd v Essa* has added a further dimension to the problems already existing regarding the enrichment claims of banks based on the mistaken payment of cheques.

C-J PRETORIUS
University of South Africa

DAMAGES FOR LOSS OF FUTURE EARNINGS – THE IMPLICATIONS OF A CERTIFICATE ISSUED IN TERMS OF SECTION 43(b) OF THE MMF ACT

Kommissaris van Binnelandse Inkomste v Hogan 1993 4 SA 150 (A)

Facts

The respondent had been seriously injured in a collision as a result of which he became a paraplegic and lost his entire earning capacity. At the time of the collision he was employed as a fireman. The action for general damages he had instituted against the MVA Fund was settled and, in respect of his loss of future earnings a certificate providing for payment in instalments was issued in terms of section 21(1C)(b) of the Compulsory Motor Vehicle Assurance Act 56 of 1972 (since replaced by s 43 of the MMF Act 93 of 1989). Apart from the first five years for which the exact amount of each instalment was set out, the amount of each instalment would be the same as the monthly salary (and later pension) earned by a sub-officer in the Fire Department of the Johannesburg City Council at the particular stage. The payments were only to continue while the defendant was still alive.

The MVA Fund was superseded by the MMF, the second appellant in this matter, which took over the liability towards the defendant. Although the act had also been replaced, this matter still had to be decided under the old act in terms of which the certificate had been issued.

Legal questions and judgment

The real issue between the parties was whether the instalments received by the respondent were subject to income tax and if so, whether employee's tax (PAYE) had to be deducted by the MMF.

It was argued on behalf of the Commissioner for Inland Revenue that the instalments constituted an annuity. Annuities are specifically included in the definition of gross income in the Income Tax Act 58 of 1962 (s 1 *sv* "gross income" par (a)).

The court (157E – J) set out the main characteristics of an annuity, namely a repetitive annual payment to which the recipient has a right. Annuities are traditionally distinguished from instalments (see eg Meyerowitz and Spiro *Meyerowitz and Spiro on income tax* par 487 – 489). Instalments serve to reduce an antecedent principal debt, whereas in the case of an annuity there is no fixed principal debt. Although the existence of an antecedent debt is a valuable indication that payments are instalments rather than an annuity, "the ascertaining of an antecedent debt . . . does not govern [the nature of the payments] by magic" (per Rowlatt R in *Jones v Commissioner of Inland Revenue* [1920] 1 KB 711 (121 LT 611, quoted by Joubert ACJ 159E). In the present case the court was greatly influenced by the fact that no remaining capital sum was to be paid by the Fund in the event of the respondent's death earlier than expected (160B – C). The court also found that there was no principal debt because the Fund's delictual liability had been replaced by a contractual obligation to pay an annuity. The instalments were thus held to be annuities subject not only to taxation but also to the deduction of employee's tax. Annuities are included in the definition of remuneration (Fourth Schedule to the Income Tax Act par 1 *sv* "remuneration") from which employee's tax has to be deducted. The Fund could not escape its statutory duty to deduct employee's tax by issuing a certificate undertaking to pay a certain amount directly into a banking account.

Discussion

The court refrained from considering the taxability of delictual damages in general, and rather devoted its attention towards establishing whether the instalments paid in terms of the certificate constituted an annuity. Although this direction is unfortunate in the light of the shortage of reported cases on the taxability of delictual damages, its merit lies in the fact that the employee's tax problem would be answered simultaneously – a logical way to go.

It might be useful to briefly consider the question whether delictual damages are taxable or not. By analogy to the taxability of contractual damages, the test should be whether the damages are intended to fill a gap in something which would have been taxable or in something of a capital nature. In *Hogan*'s case where the instalments were exactly the same as the salary he would have received, it seems fairly straightforward that the instalments would have been taxable in any case even if they were not an annuity. Just as in the case of contractual damages one would have to distinguish between damages for the loss of future

earnings (which would be taxable) and damages for the loss of earning capacity (which are of a capital nature and not taxable). Although this distinction may seem somewhat superficial, it is well recognised in tax law in relation to contractual damages (see Meyerowitz and Spiro par 428 – 429). Payment in instalments would usually be an indication that the damages are for loss of future earnings, while a lump sum would rather be viewed as an award for loss of earning capacity. Such a lump sum is intended to be invested as income-producing capital to replace the earning capacity which would otherwise have yielded the income. This is probably what the court meant by its *obiter* remark (159I) that had a lump sum been received, it would have been of a capital nature and not taxable. However, if this remark was intended to mean that it is not theoretically possible to pay both these kinds of damages in each of the two ways mentioned, I cannot agree with it.

The court's finding that the delictual liability of the Fund had been replaced by a contractual liability also calls for discussion. This finding facilitated the conclusion that the payments in question were an annuity. As has already been mentioned, the existence of a principal debt is only one of the factors to be taken into account in determining whether a payment constitutes an annuity. It is submitted that the court placed too much emphasis on this distinction between an annuity and an instalment. The conclusion that the principal debt had been erased and a contractual liability created in its place was in my view unfortunate, especially because the court could have reached the same decision without it. It is submitted that the delictual liability continued to exist despite the certificate.

Under section 21(1C)(b) of the old act, the issuing of a certificate was the sole prerogative of the MVA Fund or its appointed agent. The instalments could either be agreed on or set by the court. In *Marine & Trade Insurance Co Ltd v Katz* 1979 4 SA 961 (A) the court held that issuing of such a certificate was the statutory prerogative of the Fund and that it created a liability *similar* to contract. It is submitted that in finding that such a certificate embodied a contract between the parties in terms of which they replace the delictual liability, the court in the present case deviated from the position set out in the *Marine & Trade Insurance* case. The court also failed to consider the nature of the resultant liability in the case where the instalments were not agreed upon, but fixed by the court as was possible under section 21(1C)(b) of the MVA Act. Would such a determination by the court also have altered the delictual nature of the liability?

Under the new section 43(b) it is no longer possible for the court to set the instalments. They can only be agreed upon by the parties. The implication of this is that a plaintiff can effectively prevent such a certificate from being issued and insist that the court determine a lump sum (Visser and Potgieter *Law of damages* (1993) 374). It is submitted that not even under the new section 43(b) can it be said that agreeing on instalments would amount to a novation of the delictual liability. In the first place, clear indications of the *animus novandi* are absent. The mere fact that parties agree on the manner of payment of a debt does not necessarily mean that they wish to extinguish the debt and replace it by a new debt.

I now come to the second argument in favour of my view that the delictual liability continues to exist despite a section 43(b) certificate. If agreeing on the amount of the instalments to be paid by the MMF amounts to a novation of the delictual debt, the need for section 43(b) becomes difficult to see. Surely

parties who want to contract to extinguish a delictual liability and replace it with a contractual duty would be free to do so without a statutory go-ahead. It is thus submitted that the purpose of section 43(b) is to provide for a specific method of payment of a delictual liability.

The effect of a section 43(b) certificate is that the liability in respect of future loss of earnings remains unliquidated. The whole idea of the provision is to obviate the need for quantification of the prospective loss (158H) – as the delictual "once and for all" rule requires (see Neethling, Potgieter and Visser *Law of delict* (1994) 213 – 217). The words "the amount payable" in section 43(b) refers to the unquantified delictual liability as such or alternatively to the amount that would eventually be paid (see *Marine and Trade Insurance Co Ltd v Katz supra*).

The real question should therefore be whether the paying off in instalments of an unliquidated principal sum can amount to an annuity. This question should in my opinion be answered in the affirmative. The payments in terms of the certificate in *Hogan*'s case clearly had the main characteristics of an annuity. Coupled with the fact that the principal debt was unliquidated, the factors in favour of an annuity construction were indeed very strong.

In conclusion, although the correct result was reached, it is submitted that the line of argument of the court, especially the argument that a section 43(b) certificate creates a contractual obligation in the place of a delictual liability, is open to criticism.

KATHLEEN VAN DER LINDE
University of South Africa

ONREGMATIGHEIDSBEWUSSYN BY DELIKTUELE AANSPREEKLIKHEID WEENS VRYHEIDSONTNEMING

Tödt v Ipser 1993 3 SA 577 (A)

1 Inleiding

In dié saak is die relevante feite in 'n neutedop soos volg: I het 'n artikel 65A-bevel van 'n landdros verkry om die geregsbode in staat te stel om T te arresteer. T se man het by arrestasie aangebied om die verskuldigde bedrag te betaal, maar die geregsbode het geweier om dit te aanvaar en haar na die gevangenis geneem waar sy tot die volgende dag aangehou is. T eis vervolgens genoegdoening weens onregmatige vryheidsontneming van I. Die verhoorhof het die eis van die hand gewys op grond van die feit dat die geregsbode nie as verteenwoordiger van I opgetree het nie en die lasbrief uitgereik is na uitoefening van 'n judisiële diskresie deur die landdros kragtens artikel 65(f) van die Wet op Landdroshowe 32 van 1944. In appèl word beslis dat daar nie 'n afdwingbare bevel ooreenkomstig artikel 65A teen T was nie en dat die instel van 'n artikel 65A-prosedure in die afwesigheid van 'n afdwingbare vonnisskuld onregmatig is en 'n deliktuele eis fundeer. Die appèlhof beslis dat afwesigheid van onregmatigheidsbewussyn nie deliktuele aanspreeklikheid weens vryheidsontneming verskoon nie (586).

Vir dié konklusie bestaan daar ook voorafgaande gewysderegtelike gesag (*Smit v Meyerton Outfitters* 1971 1 SA 137 (T) 139; *Minister of Justice v Hofmeyr* 1993 3 SA 131 (A) 155 – 157). Die vraag wat kortliks in die onderhawige bespreking ondersoek word, is of hierdie reël in so 'n rigiede vorm geregtigheid dien en gevolglik wenslik is.

2 Onregmatige arrestasie

Artikel 331 van die Strafproseswet 51 van 1977 erken die afwesigheid van onregmatigheidsbewussyn uitdruklik as verskoningsgrond ten aansien van 'n arrestasie met 'n gebrekkige lasbrief (sien ook a 46(1); Neethling *Persoonlikheidsreg* (1991) 114 117; Burchell *Principles of delict* (1993) 203; Labuschagne "Beskerming van bewegingsvryheid: opmerkinge oor die menseregtelike onderbou van deliktuele aanspreeklikheid" 1992 *THRHR* 247. Sien ook tav Kanada, Kee "False imprisonment" in McBean (red) *Remedies in tort* vol 2 (1993) 7-26).

3 Ander vorme van vryheidsontneming

'n Mens moet daarteen waak om onregmatige arrestasie te sien as die enigste wyse waarop onregmatige vryheidsontneming kan plaasvind. Ter illustrasie kan verwys word na die volgende hipotetiese voorbeelde:

3 1 Terugwerkende wetgewing

'n Hoof van 'n gevangenis plaas 'n gevangene op grond van omstandighede gemagtig deur (ondergeskikte) wetgewing in eensame opsluiting (sien Labuschagne "Deliktuele beskerming van die bewegingsvryheid van die gevangene" 1993 *Stell LR* 131). Dié wetgewing word later egter (terugwerkend) nietig verklaar (Labuschagne "Nietigverklaring van wetgewing weens vaagheid" 1991 *SA Publiekreg* 172; sien ook Shipley "False imprisonment: civil liability of private person as affected by invalidating of statute or ordinance for violation of which arrest was made" 16 ALR 3d 535 537 – 538 (annotasie tot *Coleman v Mitnick* (1964) 16 ALR 3d 527 (Indiana AC)). Dit sou tog uiters onbillik wees om genoemde hoof van die gevangenis, asook die staat, in dié geval deliktueel aanspreeklik te hou.

3 2 Die presedentestelsel

Die superintendent van 'n hospitaal vir geestesongesteldes hospitaliseer (kommitteer) 'n pasiënt op grond van die interpretasie van toepaslike wetgewing deur die provinsiale afdeling van die hooggeregshof. Die appèlhof bevind egter dat hierdie interpretasie foutief is (vgl die Kanadese sake *Tanner v Norys* (1980) 4 WWR 33 en *Cochlin v Alberta* (1983) 4 DLR (4th) 763 (Alberta QB); Kee 7 – 27 en 7 – 28). Ook in hierdie geval sou dit uiters onbillik wees om die superintendent, asook die staat, deliktueel aanspreeklik te hou.

3 3 Foutiewe beslissing deur die hof

Daar word algemeen aanvaar dat 'n regterlike diskresie (en bevinding) wat *bona fide* uitgeoefen word, nie in Suid-Afrika tot deliktuele aanspreeklikheid aanleiding gee nie (*Groenewald v Minister van Justisie* 1973 3 SA 877 (A) 883 – 884; *Moeketsi v Minister van Justisie* 1988 4 SA 707 (T); Neethling "Amptelike bevoegdheid: die aanspreeklikheid van 'n regterlike beampte vir onregmatige vryheidsberowing" 1989 *THRHR* 468; vgl Labuschagne 1992 *THRHR* 248).

Dit is ook die houding van die Kanadese hooggeregshof (*Lamb v Benoit* (1959) SCR 321; Kee 7-29).

In 'n beslissing van 19 Desember 1991 (die sogenaamde "Anca-arrest") het die Belgiese *Hof van Cassatie* beslis dat die staat in die reël aanspreeklik gestel kan word vir skade veroorsaak deur 'n regterlike fout (Storme "De rechterlijke macht" 1993 *NJB* 917). Hierdie beslissing kan beskou word as 'n baken in die menslike beskawingsproses en in geregtigheid. Dat hierdie benadering uiteindelik ook na ons toe sal oorwaai, is myns insiens onvermydelik. 'n Mens kan jou indink welke probleme dit sou afgee as onregmatigheidsbewussyn nie as 'n voorwaarde vir deliktuele aanspreeklikheid vir "opsetsdelikte" gestel sou word nie. Daar moet altyd in gedagte gehou word dat die staat se fondse in hoofsaak deur die belastingbetalers (die burgers) verskaf word. Wat insiggewend van die onderhawige saak is, is die feit dat die verweerder nieteenstaande intervensie van 'n landdros aanspreeklik gehou is (sien ook *Shoba v Minister van Justisie* 1982 2 SA 554 (K); Labuschagne 1992 *THRHR* 249).

4 Konklusie

Die bewegingsvryheid van die mens is ongetwyfeld 'n vryheid wat hoog aangeslaan behoort te word. Daarom het dit wêreldwyd die status van 'n mensereg. Deliktuele aanspreeklikheid vir die "skending" van dié mensereg sonder onregmatigheidsbewussyn dien egter nie in alle omstandighede geregtigheid nie, soos blyk uit bogaande bespreking. In die onderhawige saak is die verweerder in finale instansie aanspreeklik gehou vir 'n fout van die landdros. Die beslissing van die provinsiale afdeling van die hooggeregshof (verhoorhof) was myns insiens korrek ten aansien van I se aanspreeklikheid. Afwesigheid van onregmatigheidsbewussyn moes hom delikregtelik verskoon het.

JMT LABUSCHAGNE
Universiteit van Pretoria

In the present case it was obviously not possible for the plaintiff herself to state what she would have earned at the Cape Bar as she had not practised at the Bar before. It is furthermore doubtful whether evidence of the earnings of other members of the Cape Bar or of their average or mean earnings would have been of much assistance in determining the plaintiff's probable potential earnings. Skills, fees and earnings at the Bar vary from one individual to the other, there are many reasons for success at the Bar and one member's earnings may not be a reliable yardstick of what another member would earn (*per* Vivier JA in *Griffiths v Mutual and Federal Insurance Co Ltd* 1994 1 AS 535 (A) 546).

BOEKE

HANDBOOK ON THE MINERALS ACT 1991 AND THE REGULATIONS

by JS HOUSTON

Juta Cape Town Wetton Johannesburg 1993; vii and 587 pp (loose leaf)

Price R275,00

Before the introduction of the Minerals Act 50 of 1991, prospecting and mining for minerals were regulated by statutes such as the Mining Rights Act 20 of 1967, the Precious Stones Act 73 of 1964, the Mineral Laws Supplementary Act 10 of 1975, the Tiger's-Eye Control Act 77 of 1977 and the Nuclear Energy Act 92 of 1982. The control of the actual operations of mines, works and machinery used in connection with them was provided for by the Mines and Works Act 27 of 1956 and the regulations made under it, in which elaborate provisions were made for ensuring the safety of personnel engaged in the mining industry and for protecting the underground and surface works and installations in mines (Franklin and Kaplan *The mining and mineral laws of South Africa* (1982) 3 – 4).

Houston, being an electrical engineer by profession, originally started his book in 1985 as a handbook on the Mines and Works Act and regulations (vii). On 15 December 1988 the Department of Mineral and Energy Affairs published the Proposed Minerals Bill (GN 856 of 1988) for general information and comment. The Minerals Act was enacted on 22 May 1991 and came into operation on 1 January 1992 (Proc R123 of *GG* 13682 of 1991-12-20). The Minerals Act repealed *inter alia* the Mines and Works Act 27 of 1956 (save for section 9 and related definitions), the Precious Stones Act 73 of 1964 as a whole, the Mining Rights Act 20 of 1967 (save for Chapter XVI and related definitions), the Mineral Laws Supplementary Act 10 of 1975 as a whole, the Tiger's-Eye Control Act 77 of 1977 as a whole, and section 47 of the Nuclear Energy Act 92 of 1982 (s 68 of the Minerals Act; Kaplan and Dale *A guide to the Minerals Act 1991* (1992) 1).

The Minerals Act has as its objectives the regulation of: (a) the prospecting for and the optimal exploitation, processing and utilisation of minerals; (b) the safety and health of persons concerned in mines and works; and (c) the orderly utilisation and the rehabilitation of the surface of land during and after prospecting operations.

In so far as content is concerned, the Minerals Act consolidated not only the legislation dealing with prospecting and mining of minerals, but also legislation such as the Mines and Works Act which was designed to ensure the safety and health of personnel in the mining industry and can, against the background of the historical development of mining legislation and mining safety legislation, be considered as a hybrid statute (Kaplan and Dale *Minerals Act* 12 – 13; Badenhorst and Van Heerden "Prospekteer- en mynboukontrakte ingevolge die Mineraalwet 50 van 1991" 1992 *THRHR* 222). The Minerals Act also contains various environmental conservation provisions (see in general Rabie "Legislation for the rehabilitation of mining surfaces" 1991 *THRHR* 774)

and because of this, the act may also be viewed as a statute with strong environmental-law elements. As with most statutes, statutory offences and penalties are also created (see s 60 and 61 of the Minerals Act) to ensure the achievement of stated objectives.

In the light of the foregoing, and especially with regard to the objectives of the Mineral Act, the title of Houston's work is misleading in the sense that it merely focuses on the safety and health of persons concerned in mines and works. Throughout the work the angle of the author is from a "Mines and Works Act" perspective and the two other areas of law are not treated. A brief summary or explanation on the nature, content, acquisition, transfer and loss of mineral rights, prospecting rights and mining rights is crucial to any work on mineral law, even though it must be conceded that the Minerals Act largely regulates the exercise of mineral rights, prospecting rights and mining rights (see Badenhorst and Van Heerden "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 – *Ondombo Beleggings (Edms) Bpk v Minister of Mineral and Energy Affairs*" 1993 *TSAR* 167 – 168). In the light of the all-important role of environmental law in the future, these features of the act should also have been discussed.

However, in all fairness, the author's following stated objectives should be kept in mind:

> "The first is, of course, an attempt, as a layman, to explain the workings of the legal system as it affects the ordinary person. Secondly, to give a better insight into the interesting historical development of this law and thirdly to provide a handy reference, both to the particular section or regulation as well as a selection of Supreme Court decisions in specific cases and to illustrate how the legal mind applies itself to the very critical interpretation of what to many is an everyday rule" (vii).

Part I contains a section on criminal liability. Houston's main aim with this part is to give a summary of the basic principles of criminal law (1-17). It ought to be stressed that this part makes no attempt to present a detailed account of criminal liability. Certainly for those seeking expository descriptions of criminal law there are many better texts and articles now available. However, to criticise Houston's work for its lack of detailed analysis of criminal liability would quite miss the point. The purpose of Part I is merely to provide an outline of criminal liability. The author looks briefly at the sources of criminal law; the nature of crimes; the structure and formulation of statutory offences; criminal liability; strict liability for statutory offences and vicarious liability.

It must be remembered, however, that the law has its own technical words and that non-technical words are sometimes used in the law in a technical sense. A crime, for example, is defined by Houston (1-17) as "anything which is said by the common law or a competent legislature to be a crime". The only satisfactory definition of a crime is a "formal" definition on the basis of procedural consequences attached by law to conduct. The definition of criminal conduct must be precise enough to leave comparatively little room for arbitrary application.

Particular problems arise with the low level of specificity of knowledge required of criminal law in this part, for example, "Criminal capacity is absent where a person is very young (under the age of 14 years). . ." (1-6). Another example is that *dolus indirectus* is not referred to in the explanation of intention (1-9). Given the narrow scope of this "short descriptive section" (1-1) on criminal liability, the reader must be aware that he must look elsewhere for a detailed account of criminal liability.

Part II provides a discussion of the historical development of the Minerals Act and Regulations (almost entirely from a "mines and works" perspective). The mining of minerals by man since biblical times, the development of industrial legislation since the Industrial Revolution in England, and the influence of labour-law conventions in the

international arena are interestingly sketched by the author (2-1 – 2-5). The development of legislation since the time of Jan van Riebeeck and Sir John Cradock's famous proclamation of 6 August 1813 is also discussed (2-5 – 2-9). However, no reference to any sources of authority or scholarly works is provided in this part. Houston's statement that the (mining) laws of Transvaal date back to 1896 (2-5) is not correct. For instance, Dale (*An historical and comparative study of the concept and acquisition of mineral rights* (LLD thesis Unisa 1979) 175 – 192) discusses various South African Republic (*ZAR*) statutes dating from 13 June 1853. Houston refers to the Mines Works and Machinery Ordinance 54 of 1903 as the first law drafted with the explicit purpose of providing for the safety and health of employees in mines (2-5). Dale (*Mineral rights* 191) mentions in passing that the first South African Republic statute dealing with "mines and works" appeared as Law 3 of 1893. From Dale it also appears that mining laws already existed in the Orange Free state (*idem* 203 – 205) and Natal (*idem* 208 – 214) before the dates mentioned by the author (2-5). Be that as it may, Houston does make the interesting observation that our legislation (similar to that of other countries), first established "the rights to minerals and the rights to mine" before safety requirements were determined (2-5).

Houston provides an overview of the Mines, Works and Machinery Ordinance 54 of 1903 which was the forerunner to the Mines and Works Act 12 of 1911 and the Mines and Works Act 27 of 1956 and other related statutes (2-6 – 2-7). Even though Houston's work was published in 1993 it contains no indication that the Minerals Act has come into operation or more specifically, came into operation on 1 January 1992 (2-8). Even the argument that the date of commencement may be indicated by implication, does not hold water. For example, chapter VII of the Minerals Act contains important transitional provisions; their implementation is dependent on the starting date of these transitional periods. It is merely stated that the Minerals Act replaces the Mining Rights Act and the Mines and Works Act (2-8). As is indicated above, other equally important statutes had also been repealed and this should be indicated, even to the lay reader. Houston provides a useful discussion of the changes made to the designation of government officials (in terms of the stated statutes) and specific changes to the Mines and Works Act and the introduction of new concepts (2-8 – 2-9).

The following statement by Houston (2-9) is subject to criticism: "The Minerals Act, 1991 has been designed to simplify the granting and operation of mineral rights." The Minerals Act does not deal with the acquisition or transfer of mineral rights (or prospecting or mining rights) but with the exercise of mineral rights (and prospecting and mining rights). Such rights are acquired and transferred in terms of the common law, formalities legislation and registration legislation (see Badenhorst and Van Heerden 1992 *THRHR* 227 – 233). The statement (2-9) that the stated objective of the Minerals Act is to simplify the granting of mining authorisations should also refer to prospecting permits, if, for argument's sake, one assumes that this (rather than the regulation of prospecting and mining) is the objective of the legislature. The simplification of the acquisition of mining rights (which is different in nature to a mining authorisation (see further Badenhorst and Van Heerden 1993 *TSAR* 167 – 168)) was achieved by the repeal of the Mining Rights Act and the Precious Stones Act and a return to the prospecting contract and mineral lease as the only new contracts that can be entered into after the introduction of the Minerals Act (Badenhorst and Van Heerden 1993 *THRHR* 233 – 234; see s 47(1)(b) of the Minerals Act in respect of the "alienation" of "old mining rights").

The discussion of the influence of decided cases on the Minerals Act (2-9 – 2-11) is at times incorrect and confusing and should preferably be rewritten *in toto*. Two such examples of incorrect statements by the author are:

(a) "Many cases are taken to one of the Provincial Divisions of the Supreme Court on some form of appeal. This is usually in connection with either the verdict or sentence or both . . ." (2-9).

(b) "These decisions (of judges) are reported in various legal journals, one of which is the *SA Law Reports*" (2-9).

It should perhaps be made clear that (apart from the rules governing the interpretation of statutes) decisions of our courts on the interpretation of sections of a statute will be relevant only in the interpretation of sections of the Minerals Act with the same or similar wording. The conclusion reached by Houston on the Minerals Act (2-11) is restricted to safety regulations, and makes no mention of the other objectives of the act. The work should either be restricted to a comment on the safety and health aspects of the act, with an indication to this effect in the title or preface, or be expanded to cover the entire spectrum of the Minerals Act.

Part III consists of the Minerals Act, regulations made in terms of the Mines and Works Act 27 of 1956, and the unrepealed parts of both the Mines and Works Act 27 of 1956 and the Mining Rights Act 20 of 1967 (see the first par above). The regulations in terms of the Mines and Works Act will, in terms of section 68(2) of the Minerals Act, remain in force until amended or repealed by new regulations made in terms of section 63 of the Minerals Act. Houston provides limited commentary in respect of some "mines and works" definitions, sections and regulations. Perhaps the commentary could have been separated from the provisions of the act and regulations.

Part IV consists of a compendium of decided cases, three government notices in terms of the Mines and Works Act 27 of 1956 and the Mineral Act. With a few exceptions, all the cases are criminal cases within the context of "mines and works". Cases are printed in full and a summary, almost in the format of a headnote, is given of cases decided prior to 1946. From an academic point of view, it is a pity that for purposes of reference the original numbering of the cases (printed in full) has been left out. There is an index of cases arranged according to suffix, alphabetical and chronological order. The page numbers of the decisions in the index according to suffix, with the exception of the first decision, do not correspond to the numbers of the decisions in the text. Both the alphabetical and the chronological indexes contain cross references to the suffix numbers, with the result that these indexes are also incorrect.

The chronological index is useful, since it lists the decisions with reference to section 1(iv) of the Minerals Act and sections of the Regulations. It should, however, be noted that none of the cases listed by Houston deals with the definition of "mineral" in section 1(xiv) of the Minerals Act *per se*. We are still awaiting a decision on the meaning of the new definition from the courts! For instance, *R v Day* 1952 4 SA 105 (N) dealt with the meaning of "mineral" as defined in section 2 of the Mines and Works Act 12 of 1991. The meaning of the concept "mineral", which is not defined in the Deeds Registries Act 37 of 1947, was defined in *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein* 1985 4 SA 773 (A). (The decision in *S v Fourie* 1963 2 SA 159 (O), which is also listed with reference to the concept of a "mineral", does not deal with the meaning of the concept "mineral" at all. It should perhaps have been a reference to *S v Funchal* 1961 4 SA 52 (T), where the meaning of "mineral" was considered for the purposes of the Mines and Works Act 27 of 1956. In any event, the last-mentioned decision should have been mentioned in this particular context.) It should be noted that even though definitions of the concept of a "mineral" in other statutes may be of assistance in the interpretation of a particular section (such as section 1(xiv) of the Minerals Act) the statutory meaning of the concept "mineral" should be interpreted anew in every decision (*Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein* 1983 3 SA 191 (O) 195H). A decision on the meaning of "mineral" in one context is not necessarily binding in another context (*Consolidated Diamonds of South West Africa Ltd v Administrator, SWA* 1958 4 SA 572 (A) 599C – D). A lay person may gain the impression that there is more or less one "legal" definition of the concept "mineral" – which is far removed from the truth.

At the end of part IV a schedule of regulations amended, inserted or deleted is provided. Houston's statement that these regulations were first published under the Minerals Act by Government Notice R992 of 26 June 1970 (4-159) is confusing. Regulations

were published under section 12 of the Mines and Works Act 27 of 1956 and must still be published under section 63 of the Minerals Act.

An overall index of the Minerals Act and Regulations is also provided. As a loose-leaf publication the work is contained in a sturdy binder and the quality of the printing is good.

If Houston's work is confined to the safety and health aspect of the Minerals Act he has to a large extent, subject to our criticism, achieved his stated objectives. Our review should not be seen as an attempt from within the cold comfort of a legal study to shoot down the effort of a non-legal scholar to provide a manual for a certain sector of personnel in the mining industry. Houston sees his work as "an attempt to feed something back into an industry in which the author has grown up, received training and from which he has finally retired". While it cannot be said that Houston's work represents *terra nova* (after all, the Mines and Works Act 27 of 1956 and chapter V of the Minerals Act are discussed by Franklin and Kaplan *Mineral Laws* 539 – 573 and Kaplan and Dale *Minerals Act* 165 – 181, resp) he should be congratulated for his brave attempt to provide an industry perspective and a compilation of an area of law which is to some extent neglected by the legal profession. The publication should, however, be improved.

PJ BADENHORST
JA VAN DEN HEEVER
University of the North

BIBLIOGRAFIE VAN HOOGLERAREN IN DE RECHTEN AAN DE UTRECHTSE UNIVERSITEIT TOT 1811

deur M AHSMANN met medewerking van R FEENSTRA en CJH JANSEN (Geschiedenis der Nederlandsche Rechtswetenschap Deel VII: Bibliografie Nederlandse Rechtswetenschap tot 1811 Afl 2)
North Holland (Noord-Hollandsche Uitgeversmaatschappij) Amsterdam Oxford New York Tokio 1993

Prys Dfl 55,00

Hierdie bibliografie van die Utrechtse regsprofessore tot 1811 is die tweede aflewering van 'n bibliografie waarvan die eerste aflewering in 1984 verskyn het: *Bibliografie van hoogleraren in de rechten aan die Leidse Universiteit tot 1811* deur Margreet Ahsmann en R Feenstra met medewerking van R Starink. 'n Aanvullende afdeling tot die Leidse bibliografie is tewens by hierdie werk ingesluit. Oorspronklik is die werk vir die tweede aflewering begin deur GCJJ van den Bergh, M van de Vrugt en CJH Jansen, maar mettertyd het Margreet Ahsmann se raadplegende hoedanigheid oorgegaan in eindredaksie en uiteindelik volledige redaksie van die werk.

Die bibliografie betrek alle juriste wat tussen 1636 (stigtingsjaar van die Utrechtse Universiteit) en 1811 (degradasie tot "école secondaire" in die Franse Keiserryk) die posisie van "lector" of hoogleraar aan die Utrechtse Universiteit beklee het. Kort biografiese aantekeninge word ten aansien van elke outeur voorsien. Hoewel die Utrechtse professore waarna verwys word almal juriste was, bevat die bibliografie ook verwysings na nie-juridiese werke – 'n welkome gebaar met die oog op bibliografiese volledigheid,

veral as die groot belang van nie-juridiese werke van die Romeins-Hollandse skrywers in gedagte gehou word (dink maar aan De Groot se werke oor die teologie wat nou met sy beskouing oor die staat verweef is).

Werke wat vermeld word, word beskryf aan die hand van die eksemplaar wat in die Utrechtse universiteitsbiblioteek aanwesig is of, indien die betrokke werk nie in die universiteitsbiblioteek aanwesig is nie, volgens 'n eksemplaar in 'n ander openbare biblioteek. In hierdie volume (anders as in die Leidse bibliografie) word die aanwesigheid van die betrokke werk in ander biblioteke (sover bekend) vermeld. Enkele Suid-Afrikaanse biblioteke word ook verteenwoordig, naamlik die biblioteke van die Appèlafdeling van die Hooggeregshof in Bloemfontein, die hooggeregshof in Kaapstad, die universiteitsbiblioteek Kaapstad en die universiteitsbiblioteek Witwatersrand.

Ander biblioteke buite Nederland wat vermeld word, sluit in universiteits-, stads- en ander biblioteke in Skotland, Engeland, Frankryk, Italië, Spanje, Duitsland, die Verenigde State (Harvard, Yale, Princeton en die Library of Congress, Washington), België, Noorweë, Rusland en Switserland. Vanselfsprekend verhoog dit die bruikbaarheid van die bibliografie dramaties, byvoorbeeld vir die akademikus wat van plan is om oorsee historiese navorsing te doen en wat nou in staat is om die aanwesigheid van bepaalde werke in die stede wat besoek gaan word, selfs voor die vertrek met redelike sekerheid vas te stel. Die lys van biblioteke (tewens die lys van verkort aangehaalde literatuur) voor in die bibliografie is op sigself vir 'n regshistoriese navorser nuttig. Die bibliografie bevat ook 'n nuttige lys van drukkers en uitgewers en van persoonsname (Leiden en Utrecht onderskeidelik).

Die volgende Utrechtse juriste is in hierdie bibliografie opgeneem: Henricus Johannes *Arntzenius*, Herman *Arntzenius*, Pieter *Bondam*, Cornelis *van Eck*, Cornelius Adrianus *Enschut*, Friedrich Gottfried *Houck*, Antonius *Matthaeus* [*II*], Hendrik *Moreelse*, Johannes *van Muyden*, Everardus *Otto*, Lucas *van de Poll*, Cyprianus *Regneri ab Oosterga*, Cornelis Wille *de Rhoer*, Pieter *Roscam*, Johan Gerhard Christiaan *Rücker*, Frederik *Saxe*, Christiaan Hendrik *Trotz*, Meinard *Tydeman*, Paulus *Voet*, Jacobus *Voorda*, Johannes Henricus *Voorda*, Abraham *Wieling*, Abraham *van Wyckersloot*. Dit is vanselfsprekend vir Suid-Afrikaanse juriste belangrik om hierdie gesaghebbende bibliografie van werke deur invloedryke skrywers soos Matthaeus II beskikbaar te hê, maar die nut van die bibliografie ten aansien van ander juriste soos Arntzenius, (die ander) Voet, Voorda en Wieling moet nie onderskat word nie.

Juriste wat reeds oor die Leidse bibliografie beskik en dit gebruik, sal weet hoe nuttig en tydbesparend hierdie werk is, en met die Utrechtse bibliografie stel Ahsmann en haar medewerkers 'n goeie aanvulling tot die Leidse bibliografie aan navorsers beskikbaar. Vir regsnavorsers wat (selfs net van tyd tot tyd) regshistoriese bronne gebruik, is hierdie bibliografie, soos sy voorganger, 'n onmisbare hulpmiddel. Afgesien van die moeite en tyd wat dit kan bespaar vir die navorser wat 'n oorsese reis beplan, is die tweede aflewering vanweë die verwysings na plaaslike biblioteke selfs vir binnelandse navorsing bruikbaar. Hierdie aspek van die werk onderstreep opnuut die dringende behoefte aan 'n omvattende bibliografie van regshistoriese bronne in Suid-Afrikaanse biblioteke, of minstens aanvullings by die bestaande bibliografieë van die Universiteite van die Witwatersrand en Kaapstad.

Hierdie bibliografie (en sy Leidse voorganger) word ten sterkste aanbeveel by alle regsnavorsers wat regshistoriese bronne raadpleeg. Beide aflewerings is beskikbaar by die Afdeling Edita van die Koninklijke Nederlandse Akademie van Wetenschappen, Postbus 19121, 1000 DG Amsterdam (faks 09 27 20 6204941).

AJ VAN DER WALT
Universiteit van Suid-Afrika

CASES AND MATERIALS ON CRIMINAL LAW
by JRL MILTON and JM BURCHELL
Juta Cape Town Wetton Johannesburg 1992; 752 pp
Price R112,00 (soft cover)

The publication of Milton and Burchell's *Cases and materials on criminal law* (hereafter referred to as the *Casebook*) was foreshadowed in Burchell and Milton's *Principles of criminal law* (1991) (hereafter referred to as *Principles*) in which there is a cross-reference to the relevant cases and materials in the *Casebook*. The main aim of the *Casebook* is to provide the students of criminal law with a "portable library" (see the Preface v) and, secondly, to provide the law teacher with the means of adopting the Socratic or case-book method of teaching criminal law. It is obviously not the intention to assist the practitioner who owes it to his client to read the whole report of a case and not just selected extracts which, depending on the nature of his case, may or may not be apposite. This, of course, should also be the aim of all students of criminal law. However, the overall number of law students continues to increase each academic year which puts an intolerable strain on existing library resources and, for this reason alone, a comprehensive casebook is indispensable.

The decision to publish the *Casebook* by using a cheaper quality of paper was a wise one. This makes it possible to include many more cases and materials than would otherwise have been possible, and at an affordable price. It just would not be possible for a student who has the time and the resources to collect together all the cases and materials cited in the 752 pages of the *Casebook* for himself at a cost of R112,00. For this reason alone the *Casebook* is excellent value.

Another wise decision was to publish all the cases and materials in the *Casebook* in English. This also made it possible to cite many more cases and materials than would otherwise have been possible. If the Afrikaans judgments had been cited in the original language together with an English translation, this would have added enormously to the costs of publication. In addition, the decision to publish all cases and materials in the one language was motivated by Milton and Burchell in their Preface at v by the contention that "[s]tudents whose mother tongue is not Afrikaans will seldom attempt to read the reported cases in which judgment is delivered in that language".

The *Casebook* has the advantage that it relieves the authors of having to cite copious extracts from the cases and statutes they have cited in their companion textbook, the *Principles*. The cross-referencing is generally clear and easy to follow (but see below for possible improvement). The traditional treatment of the general principles of criminal law and the classification of the common-law crimes virtually make it obvious which cases and materials need to be cited and it would seem that there are no glaring omissions in this regard. The only quibble that one might have, is with the decision of the authors as to which portions of the judgment ought to be cited in the *Casebook* and which left out. But the answer to this problem, if it is indeed a problem, would be to read the law report itself!

The *Casebook* is highly recommended to students and teachers of criminal law and it achieves the aims that the authors had in mind. I would, however, venture the following suggestions in order to make future editions even more user-friendly:

(a) The keen student who wants to read the law report – and as mentioned above, this should always be encouraged – might want to know the page references of the law

report from which the extracts have been cited. It would, therefore, be useful to cite the relevant page references in brackets after each citation.

(b) The mode of citation of the cases in the *Casebook* and in the *Principles* is not uniform. In the Table of Cases in the *Principles* the cases are cited alphabetically regardless of whether they are post- or pre- May 1961, whereas in the *Casebook* the majority of the cases cited in the Table of Cases are to be found under "R" or "S". It would be preferable to use the approach adopted in the *Principles* in the *Casebook* as well.

(c) In the Table of Cases in the *Casebook* the references given are to the page numbers. But when one refers to the case at the page number given in the Table of Cases, one sometimes finds that a cross-reference to that case elsewhere in the *Casebook* will be to the case number of that case rather than to the page number; see, for example, the reference to the case of *Chretien* in the Table of Cases: it refers the reader to page 212 (it should be 211 and does even mention the reference at page 3). The reference to *Chretien* at page 3 does not refer the reader to the extract cited at page 211; it merely refers the reader to # 97. If one were to turn directly to the reference at page 211, one would not know that another extract from the same case is to be found at page 3. Instead of using the cross-reference " # . . . ", it would have been more helpful to cross-reference to the page of the *Casebook*. It is far easier to flip over the pages of a book to the correct page rather than to look for the case number.

I trust these few comments will not be seen as criticisms but, rather, as suggestions. I, for one, make a habit of taking with me to lectures a copy of Milton and Burchell's *Casebook* and I encourage my students to do the same.

I SCHÄFER
Rhodes University

AMLER'S PRECEDENTS OF PLEADINGS

by LTC HARMS assisted by JH HUGO

Fourth edition; Butterworths Durban 1993; 417 pp

Price R213,18

The fourth edition of this work has appeared less than four years after the previous edition. Before even touching on content, may one be permitted to reflect on the shocking effect of inflation? The previous edition cost a mere R120 – granted GST, as it was then known, was excluded.

The third edition of this work was a welcome and long overdue overhaul of the second edition. Apart from including the numerous changes to South African law which had been made over this period, the format of the work was changed to include fuller notes and fewer precedents. The time lapse of more than twenty years between these two editions meant that the third edition rendered the second edition obsolete. The same cannot be said of the fourth edition.

As far as content is concerned, two legislative changes have been included in the precedents. The first, and most far-reaching, is the Multilateral Motor Vehicle Accidents Fund Act of 1989. The promulgation of this act necessitated major amendments to the precedents for motor vehicle accident claims. Unfortunately, these precedents are still

not completely up to date. The prescribed notice period provided for in article 63 of the schedule to the act was amended by Proc 102 of 1991 with effect from 1 November 1991 and the reference to a 90-day notice period in the claim precedent is therefore no longer correct. Secondly, section 6(a) of the Domicile Act of 1992 amended section 2(1) of the Divorce Act of 1979 which deals with jurisdiction in actions for divorce. A note setting out these new jurisdictional provisions has been included. However, it would have been helpful had reference been made to the fact that a married woman is now competent to acquire a domicile of choice and that more than one court can therefore exercise jurisdiction on the basis of domicile within its area by either of the parties. This is a complete departure from the previous domicile of dependence of married women; although the Divorce Act, prior to its amendment, also referred to the domicile of the wife, this in fact referred to the husband's domicile. (In passing: the act as amended retains the traditional concept of only two parties to a marriage and refers to the domicile or residence of "either of the parties". The authors seem to hold a more liberal view and state that the domicile or residence of "any one of" the parties will vest a court with jurisdiction.)

Three further brief headings have been added to the text. One deals with pleas of payment, another with the prayers for relief which must end any pleading and the last contains a useful precedent of a stated case. Recent judicial decisions have also been included in the text.

Two welcome changes have been made to the format of the fourth edition. A full table of contents has been included which sets out the various headings under which a topic might be covered in the contents. For the first time it is now possible to decide what headings might be relevant to a given topic at a glance. Additional cross-referencing has been included and appears under a sub-heading "Related subjects" in each heading. This will greatly facilitate the search for relevant precedents.

Although this textbook is essential for practitioners and students who are required to draft pleadings, it is debatable whether the changes detailed above necessitated the appearance of a fourth edition so soon after publication of the third edition.

RA KELBRICK
University of South Africa

FARM LABOUR: A GUIDE TO BASIC LABOUR LAW IN THE AGRICULTURAL SECTOR

by A DE JAGER and C WILD

Juta Cape Town Wetton Johannesburg 1993; 122 pp

Price R48,00

This book is available in both English and Afrikaans (*Plaasarbeid: 'n handleiding van die basiese arbeidsreg in die landbousektor*). As indicated by the title, it is intended as a guide to basic labour law in the agricultural sector. It is directed at farmers, farm workers, trade unionists, students and lawyers.

The book is divided into three parts. The first deals with the common law, the employment contract and the statutes which are applicable to the employment relationship. Part

two, which is labelled "Administrative systems", contains a number of registers designed to record, for example, annual and sick leave, wages, absence and disciplinary issues. The final part contains a number of "Standard agreements", such as a contract of service, notice of termination of the service contract, and agreements to deduct wages, to work overtime or to extend working hours.

In part one, the authors provide a basic explanation of the existence of a contract of service and the consequences at common law of such a contract for employers and employees. They then explain the relationship between common law and legislation, before going on to discuss the provisions of the Basic Conditions of Employment Act and the Unemployment Insurance Act. The discussion of legal principles is probably as simple as one can make it for the lay person, and should be understood by farmers and unionists. It will probably be beyond the grasp of most farm workers, but may serve as a useful guide for unionists and others wishing to educate those workers.

The registers contained in part two of the book, together with the explanation preceding each one, provide the parties with a useful synopsis of their legislative obligations as well as a convenient method of record-keeping.

As mentioned above, part three contains a number of standard contracts which the parties may utilise. The service contract, which is undoubtedly the most significant agreement entered into between the parties, is somewhat employer-orientated. It provides, for example, that "the *employer retains the right* to determine working hours"; "the *employer* undertakes to grant the employee x days annual leave *at a day which he deems fit*" (emphasis added). Farmworkers and their unions should therefore be wary of utilising the contract as it stands.

CAROL LOUW
University of South Africa

THE NATIONAL BUILDING REGULATIONS — AN EXPLANATORY HANDBOOK

by CJ FREEMAN

Second edition; Juta Cape Town Wetton Johannesburg 1990; 402 pp

Price R112,00 (soft cover)

The National Building Regulations were introduced by section 17(1) of the National Building Regulations and Building Standards Act 103 of 1977, as amended, and came into effect on 1 September 1985, replacing the building regulations and by-laws of individual local authorities with a uniform set of rules applicable in South Africa. The first edition of this work dealt with the 1985 regulations which were subsequently withdrawn and replaced by new National Building Regulations in 1988.

The 1988 regulations are now almost entirely functional and the deemed-to-satisfy requirements, originally contained in schedules to the regulations, are now embodied in a separate document, *SABS 0400, Code of practice for the application of the National Building Regulations*. The code is a non-statutory document which contains technical information necessary for the practical application of the regulations. Freeman has

included in this second edition all the amendments which were promulgated since publication of the first edition of this work, making for a considerably expanded edition.

The book comprises three distinct divisions: first the act, followed by the regulations and finally the code. The act, the regulations and the code are of a technical nature which make the explanations, notes and illustrations provided by the author invaluable to anyone concerned with their implementation. Furthermore, he has also referred to material which did not exist when the first edition was published, for example, regulations governing facilities for disabled persons, the Review Board Regulations and other regulations made under the Machinery and Occupational Safety Act 6 of 1983.

Freeman is to be congratulated on this publication which should prove invaluable to anyone concerned with the interpretation of the building regulations, act and code.

L HAWTHORNE
University of South Africa

Since prisons are intended primarily as places of punishment and rehabilitation of criminals it is inevitable, even in a comparatively enlightened era, that the pattern of existence for the inmates of a prison will largely be bleak, cheerless and uncomfortable. It is true that prison conditions have much improved since the age when the lot of the average prisoner was one of deliberate maltreatment and degradation. But while in general social changes have ameliorated conditions of detention, one fundamental feature of prison life persists. The prisoner is still very largely at the mercy of his gaolers. It is this fact which in the development of our law lends particular significance to the decision in [*Whittaker v Roos and Bateman* 1912 AD 92, *per* Innes JA].

The Innes dictum *serves to negate the parsimonious and misconceived notion that upon his admission to a gaol a prisoner is stripped, as it were, of all his personal rights; and that thereafter, and for so long as his detention lasts, he is able to assert only those rights for which specific provision may be found in the legislation relating to prisons, whether in the form of statutes or regulations. The Innes* dictum *is a salutary reminder that in truth the prisoner retains all his personal rights save those abridged or prescribed by law* (*per* Hoexter JA in *Minister of Justice v Hofmeyr* 1993 3 SA 131 (A) 141).

VOORWOORD

Die Bestuur van die Vereniging Hugo de Groot het by die Vereniging se jaarvergadering gedurende Januarie vanjaar besluit dat een uitgawe van die *Tydskrif* in 1994 in die besonder gewy moet word aan die nuwe oorgangsgrondwet, Die Grondwet van die Republiek van Suid-Afrika 200 van 1993, wat op 27 April 1994 in werking getree het. Langs hierdie weg poog die *Tydskrif* om 'n bydrae tot die bekendstelling van en debat oor die Grondwet te lewer. Hierdie uitgawe bevat dan ook 'n bespreking van verskillende aspekte van die Grondwet. Omdat daar egter so 'n magdom onderwerpe is waaraan aandag gegee kan word, is dit onvermydelik dat nie alle aspekte gedek word nie. Om hierdie rede is daar besluit om vooraf baie kortliks die *fundamentele regte* wat in die Grondwet verskans word, en die *grondwetlike beginsels* wat die grondslag van die "finale teks" van die Grondwet moet uitmaak, weer te gee. Sodoende kan minstens wat hierdie aller-belangrike onderwerpe betref, 'n geheelbeeld gevorm word.

Die fundamentele regte

Die fundamentele regte word in hoofstuk 3 vervat. Die hoofstuk is van toepassing op alle reg van krag en alle administratiewe besluite geneem gedurende die tydperk waarin die Grondwet in werking is (a 7(2)). Met ander woorde, dit het nie betrekking op administratiewe handelinge wat verrig is voordat die Grondwet in werking getree het nie. *Regspersone* word oor dieselfde kam as natuurlike persone geskeer vir sover die aard van die fundamentele regte hulle vatbaar daarvoor maak (a 7(3)) – daarom sal byvoorbeeld die reg op lewe nie 'n regspersoon toekom nie maar die reg op privaatheid wel. Die fundamentele regte mag deur ander algemeen geldende reg *beperk* word, maar net in die mate waarin die beperking redelik is, regverdigbaar is in 'n oop en demokratiese samelewing gebaseer op vryheid en gelykheid, en die wesenlike inhoud van 'n fundamentele reg nie ontken word nie (a 33(1)). Verder word voorsiening gemaak vir *opskorting* van sekere fundamentele regte ten tyde van 'n *noodtoestand* wat kragtens 'n parlementswet verklaar is (a 34).

By die *uitleg* van die bepalings van hoofstuk 3, moet 'n hof waardes bevorder wat 'n oop en demokratiese samelewing gebaseer op vryheid en gelykheid ten grondslag lê. Boonop moet 'n hof relevante volkereg by hierdie uitleg in ag neem, en het 'n diskresie om vergelykbare buitelandse hofbeslissings te oorweeg (a 35(1)). Baie belangrik is voorts dat 'n hof by die uitleg van enige wet of by die toepassing en ontwikkeling van die gemenereg en die gewoontereg, die gees, strekking en oogmerke van hoofstuk 3 behoorlik in ag moet neem (a 35(3)).

Die fundamentele regte wat uitdruklik beskerm word, is die volgende:

- Die reg op gelykheid (a 8(1)). Diskriminasie op grond van ras, geslagtelikheid, geslag, etniese of sosiale herkoms, kleur, seksuele georiënteerdheid, ouderdom, gestremdheid, godsdiens, gewete, geloof, kultuur of taal word spesifiek verbied, maar daar word ook gesê dat die lys nie 'n *numerus clausus* uitmaak nie (a 8(2)). Verder word ook vir die regsgeldigheid van regstellende aksie voorsiening gemaak (a 8(3)).
- Die reg op lewe (a 9). Niks word gesê oor byvoorbeeld die doodvonnis of aborsie nie.

- Die reg op waardigheid (a 10). Hierdie reg behoort alle persoonlikheidsregte te omvat wat nie andersins uitdruklik as fundamentele regte erken word nie (sien ook *infra* 516 ev).
- Die reg op vryheid en sekuriteit van die persoon, met inbegrip van die reg om nie sonder verhoor aangehou te word, of om nie gemartel te word of aan wreedaardige, onmenslike of vernederende behandeling onderwerp te word nie (a 11).
- Die reg om nie aan slawerny of dwangarbeid onderwerp te word nie (a 12).
- Die reg op privaatheid (a 13).
- Die reg op vryheid van gewete, godsdiens, denke, oortuiging en opinie, waarby akademiese vryheid aan instellings van hoër onderrig inbegrepe is (a 14(1)). Erkenning word ook verleen aan stelsels van persone- en familiereg wat nagevolg word deur persone wat 'n besondere godsdiens aanhang (a 14(2)).
- Die reg op vryheid van spraak en uitdrukking, met inbegrip van vryheid van die pers en ander media, en vryheid van artistieke kreatiwiteit en wetenskaplike navorsing (a 15).
- Die reg om vreedsaam en ongewapen saam met ander te vergader en te betoog, en om petisies voor te lê (a 16).
- Die reg op vryheid van assosiasie (a 17).
- Die reg op vryheid van beweging oral in die nasionale grondgebied (a 18).
- Die reg om vrylik 'n verblyfplek binne die nasionale grondgebied te kies (a 19).
- Die reg van elke burger om die Republiek binne te kom, daarin te bly en dit te verlaat, en om nie sonder regverdiging sy of haar burgerskap ontneem te word nie (a 20).
- Politieke regte, soos die reg om 'n politieke party te stig, lede daarvoor te werf, en so meer; die reg van elke burger om te stem, dit in die geheim te doen en om hom of haar vir 'n openbare amp verkiesbaar te stel (a 21).
- Die reg om beregbare geskille deur 'n geregshof of ander onafhanklike en onpartydige forum te laat besleg (a 22).
- Die reg op toegang tot inligting wat deur die staat of 'n staatsorgaan gehou word, vir sover die inligting nodig is vir die beskerming van 'n persoon se regte (a 23).
- Die reg op administratiewe geregtigheid (a 24; sien hieroor *infra* 467 ev).
- Regte van aangehoudenes, gearresteerdes en beskuldigdes ('n bepaling wat in besonderhede voorsiening maak vir "due process") (a 25; sien ook *infra* 487 ev).
- Die reg om vrylik aan die ekonomiese verkeer deel te neem, met dien verstande dat sekere beheermaatreëls geneem mag word om doelstellings soos ekonomiese ontwikkeling, sosiale geregtigheid, billike arbeidspraktyke en so meer te bevorder (a 26).
- Die regte van sowel werkers as werkgewers (op billike arbeidspraktyke, om by vakbonde of werkgewersorganisasies onderskeidelik aan te sluit, kollektief te beding, vir doeleindes van kollektiewe bedinging te staak, en so meer) (a 27; sien ook *infra* 498 ev).
- Die reg om regte in eiendom te verkry en om nie sonder regverdige vergoeding onteien te word nie (a 28).

- Die reg van elkeen op 'n omgewing wat nie nadelig vir sy of haar gesondheid of welsyn is nie (a 29; sien ook *infra* 481 ev).
- Die regte van kinders op 'n naam en nasionaliteit, op ouerlike sorg, sekuriteit, basiese voeding en gesondheids- en maatskaplike dienste, om nie mishandel of verwaarloos te word of aan uitbuitende arbeidspraktyke onderwerp te word nie. Kinders wat in aanhouding is, moet in omstandighede aangehou word wat rekening hou met hul ouderdom (a 30).
- Taal- en kultuurregte (a 31).
- Die reg van elkeen (nie net kinders nie) op basiese onderwys en gelyke toegang tot onderwysinstellings; waar dit redelik uitvoerbaar is, op onderrig in die taal van sy of haar keuse; om onderwysinstellings gebaseer op 'n gemeenskaplike kultuur, taal of godsdiens tot stand te bring waar dit uitvoerbaar is, en mits daar nie op grond van ras gediskrimineer word nie (a 32).

Grondwetlike beginsels van die oorgangsgrondwet

Die partye wat oor die oorgang na 'n nuwe Suid-Afrikaanse Grondwet onderhandel het, het besluit dat 'n stel beginsels waarop alle (of feitlik alle) partye ooreengekom het, 'n vaste basis vir 'n toekomstige grondwet sou vorm. Sodanige beginsels is inderdaad opgestel en saamgevat in 'n sogenaamde "plegtige ooreenkoms" (*solemn pact*). Kragtens artikel 71(2) van die Grondwet moet die konstitusionele hof sertifiseer dat die nuwe grondwetlike teks wat deur die Grondwetgewende Vergadering aangeneem word, voldoen aan die volgende grondwetlike beginsels wat in bylae 4 van die Grondwet vervat word:

- Die Grondwet maak voorsiening vir die instelling van een soewereine staat, 'n gemeenskaplike Suid-Afrikaanse burgerskap en 'n demokratiese regeringstelsel wat daartoe verbind is om gelykheid tussen mans en vroue en persone van alle rasse te bewerkstellig (I).
- Elkeen beskik oor alle universeel aanvaarde fundamentele regte, vryhede en burgerlike vryhede waarvoor daar voorsiening gemaak moet word en wat deur verskanste en beregbare bepalings in die Grondwet beskerm moet word (II).
- Ras-, geslags- en alle ander vorme van diskriminasie word verbied en ras- en geslagsgelykheid en nasionale eenheid bevorder (III).
- Die Grondwet is die hoogste reg van die land. Dit bind alle staatsorgane op alle regeringsvlakke (IV).
- Die regstelsel verseker gelykheid voor die reg en 'n regverdige regsproses. Gelykheid voor die reg sluit in wette, programme of bedrywighede wat gerig is op die verbetering van die omstandighede van die benadeeldes, met inbegrip van dié wat op grond van ras, kleur of geslag benadeel is (V).
- Daar moet 'n verdeling van magte wees tussen die wetgewende, uitvoerende en regsprekende gesag, met gepaste wigte en teenwigte ten einde verantwoording, verantwoordbaarheid en openheid te verseker (VI).
- Die regsprekende gesag moet oor die toepaslike kwalifikasies beskik, moet onafhanklik en onpartydig wees en moet beskik oor die gesag en jurisdiksie om die Grondwet en alle fundamentele regte te beskerm en af te dwing (VII).
- Die regering moet verteenwoordigend wees; dit beteken 'n veelpartydemokrasie, gereelde verkiesings, universele volwasse stemreg, 'n gemeenskaplike kieserslys en, in die algemeen, proporsionele verteenwoordiging (VIII).

● Daar moet vryheid van inligting wees sodat daar toeganklike en verantwoordelike administrasie op alle regeringsvlakke kan wees (IX).

● Wetgewende organe op alle regeringsvlakke moet formele wetgewende prosedures nakom (X).

● Die verskeidenheid van taal en kultuur word erken en beskerm, en bevordering daarvan aangemoedig (XI).

● Kollektiewe selfbeskikkingsregte vir die stigting, samevoeging en instandhouding van organe van die burgerlike gemeenskap, met inbegrip van linguïstiese, kulturele en godsdienstige verenigings, word op 'n grondslag van vrye assosiasie en nie-diskriminasie erken en beskerm (XII).

● Die instelling, status en rol van tradisionele leierskap ooreenkomstig die inheemse reg moet in die Grondwet erken en beskerm word. Die inheemse reg moet soos die gemenereg deur die howe toegepas word, onderworpe aan fundamentele regte vervat in die Grondwet (sien *infra* 440 ev) en wetgewing wat spesifiek daaroor handel (XIII).

● Daar moet voorsiening gemaak word vir die deelname van politieke minderheidspartye aan die wetgewende proses op 'n wyse wat met 'n demokrasie in ooreenstemming is (XIV).

● Wysigings aan die Grondwet vereis spesiale prosedures, wat spesiale meerderhede insluit (XV).

● Beginsels XVI – XXVII handel oor provinsiale, streeks- en plaaslike regering. Demokratiese en verteenwoordigende regering op alle vlakke word beklemtoon; die magte, funksies en grense van provinsies geniet spesiale grondwetlike beskerming; die kriteria vir die afbakening van bevoegdhede tussen die nasionale en provinsiale regerings word in detail uitgespel; fiskale magte en bevoegdhede geniet groot prominensie ('n Finansiële en Fiskale Kommissie sal besluit oor die regverdige toewysing van fondse aan provinsiale en plaaslike regerings met inagneming van ekonomiese ongelykhede, bevolkings- en ontwikkelingsbehoeftes, administratiewe verantwoordelikhede ensovoorts). (Sien ook *infra* 461 ev.)

● Die reg van werkgewers en werknemers om by werkgewersorganisasies en vakbonde aan te sluit en om aan kollektiewe bedinging deel te neem, word erken en beskerm. Daar word voorsiening gemaak vir elke persoon se reg op billike arbeidspraktyke (XXVIII).

● Daar moet 'n onafhanklike en onpartydige Staatsdienskommissie, Reserwebank, Ouditeur-generaal en Openbare Beskermer (om die een of ander rede is hierdie benaming verkies bo dié van Ombud of Ombudsman) wees (XXIX).

● Daar moet 'n doeltreffende, onpartydige, loopbaangerigte staatsdiens wees wat verteenwoordigend van die breë Suid-Afrikaanse gemeenskap is en wat daartoe verbind is om die beleid van die regering van die dag lojaal uit te voer. Die reg op 'n regverdige pensioen vir staatsdienspersoneel word ook erken (XXX).

● Die veiligheidsmagte moet hulle pligte in nasionale belang uitvoer sonder om die belange van enige politieke party te bevorder of te benadeel (XXXI).

● Die Grondwet moet bepaal dat die nasionale uitvoerende gesag tot 30 April 1999 wesenlik op die wyse waarvoor daar in Hoofstuk 6 van die Grondwet voorsiening gemaak word, saamgestel moet word en funksioneer (XXXII).

- Die Grondwet moet bepaal dat, tensy die parlement weens die aanvaarding van 'n mosie van wantroue in die kabinet ontbind word, geen nasionale verkiesing voor 30 April 1999 gehou mag word nie (XXXIII).
- Laastens maak beginsel XXXIV voorsiening vir die erkenning van die reg op selfbeskikking van enige gemeenskap wat 'n gemeenskaplike kulturele en taalerfenis deel, hetsy in 'n territoriale entiteit binne die Republiek of andersins, mits daar bewese steun vir so 'n vorm van selfbeskikking is. Indien so 'n territoriale entiteit tot stand kom voordat die nuwe konstitusionele teks aangeneem is, moet die nuwe Grondwet die voortsetting van die entiteit en sy strukture, bevoegdhede en werksaamhede verskans.

JOHANN NEETHLING

GRONDWET VAN DIE REPUBLIEK VAN SUID-AFRIKA, 1993 **Wet No. 200, 1993**

AANHEF

In nederige erkentlikheid teenoor die Almagtige God,
Verklaar ons, die mense van Suid-Afrika:

NADEMAAL daar 'n behoefte bestaan om 'n nuwe bestel te skep waarin alle Suid-Afrikaners geregtig sal wees op 'n gemeenskaplike Suid-Afrikaanse burgerskap in 'n soewereine en demokratiese regstaat waarin daar gelykheid tussen mans en vroue en mense van alle rasse is sodat alle burgers in staat is om hulle fundamentele regte en vryhede te geniet en uit te oefen;

EN NADEMAAL ten einde die bereiking van hierdie oogmerk te verseker, verkose verteenwoordigers van al die mense van Suid-Afrika gemagtig moet word om 'n nuwe Grondwet aan te neem ooreenkomstig 'n plegtige ooreenkoms wat as die Grondwetlike Beginsels aangeteken staan;

EN NADEMAAL dit vir genoemde doeleindes nodig is dat voorsiening gemaak moet word vir die bevordering van nasionale eenheid en die herstrukturering en voortgesette regering van Suid-Afrika terwyl 'n verkose Grondwetlike Vergadering 'n finale Grondwet opstel;

(Afrikaanse teks deur die Staatspresident geteken.)
(Goedgekeur op 25 Januarie 1994.)

WORD DERHALWE die volgende bepalings aangeneem as die Grondwet van die Republiek van Suid-Afrika:

Tussentydse gedagtes oor die tussentydse Grondwet

Dawid van Wyk
BJur et Art LLM LLD
Professor in die Staats- en Volkereg, Universiteit van Suid-Afrika

SUMMARY

Interim thoughts on the interim Constitution

This article consists of two parts. The first contains a brief account of the development of the Constitution of the Republic of South Africa 200 of 1993. The emphasis falls on the period following the watershed speech in Parliament by the previous State President on 2 February 1990. Three stages are distinguished and discussed: from 2 February 1990 to CODESA; from CODESA to the start of the Multi-Party Negotiating Process (MPNP); and from the MPNP to 27 April 1994, the day of the first elections under the new Constitution.

The Constitution itself is discussed under the following headings: general features; the constitutional principles; fundamental rights and their protection; structures of government (at the national level: Parliament, the national executive and other institutions at the national level; the provincial level, including the further development of the system of provincial government; the local level; traditional authorities; and the Volkstaat Council); the judiciary; finance; transitional provisions; and the drafting of the final constitutional text.

The article is concluded with the observation that the Constitution forms a bridge between the past of apartheid and the democratic future, and that it should not be judged too harshly on its content and style. An appeal is made to all concerned to study the Constitution and submit comments and proposals to the Constitutional Assembly (Parliament).

1 INLEIDING

Die nuwe Suid-Afrika is uiteindelik daar, halfpad ten minste, grondwet en al. Op 27 April 1994, met die inwerkingtreding van die Grondwet van die Republiek van Suid-Afrika 200 van 1993 (soos tweemaal gewysig, behoort in hierdie besondere geval bygevoeg te word), is 'n streep getrek onder 84 jaar se moderne Suid-Afrikaanse konstitusionele geskiedenis. 'n Nuwe orde, waarop vele gewag het, is ingevoer. Die uitwerking daarvan op die Suid-Afrikaanse reg en regspraktyk sal wesenlik wees. Die sluitsteen van ons bestel sover, parlementêre soewereiniteit, is vervang. Soos in vele state is die Grondwet voortaan die hoogste reg. Anders as voorheen kan die howe nou wette van die parlement ongeldig verklaar indien hulle met die Grondwet bots. Die halwe ongemak waarmee daar in Suid-Afrikaanse handboeke en artikels met die "rule of law" omgegaan is, kan nou plek maak vir stellighede oor menseregte, hoër waardes en beperkings op staatsgesag. Kortom, die Suid-Afrikaanse staatsreg is in wese oorgeskryf.

Dit beteken nie dat alles verander het nie. Om die waarheid te sê, aspekte van die nuwe Grondwet herinner nogal sterk aan die gewraakte 1983-Grondwet. Of dit so bedoel was, is 'n kwessie van spekulasie.

Wat in hierdie bydrae beoog word, is om 'n beknopte oorsig te gee oor die ontstaan van die Grondwet en die opvallendste kenmerke daarvan ook kortliks op te som. Besonderhede, of 'n bespreking van die uitleg van die Grondwet, word doelbewus vermy.

2 ONTSTAAN VAN DIE GRONDWET

Presies waar die wortels van die nuwe Grondwet gesoek moet word, sal waarskynlik altyd 'n twisappel bly vir dié wat ernstig voel oor sulke vrae. Sommige sal beweer dit het by die hervormingsinisiatiewe van die Nasionale Party-regering begin; ander sal meer gemaklik daaroor voel as die historiese dag van 2 Februarie 1990, toe meneer FW de Klerk die wêreld vir 'n oomblik na sy asem laat snak het, as die eintlike begin van alles gesien word. Vir nog ander sal dit die "struggle" wees met 'n goeie dosis internasionale druk, laasgenoemde ook danksy die "struggle".

Dit is myns insiens nie van kritieke belang vir die begrip en uitleg van die Grondwet om hierdie historiese oorsprong noukeurig vas te stel nie. Daarmee word die feit dat die Grondwet 'n vermenging van bepaalde denkstrominge is, nie ontken of as minderwaardig afgemaak nie. Die Grondwet verteenwoordig egter so 'n grondliggende breuk met die staatsreg van die verlede, en is dermate die produk van onderhandeling en politieke spel die afgelope vier jaar, dat die uitleggers en toepassers daarvan eerder by vergelykbare ander stelsels moet gaan kers opsteek as by Suid-Afrikaanse presedente of sy verlede. Sulke ander stelsels word deesdae nie net meer in die Westerse wêreld aangetref nie, maar ook in Afrika (Namibië en Zimbabwe, byvoorbeeld) en Asië (veral Indië).

Omdat die Suid-Afrikaanse konstitusionele geskiedenis tot en met 2 Februarie 1990 bekend en berug genoeg is, en ook elders in besonderhede beskryf is,[1] word dit hier nie eens opsommenderwys weergegee nie. Waaroor wel 'n paar woorde gesê word, is die proses waardeur die Grondwet tot stand gekom het.

2 1 'n Kort voorgeskiedenis

Dit is duidelik uit meneer FW de Klerk se befaamde toespraak van 2 Februarie 1990 dat die regering van die dag besef het dat as sekere sake nie ernstig aangespreek word nie, die totale toestand in Suid-Afrika net sal bly versleg.[2] Dit was egter nie in die eerste plek sy verbintenis tot 'n onderhandelde politieke skikking en sy uitdruklike aanvaarding van die handves van regte wat die verskil begin maak het nie, maar die praktiese stappe wat deur die toenmalige staatspresident aangekondig is. Die verbod op die ANC, PAC, SAKP en 'n groot aantal ander organisasies is opgehef; politieke gevangenes sou vrygelaat word – meneer Nelson Mandela as die bekendste van almal sonder versuim; die streng noodmaatreëls wat reeds vir vyf jaar gegeld het, sou herroep of wesenlik verslap word, en die beperkings op 'n aantal organisasies wat die bevrydingsbewegings goedgesind was, sou opgehef word.

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1 Carpenter *Introduction to South African constitutional law* (1987) bevat gedetaileerde besprekings, terwyl haar intreerede "The changing face of South African public law" 1993 *SAPR/PL* 1 'n goeie oorsig bied oor die dryfsand van die Suid-Afrikaanse konstitusionele toneel.

2 Die volledige teks van die toespraak is in 1990 *Debatte van die parlement* kol 1 ev te vinde.

'n Gees van groot optimisme het gevolg, in Suid-Afrika en ook in die buitewêreld. Die ANC het gehoop dat daar teen die einde van 1990 reeds 'n nuwe grondwet en 'n nuwe regering sou wees. Die Nasionale Party was meer besadig in hulle beraming, maar het nogtans gereken dat onderhandelinge en 'n verkiesing binne ongeveer 18 maande agter die rug sou wees. Namate die politieke leiers egter met mindere of meerdere bedrewenheid die een struikelblok na die ander uit die weg begin ruim het, het die vroeë verwagtings gaandeweg plek gemaak vir die besef dat die oorgang na demokrasie in Suid-Afrika nie oornag gaan plaasvind nie. Afgesien van die suiwer konstitusionele vraagstukke het drie probleme die agenda oorheers: die vrylating van politieke gevangenes; toenemende geweld en wetteloosheid; en laastens die behoefte aan 'n verteenwoordigende onderhandelingsforum.

Die kwessie van die politieke gevangenes is redelik maklik opgelos. Die ander twee het egter brandend gebly tot aan die einde, met die verkiesing van April 1994. Geweld het onverpoosd bly voorkom, selfs toegeneem, en een van die grootste bedreigings vir die brose onderhandelingsproses geword. Ten spyte van talle pogings het sekere politieke bewegings, soos AZAPO en 'n aantal regse blanke organisasies, deurgaans geweier om aan die onderhandelinge deel te neem, of as hulle wel deelgeneem het, het van hulle in 'n stadium onttrek.

Die vier jaar tussen 2 Februarie 1990 en 27 April 1994 kan nou reeds as die eerste fase van 'n tweefase oorgang na 'n demokratiese orde beskryf word. Hierdie tydperk kan weer in drie periodes verdeel word: van 2 Februarie 1990 tot met die aanvang van KODESA aan die einde van Desember 1991;[3] van KODESA tot die begin van die Veelparty Onderhandelingsproses (VPOP) in Kempton Park in Maart 1993;[4] en laastens van die VPOP tot die verkiesing van 27 April 1994.

2 1 1 Die eerste fase: Februarie 1990 tot KODESA

'n Aantal struikelblokke moes uit die weg geruim word voordat konstitusionele onderhandelinge werklik op dreef kon kom. Die ANC en ander organisasies was pas "ontban" en moes hulle eie sake agtermekaar kry. Daarbenewens moes 'n proses van vertroueskepping tussen veral die ANC en die destydse regering plaasvind. Die 21 maande na Februarie 1990 is hierdeur in beslag geneem.

Die eerste formele vergadering tussen verteenwoordigers van die regering en die ANC het op 4 Mei 1990 te Groote Schuur plaasgevind. Die Groote Schuur Minuut wat daaruit voortgespruit het, was die eerste in 'n reeks dokumente met ooreenkomste en verstandhoudings wat die politieke roete na die onderhandelingstafel uitgestippel het.

Die kernpunte van die Groote Schuur Minuut was die beëindiging van die klimaat van geweld en 'n verbintenis tot stabiliteit en vreedsame onderhandelings. Meer spesifiek het dit gegaan oor die definisie van politieke misdade; immuniteit vir politieke oortreders; hersiening deur die regering van die bestaande veiligheidsmaatreëls; die opheffing van die noodtoestand; en die skep van effektiewe kommunikasiekanale tussen die regering en die ANC, veral met die oog op die bekamping van geweld en intimidasie.

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3 Moss en Obery (reds) *South African Review 6. From 'Red Friday' to Codesa* (1992) gee 'n breë oorsig oor hierdie tydperk.

4 'n Goeie weergawe en ontleding van die KODESA-proses is in Friedman (red) *The long journey, South Africa's quest for a negotiated settlement* (1993) te vinde.

Die Groote Schuur Minuut is opgevolg met twee verdere ooreenkomste, die Pretoria Minuut van 6 Augustus 1990 en die DF Malan Akkoord van Februarie 1991. Volgens die Pretoria Minuut word die ondernemings ingevolge die Groote Schuur Minuut bevestig en in sekere opsigte verder gevoer (politieke gevangenes, geweld, die noodtoestand wat nog in Natal gegeld het en ander veiligheidsmaatreëls). Twee nuwe punte was die ANC se opsegging van die gewapende stryd en die skep van effektiewe kanale op nasionale, streek- en plaaslike vlak om "openbare griewe" effektiewer aan te spreek. Die Minuut verklaar ten slotte dat die weg voorberei is vir politieke onderhandelinge en dat verkennende gesprekke spoedig sou begin.

Die DF Malan Akkoord, vernoem na die lughawe in Kaapstad waar dit aangegaan is, het spesifieke onduidelikhede wat uit paragraaf 3 van die Pretoria Minuut ontstaan het, opgeklaar. Die onderwerp was die opsegging van die ANC se gewapende stryd. Soos in die geval van die vorige twee Minute was die donker ondertone van geweld ook duidelik in hierdie dokument te bespeur.

Die eerste gekoördineerde poging om die geweld te besweer, het op 14 September 1991 gestalte gekry toe die Nasionale Vredesakkoord te midde van groot publisiteit deur 'n verteenwoordigende getal politieke leiers onderteken is.[5] Die netwerk van strukture wat ingevolge die Akkoord op die been gebring is, het grootliks bygedra tot die momentum van politieke onderhandelinge. Kort voor kersfees 1991, byna twee jaar na die groot toespraak van 2 Februarie 1990, het 'n groot genoeg getal politieke organisasies die punt bereik waar hulle oor 'n grondwet kon begin onderhandel.

2 1 2 Die tweede fase: KODESA tot die begin van die VPOP

Die eerste rondte van onderhandelinge, bekend as KODESA (Konvensie vir 'n Demokratiese Suid-Afrika) het by die Wêreldhandelsentrum in Kempton Park plaasgevind. Dit sou nie die finale rondte wees nie. By nabaat blyk dit dat KODESA nie ryp was vir 'n politieke skikking nie. In der waarheid was dit die openingsronde en 'n oefenlopie vir wat sou kom.[6]

Verskeie redes kan ter stawing van hierdie stelling aangevoer word. Aan die een kant het politiek 'n rol gespeel. 'n Blitsreferendum moes in Maart 1992 onder blankes gehou word om die opvatting dat 'n toenemende getal blankes hulle teen die koers van ontwikkelinge begin verset, uit die weg te ruim. Aan die ander kant het die struktuur van KODESA nie veel daartoe bygedra om onderhandelinge te vergemaklik nie.

Na die eerste voltallige sitting is vyf werkgroepe op die been gebring om oor verskillende aspekte te onderhandel. Elke werkgroep het uit twee afgevaardigdes en twee adviseurs per deelnemende organisasie bestaan. Met 19 organisasies teenwoordig het dit byna 100 persone per werkgroep beteken. Dit kon net nie bevredigend werk nie.

Die opdragte van die werkgroepe het ook probleme opgelewer.[7] Enersyds was hulle wydlopend, andersyds was die groepe onder geweldige druk om hulle taak binne enkele maande af te handel. Die mate van sukses maar ook frustrasie

5 Vgl hieroor Levine (red) "Human rights index" 1992 *SAJHR* 146-147.
6 Vgl Friedman 171-172 vn 4.
7 Die opdragte van al die werkgroepe is in 1992 *SAJHR* 126-134 herdruk.

van die werkgroepe kon duidelik uit die verslae aan KODESA 2 bespeur word.[8]

KODESA het sy eie prosedurereëls gehad. 'n Belangrike maar omstrede aspek, wat ook oorgedra is op die VPOP en wat heelwat spanning veroorsaak het, was die vereiste vir besluitneming. Konsensus moet bereik word, by gebrek waaraan 'n besluit op grond van "genoegsame konsensus" aanvaar sou word. Volgens paragraaf 3(3) van die "Standing Rules of Procedure for Plenary Sessions" sou genoegsame konsensus bestaan "when consensus is of such a nature that the work of the Convention can move forward effectively". Veral die Inkatha Vryheidsparty het ernstige bedenkings oor "genoegsame konsensus" gehad.

Die politieke uitwerking van die mislukking van KODESA was omtrent rampspoedig met verwyte en beskuldigings na alle kante. 'n Dun straal van hoop het egter bly bestaan met intensiewe kontak tussen die hoofonderhandelaars van die regering en die ANC. Na 'n vergadering in Kempton Park tussen menere Mandela en De Klerk het 'n omstrede dokument, in die omgang bekend as die "Record of Understanding", op 26 September 1992 die lig gesien. Ondanks ontkennings aan beide kante was dit duidelik dat die "verstandhoudings" in hierdie geskrif in werklikheid ooreenkomste tussen die ANC en die regering was in 'n poging om onderhandelinge weer aan die gang te kry.

Die belangrikste punte van ooreenstemming in die "Record" was dat die nuwe grondwet deur 'n verkose grondwetskrywende liggaam opgestel sou word en dat daar konstitusionele kontinuïteit sou wees. Met die oog hierop sou die grondwetskrywende vergadering ook as tussentydse parlement dien.

Een van die gevolge van die "Record of Understanding" was die vorming van die Groep Besorgde Suid-Afrikaners (beter bekend as COSAG – Concerned South Africans Group). Ofskoon hierdie groepering van sogenaamde regse blankes en behoudende tuislande (KwaZulu, Bophuthatswana en Ciskei) daarna meerdere gedaante- en naamsverwisselinge ondergaan het, het dit wesenlik daartoe bygedra dat die verset teen die rigting van onderhandeling binne en buite die formele strukture beter georganiseer is.

'n Verdere gevolg van die "Record of Understanding" was dat die VPOP in Maart 1993 op dreef gekom het.

2 1 3 Die derde fase: die VPOP tot die verkiesing van April 1994

Soos KODESA het die VPOP in Kempton Park plaasgevind. Ofskoon dit nie formeel as die opvolger van KODESA gesien is nie, is die verslae van die KODESA-werkgroepe tog as verwysingspunte beskou.

Met 26 deelnemende partye en organisasies was die VPOP meer verteenwoordigend as KODESA. Die VPOP was ook beter gestruktureer in 'n piramidale vorm. Die voltallige sitting, wat net een keer in November 1993 plaasgevind het, het 10 lede per afvaardiging gehad. Die Onderhandelingsforum, wat na sy eerste vergadering in Julie 1993 besluit het om nie weer te vergader nie, het ses lede per afvaardiging gehad, terwyl die Onderhandelingsraad uit twee afgevaardigdes en twee adviseurs per deelnemende organisasie bestaan het. Die masjienkamer van die proses was die Beplanningskomitee, 'n klein liggaam deur

8 Vgl *Working documents for CODESA 2. 15 & 16 May 1992* bd 1 en 2.

die Onderhandelingsraad gekies, wat agter geslote deure vergader het. 'n Dagbestuur ("Daily Management Committee") wat aanvanklik uit drie, en na die onttrekking van die IVP aan die begin van Julie, uit net twee lede bestaan het, was verantwoordelik vir die gladde administratiewe verloop van die proses. Dit is nou bekende geskiedenis dat die Onderhandelingsraad, wat openbare sittings gehou het, en die Beplanningskomitee die sleutel tot die sukses van die proses was. Hulle is hierin gesteun deur sewe tegniese komitees wat hoofsaaklik uit akademiese regsgeleerdes, praktisyns en beamptes bestaan het.

'n Noemenswaardige kenmerk van die VPOP wat uit KODESA oorgekom het, was die wyse waarop die posisie van vroue van meet af aan hanteer is. Die uitwerking daarvan was nie net in die strukture van die VPOP sigbaar nie, maar ook in die Subraad op die Status van Vroue van die Uitvoerende Oorgangsraad[9] en die Kommissie op Geslagsgelykheid in die Grondwet.[10]

Soos in die geval van KODESA, is besluite deur middel van konsensus of genoegsame konsensus geneem. Die IVP en die KwaZulu Regering het hulle steeds hierteen verset, in so 'n mate dat hulle dit in Augustus 1993 in die Hooggeregshof aangeveg het, maar sonder sukses (sien *infra* 519 ev). In die praktyk het dit beteken dat indien die regering of die ANC nie saamgestem het met 'n besluit nie, genoegsame konsensus onwaarskynlik was. Dit was egter nie 'n waterdigte reël nie.

Die VPOP het ongeveer agt maande geduur, ofskoon die Onderhandelingsraad tot kort voor die verkiesing van 1994 nog 'n keer moes vergader om verdere wysigings aan die Grondwet goed te keur. Gedurende die agt maande is vyf wetsontwerpe en die grondwetteks onderhandel. Die eerste vier wetsontwerpe het betreklik vinnig gekom: dié op die Onafhanklike Mediakommissie, die Onafhanklike Uitsaai-owerheid, die Onafhanklike Verkiesingskommissie en die Uitvoerende Oorgangsraad.[11] Hierdie wetsontwerpe is gedurende 'n kort sitting van die parlement in September 1993 aangeneem. Die Kieswetsontwerp en die grondwetteks het langer geneem en is eers in November deur die parlement. Selfs toe was hulle nie afgehandel nie. Albei is aan die einde van Februarie 1994 gewysig terwyl die Grondwet twee dae voor die inwerkingtreding daarvan op 27 April 1994 'n tweede keer gewysig is in 'n poging om die IVP se deelname aan die verkiesing te verseker.

2 2 Die oorgang

Twee verwante vrae het die vroeë stadium van die onderhandelingsproses oorheers: enersyds, wie die grondwet sou skryf, en andersyds hoe die bestaande regerings en regeringstrukture verhinder sou word om politieke voordeel uit die onderhandelingsproses te trek as gevolg van hulle toegang tot openbare fondse. Die geregverdigde vrees het bestaan dat veral die sentrale regering onbehoorlik begunstig sou word deur 'n dubbele rol as speler en skeidsregter, soos dit genoem is.

Daar was 'n duidelike behoefte aan oorgangsmaatreëls. Die ANC en sy aanhangers in die onderhandelingsproses het van meet af aan 'n tweefase oorgang in gedagte gehad. Die eerste fase sou eindig met die verkiesing van 'n grondwetskrywende vergadering; die tweede fase sou die grondwetskrywing self wees.

9 A 8(1)(f) gelees met a 19 van die Wet op die Uitvoerende Oorgangsraad 151 van 1993.
10 A 119-120.
11 Onderskeidelik Wet 152, 153, 150 en 151 van 1993.

Volgens 'n vroeër beraming sou die hele proses net meer as 'n jaar duur.[12] Die Suid-Afrikaanse regering, gesteun deur veral die IVP, het 'n enkelfase oorgang voorgestaan. KODESA sou die grondwet opstel en daarna sou 'n verkiesing ingevolge die grondwet plaasvind.

Selfs tydens KODESA was dit duidelik dat 'n enkelfase oorgang nie haalbaar was nie en is deur al die partye aanvaar dat daar minstens twee fases sou wees. Voordat besonderhede egter uitgewerk kon word, het KODESA op 'n dooiepunt uitgeloop. Die knoop is deurgehak met die kompromis wat uit die "Record of Understanding" voortgespruit het, en wat uiteindelik neerslag gevind het in die verskillende oorgangswette waarna in die vorige gedeelte verwys is. Dié wette was almal daarop gerig om te verseker "dat die politieke speelveld gelyk sou wees" (om weer een van die vele uitdrukkings wat rondom die Suid-Afrikaanse onderhandelingsproses ontstaan het, te gebruik[13]).

As deel van 'n pakket van ooreenkomste het die Onderhandelingsraad van die VPOP besluit dat nie een van die oorgangswette in werking sou tree voordat daar op die grondwetteks ooreengekom is nie. Hierdie ooreenkoms is eers op 17 November 1993 deur die voltallige sitting van die VPOP bekragtig, met die gevolg dat daar buitengewone druk op die oorgangstrukture was om al die reëlings vir die eerste volledig demokratiese verkiesing te tref.[14]

3 DIE GRONDWET VAN DIE REPUBLIEK VAN SUID-AFRIKA 200 VAN 1993

3 1 Inleiding

Ruimte ontbreek om hier in te gaan op die mate waarin die Grondwet deur die voorstelle en insette van die verskillende onderhandelingsgenote gestalte gekry het.[15] Anders as in die geval van Namibië het nie een van die partye by die VPOP 'n dokument voorgelê wat naastenby na 'n konsepgrondwet gelyk het nie.[16] 'n Mens kry eerder die indruk dat die belangrikste politieke dryfkragte bereid was om die Grondwet as 't ware tydens die onderhandelingsproses te laat ontvou op sterkte van 'n aantal konstitusionele beginsels waarop aanvanklik ooreengekom is.

Lank voor daar met die opstel van die Grondwet begin is, was dit duidelik dat twee sake, elk met 'n eie stel onderafdelings, die agenda sou oorheers: die staatsvorm en fundamentele regte. Dat laasgenoemde met heelwat meer gemak hanteer is as die staatsvorm word waarskynlik verklaar deur die feit dat al die belangrike partye reeds voor die onderhandelinge saamgestem het dat daar 'n

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12 "Negotiations step-by-step. Draft proposals" Februarie 1992 *Mayibuye* 11.

13 Ander is "bosberaad", "bilaterals" en "multilaterals": vgl ook Haysom "Negotiating a political settlement in South Africa" in Moss en Obery 26 vn 3.

14 Daar word nie verder op die oorgangstrukture ingegaan nie. Vir 'n voorinwerkingstredingsbespreking van die Wet op die Onafhanklike Verkiesingskommissie, sien Murphy "The Independent Electoral Commission Act 1993" 1993 *SAPR/PL* 283. Vir meer besonderhede oor die ontstaan van die Grondwet, sien De Villiers (red) *The birth of a constitution* (1994).

15 Vgl Du Plessis "The genesis of the chapter on fundamental rights in South Africa's transitional constitution" 1994 *SAPR/PL* 1 vir die uitwerking van verskillende strominge op die totstandkoming van die handves van regte in hfst 3.

16 Oor Namibië, sien Van Wyk "The making of the Namibian Constitution: lessons for Africa" 1991 *CILSA* 341.

verskanste en afdwingbare stel fundamentele regte moet wees.[17] Regstellende optrede en restitusie was verder 'n integrerende deel van die debat oor fundamentele regte.

Die staatsvorm en verwante probleme soos wigte en teenwigte, die verhouding tussen die sentrale regering en streke en plaaslike regering was ook geruime tyd al op die agenda.[18] Nogtans was hulle by die inwerkingtreding van die Grondwet steeds nie werklik opgelos nie.

3 2 Algemene kenmerke van die Grondwet

Die Grondwet is 'n lywige dokument met sy 227 gedrukte bladsye in die voormalige twee amptelike tale. Die 251 artikels in 15 hoofstukke en 7 bylaes moet die grondwet onder van die lywigstes ter wêreld laat tel.[19] 'n Interessante eienaardigheid van die Grondwet in 'n Suid-Afrikaanse verband is die slotgedeelte in gewone taal onder die opskrif "Nasionale eenheid en versoening". Saam met die voorrede, waarin klem gelê word op Suid-Afrika as 'n demokratiese regstaat en op gelykheid, fundamentele regte, nasionale eenheid en "rekonstruksie", beliggaam dit die wese van die Grondwet van 1993: dit is bowenal die simbool van 'n nuwe, apartheidsvrye Suid-Afrika. Terselfdertyd vorm dit die brug tussen die verlede en die toekoms, en die konstitusionele grondslag vir die opstel van 'n "finale" grondwet. Dat dit as oorgangsdokument

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17 Die literatuur hieroor het haas onoorsienbaar geword. As voorbeelde: Forsyth en Schiller *Human rights: the Cape Town conference* (1979); Van der Westhuizen en Viljoen *A bill of rights for South Africa. 'n Menseregtehandves vir Suid-Afrika* (1988); SA Regskommissie Werkstuk 25 Projek 58 *Groeps- en menseregte* (1989); Wiechers "'n Monument in die Suid-Afrikaanse regsontwikkeling: die werkstuk van die Suid-Afrikaanse Regskommissie oor groeps- en menseregte" 1989 *THRHR* 311; Du Plessis "Glosses to the Working Paper of the South African Law Commission on group and human rights (with particular reference to the issue of group rights)" 1989 *THRHR* 421; ANC *Constitutional guidelines for a democratic South Africa* (1988 – herdruk in 1989 *SAJHR* 129); Van der Vyver "Comments on the constitutional guidelines of the African National Congress" 1989 *SAJHR* 133; Corder en Davis "The constitutional guidelines of the African National Congress: a preliminary assessment" 1989 *SALJ* 633; SA Regskommissie *Interim-verslag oor groeps- en menseregte* (1991); ANC *A bill of rights for a new South Africa* (1990), *A bill of rights for a democratic South Africa* (1992), *ANC draft bill of rights. Preliminary revised version 1.1* (1992), *ANC draft bill of rights. Peliminary revised version February 1993* (1993); Corder et al *A charter for social justice. A contribution to the South African bill of rights debate* (1992).

18 Sien bv Dugard "The quest for liberal democracy in South Africa" 1987 *Acta Juridica* 239 ev, "Towards a liberal democratic order for South Africa" 1990 *Revue Africain de Droit International et Comparé* 365 ev; Erasmus "Towards a new constitution: what are the issues?" 1991 *De Rebus* 665.

19 Die hoofstukke is getiteld: "Konstituerende en formele bepalings" (hfst 1); "Burgerskap en stemreg" (hfst 2); "Fundamentele regte" (hfst 3); "Die parlement" (hfst 4); "Die aanname van die nuwe grondwet" (hfst 5); "Die Nasionale uitvoerende gesag" (hfst 6); "Die regsprekende gesag en regspleging" (hfst 7); "Die Openbare Beskermer, die Menseregtekommissie, die Kommissie op Geslagsgelykheid en die Kommissie op die Herstel van Regte in Grond" (hfst 8); "Provinsiale regering" (hfst 9); "Plaaslike regering" (hfst 10); "Tradisionele owerhede" (hfst 11); "Finansies" (hfst 12); "Staatsdienskommissie en staatsdiens" (hfst 13); "Polisie en verdediging" (hfst 14); en "Algemene en oorgangsbepalings" (hfst 15). Die bylaes is: "Omskrywing van provinsies" met inbegrip van "geaffekteerde gebiede" (bylae 1); "Stelsel vir die verkiesing van die Nasionale Vergadering en provinsiale wetgewers" (bylae 2); "Eed en plegtige verklarings" (bylae 3); "Grondwetlike beginsels" (bylae 4); "Prosedure vir die verkiesing van die President" (bylae 5); "Wetgewende bevoegdhede van provinsies" (bylae 6); en "Herroeping van wette" (bylae 7).

bedoel is, blyk duidelik uit die verbod ingevolge konstitusionele beginsels XXXII en XXXIII op die hersamestelling van die kabinet en die hou van 'n algemene verkiesing voor 30 April 1999; die rol van die parlement as grondwetskrywende liggaam; en die gereelde verwysings na die nuwe of finale grondwetlike teks.

'n Onaantreklike kenmerk van die Grondwet, wat hopelik by die opstel van die nuwe teks vermy sal word, is die tipiese Suid-Afrikaanse wetstyl waarin dit geskryf is. Bloot formeel is dit te begryp. Die Grondwet is per slot van rekening 'n wet van die "ou" parlement ingevolge die Grondwet van 1983. As sodanig dien dit die belangrike doel van staatsregtelike kontinuïteit. Aan die ander kant verteenwoordig dit egter ook 'n grondliggende breuk met die ou orde van parlementêre soewereiniteit en die spesifieke wyse van wetsopstelling wat daarmee gepaard gegaan het. As die hoogste, waardebeliggamende reg van die land hoef die Grondwet nie in die formalistiese taal van die ou Suid-Afrika geskryf te word nie.

Vir 'n oorsig soos dié kan die Grondwet onder sewe temas tuisgebring word: die konstitusionele beginsels, fundamentele regte en die handhawing daarvan, regeringstrukture, die regsprekende gesag, finansies, oorgangsbepalings en die aanname van die nuwe Grondwet.

3 2 1 Die konstitusionele beginsels

In die lig van hulle belangrikheid kan 'n mens net raai oor die rede waarom hierdie sluitstuk van die Grondwet in 'n bylae verberg is. Dit kan te wyte wees aan die Suid-Afrikaanse manier van wetsopstelling; daar kon ook ander redes gewees het. Feit bly dat geen finale grondwetlike teks in werking mag tree nie tensy die konstitusionele hof gesertifiseer het dat dit in ooreenstemming met hierdie belangrike beginsels is.[20]

Die 34 konstitusionele beginsels word in die aanhef as plegtige ooreenkoms beskryf. Terwyl die meerderheid van hulle algemene demokratiese waardes en norme weerspieël,[21] het sommige van hulle 'n spesifieke Suid-Afrikaanse karakter. Die vereiste van demokratiese verteenwoordiging op alle regeringsvlakke word byvoorbeeld getemper deur 'n bepaling oor tradisionele leiers.[22] Ten einde die IVP te akkommodeer, is hierdie beginsel twee dae voor die verkiesing gewysig om te bepaal dat die Grondwet en provinsiale grondwette die instelling en gesag van tradisionele konings moet erken.[23] Beginsel XII verwys na "kollektiewe selfbeskikkingsregte"; in 'n latere poging om 'n deel van die bevolking met nasionalistiese geneigdheid by die eerste verkiesing te betrek, is hierdie beginsel uitgebrei om selfbeskikking in 'n bepaalde gebied of op 'n ander erkende wyse in te sluit.[24]

3 2 2 Fundamentele regte en die handhawing daarvan

Daar word elders in hierdie uitgawe van die *Tydskrif* meer breedvoerig oor die fundamentele regte geskryf. Die netwerk van instellings wat deur die Grondwet

20 A 71(1) en (2) van die Grondwet.
21 Bv gelykheid en geen diskriminasie, skeiding van magte en 'n onafhanklike regbank.
22 Beginsel XVII gelees met beginsel XIII.
23 A 2 van die Tweede Wysigingswet op die Grondwet van die Republiek van Suid-Afrika 3 van 1994.
24 Beginsel XXXIV, ingevoeg deur a 13(b) van die Wysigingswet op die Grondwet van die Republiek van Suid-Afrika 2 van 1994.

geskep word vir die bevordering en handhawing van die fundamentele regte in hoofstuk 3 kan egter kwalik oorbeklemtoon word. Behalwe vir die formele regsweg, naamlik die konstitusionele hof en ander howe,[25] speel die Openbare Beskermer,[26] die Menseregtekommissie,[27] die Kommissie op Geslagsgelykheid[28] en die Kommissie op die Herstel van Regte in Grond [29] almal 'n belangrike rol in die ontwikkeling en versterking van die fundamentele regte-bestel van die Grondwet.

3 2 3 Regeringstrukture

Die Grondwet maak voorsiening vir demokratiese en verteenwoordigende regeringsinstellings op die gebruiklike drie vlakke, naamlik nasionaal, streek (of provinsiaal) en plaaslik. Tradisionele owerhede word ingevolge hoofstuk 11 van die Grondwet onder provinsiale en plaaslike regering ingedeel. Soos sy voorganger skep die 1993-Grondwet strukture wat nader aan 'n parlementêre stelsel is as enigiets anders.

3 2 3 1 Die nasionale vlak

Op nasionale vlak is die regering in die hande van die parlement, die president[30] en die kabinet. Kragtens hoofstuk 5 is die parlement ook die grondwetmakende liggaam, amptelik bekend as die Grondwetlike Vergadering.

(a) Parlement

Die parlement bestaan uit die Nasionale Vergadering (NV) en die Senaat. Die 400 lede van die NV is op grond van 'n stelsel van proporsionele verteenwoordiging en met beperkte mandaat gekies.[31] Die speaker of adjunkspeaker sit op vergaderings van die NV voor.[32] Die NV is in beheer van sy eie prosedure onderworpe aan die kworumvereiste van een derde van die lede vir gewone besigheid en die helfte vir wetgewing.[33]

Die Senaat bestaan uit 10 lede per provinsie, deur elke provinsiale wetgewer op die basis van proporsionele verteenwoordiging aangewys.[34] Die voorsitter is 'n president of adjunkpresident uit eie geledere gekies, en soos in die geval van die NV is die senaat baas van sy eie prosedure. Die kworumvereiste is ook dieselfde as vir die NV.[35]

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25 Sien hfst 7. Ongelukkig is die bepalings oor die jurisdiksie van die konstitusionele hof alles behalwe duidelik. Hulle behoort by die eerste beste geleentheid verbeter te word.
26 Veral ingevolge a 112(1).
27 Vgl a 116 vir die bevoegdhede en funksies van die kommissie.
28 A 119 en 120 bevat die grondslag, terwyl 'n wet van die parlement die besonderhede vir die werking van hierdie kommissie moet voorsien.
29 A 122 gelees met a 121 en 123.
30 Die veranderde terminologie verdien aandag. Sedert Suid-Afrika in 1961 'n republiek geword het is die term "staatspresident" gebruik. Op Afrikaans, met sy Germaanse bande, val dit nie vreemd op nie. Die Engelse weergawe van "state president" is egter nie elegant nie, en die nuwe betiteling kan om hierdie rede verwelkom word.
31 A 40(1) gelees met bylae 2. A 43(b) bepaal dat 'n lid wat van politieke party verander, sy of haar setel moet ontruim.
32 A 41. Dit was 'n historiese geleentheid toe 'n vrou, Frene Ginwala, tot eerste speaker van die nuwe NV verkies is.
33 Vgl a 55(1) 58 47.
34 A 48.
35 A 49 54.

Artikels 55 tot 62 bevat wesenlike prosedurebepalings, van parlementêre privilegie tot openbare toegang tot die parlement. In 'n neutedop is die belangrikste van hierdie bepalings die volgende:

- Artikel 57(3) ingevolge waarvan die president 'n gesamentlike sitting van die NV en die senaat kan aanvra.
- Die aanneem van wetgewing, waarvan vier kategorieë onderskei kan word:

(a) Gewone wetsontwerpe, wat in enige huis ingedien mag word. In die geval van 'n geskil tussen die huise word die wetsontwerp na 'n gesamentlike komitee verwys, waarna die wetsontwerp deur 'n gewone meerderheid van al die lede van albei huise aangeneem kan word. Behalwe geldwetsontwerpe, die nuwe grondwetlike teks, wysigings aan die Grondwet en sekere provinsiale wetsontwerpe, is alle wetsontwerpe gewone wetgewing.[36]

(b) Geldwetsontwerpe, wat oor begrotings en belasting gaan, kan net by die NV ingedien word en kan uiteindelik ten spyte van teenstand deur die senaat, deur die NV aangeneem word.[37]

(c) Wetsontwerpe wat die grense en bevoegdhede van die provinsies raak, moet afsonderlik deur die twee huise aangeneem word met die instemming van die meerderheid van die senatore van die betrokke provinsie of provinsies.[38]

(d) Grondwetlike wysigings word deur 'n gesamentlike sitting van die twee huise met 'n tweederde-meerderheid van al die lede van die twee huise aangebring. Wanneer dit oor die bevoegdhede van provinsies gaan, sit die huise afsonderlik, geld die tweederde-vereiste steeds en moet die toestemming van die betrokke provinsiale wetgewers ook verkry wees.[39]

- Die president se toestemming tot wetgewing wat, behalwe in die geval van prosedure-gebreke, verleen moet word.[40]
- Artikel 66 ingevolge waarvan die president, die uitvoerende visepresidente, ministers en adjunkministers sonder stemreg in 'n huis waarvan hulle nie lid is nie, mag sitting neem en praat.

(b) Die nasionale uitvoerende gesag

Ongeag die bewoording van artikel 75 wat voorgee dat die uitvoerende gesag op nasionale vlak in die hande van die president is, berus die werklike uitvoerende gesag by die kabinet. Die kabinet bestaan uit die president, die uitvoerende visepresidente en nie meer nie as 27 ministers. Die president kan in eie reg min doen. In die gewone gang van sake is hy of sy op die instemming van die res van die kabinet aangewese.

Die poging om die president afsonderlik te behandel, laat die Grondwet in strukturele probleme beland. Aan die een kant omskryf artikel 88(1) die kabinet as bestaande uit die president, die uitvoerende visepresidente en die ministers. Aan die ander kant vereis artikel 82(3) dat die president die oorgrote meerderheid van sy of haar bevoegdhede "in oorleg met" die *kabinet* moet uitoefen.[41]

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36 A 59.
37 A 60.
38 A 61.
39 A 62.
40 A 64(1) gelees met a 82(1)(b).
41 "In oorleg met" word in a 233(3) effektief omskryf as "met die toestemming van".

Dit suggereer dat die kabinet 'n selfstandige bestaan naas die president het. Hierdie indruk word versterk deur artikel 93 wat verwys na 'n mosie van wantroue in die kabinet, met of sonder die president. Hierdie eerbiedige behandeling van die president is onvanpas in 'n regstaat waar die uitvoerende gesag in werklikheid kollektief uitgeoefen word, en waar die stelsel in wese parlementêr is. Die kritiek word verder geregverdig deur die herhaalde verwysings in die Grondwet self – soos in artikel 86(2) – na die gees onderliggend aan 'n regering van nasionale eenheid.

Die president word deur die lede van die NV gekies in ooreenstemming met die prosedure neergelê in artikel 77. In normale omstandighede sal meneer Nelson Mandela, as eerste president, die amp vir die duur van die 1993-Grondwet beklee.

Die bevoegdhede van die president word in artikel 82 aangetref. Daar is drie kategorieë: 'n aantal spesifieke bevoegdhede, waarvan hy sommige op sy eie kan uitoefen; ander wat hy in oorleg met die visepresidente moet uitoefen en die res wat in oorleg met die kabinet uitgeoefen word. Anders as in die geval van die 1983-Grondwet, word geen verwysing na prerogatiewe aangetref nie. Die korrekte afleiding lyk of hierdie gemeenregtelike bevoegdhede uiteindelik voor die hoër mag van die Grondwet gewyk het.

Die president moet die visepresidente oor vyf sake raadpleeg: beleid van die nasionale regering, die bestuur van die kabinet, die bevoegdhede van die visepresidente, die aanstelling van buitelandse verteenwoordigers en sekere sake in artikel 82(1) vervat.[42]

Alle handelinge wat in oorleg met die kabinet verrig word, moet deur die president onderteken en deur 'n minister mede-onderteken word.[43] Die president is ook opperbevelhebber van die nasionale verdedigingsmag en by magte om met die instemming van die parlement 'n toestand van nasionale verdediging af te kondig.[44]

Die uitvoerende visepresidente is 'n nuwigheid. Elke party met minstens 20% van die stemme in die verkiesing was geregtig op een visepresident. Selfs al sou nie een nie, of net een, van die partye die vereiste persentasie behaal het, sou daar steeds twee visepresidente gewees het.[45]

Anders as die president, wat met sy verkiesing outomaties sy setel in die parlement ontruim het, het die visepresidente die keuse om dit nie te doen nie.[46] Die presidentskap is klaarblyklik ontwerp om op die hoogste vlak uitdrukking te gee aan die idee van nasionale eenheid.

Die derde komponent van die uitvoerende gesag op die nasionale vlak, is die ministers van die kabinet. Hulle posisie word gereël deur artikels 88 en 92.

Artikel 88 bevat uitvoerige voorskrifte oor die aanstelling van die nie meer nie as 27 ministers. Elke party met minstens vyf persent van die stemme en wat besluit het om aan die regering van nasionale eenheid deel te neem, is geregtig op 'n getal ministers in verhouding tot die persentasie stemme wat die party gekry het. Die president besluit na oorleg met die visepresidente en die leiers

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42 A 82(2).
43 A 83(2).
44 A 82(4)(a) en (b)(i).
45 Vgl a 84 en 85.
46 Vgl a 77(4) 84(3).

van die onderskeie partye oor die portefeuljes en stel die ministers aan.[47] Ingevolge artikel 88(5) moet hierdie handelinge op grond van konsensus en in die gees onderliggend aan 'n regering van nasionale eenheid verrig word. Wanneer konsensus nie bereik kan word nie, het die president die laaste sê oor die portefeuljes en oor die ministers van sy eie party, terwyl die leiers van die ander partye besluit wie die ministers uit hulle onderskeie partye sal wees. In die praktyk lyk dit of konsensus hier beteken dat daar van die begin af ooreengekom is dat elke leier sy of haar party se ministers sou aanwys.

Subartikels (8) en (9) is interessant en belangrik omdat hulle ministers uitdruklik verbied om by enige bedrywigheid betrokke te wees wat tot 'n botsing van amptelike en persoonlike belange kan lei of tot eie verryking of dié van 'n ander persoon.

Artikel 92, oor ministeriële en kabinetsverantwoordelikheid, is nie heeltemal duidelik nie. Subartikel (1) laat geen twyfel nie dat ministers individueel teenoor die president en teenoor die parlement aanspreeklik is vir hulle departemente. Verder is *alle* lede van die kabinet dienooreenkomstig gesamentlik aanspreeklik vir die optrede van die nasionale regering. Die probleem is dat "al" die lede van die kabinet kwalik aan die president verantwoording verskuldig kan wees, want die president is een van "al" die lede van die kabinet. Benewens die klank van outoritarisme wat aan die eerste jare van die 1983-Grondwet herinner, maak dit eintlik weinig sin om die visepresidente en die ministers teenoor die president aanspreeklik te stel. Selfs sonder so 'n bepaling sou die president steeds ingevolge artikel 84(4)(d) 'n minister se dienste kon beëindig.

Verantwoordelikheid teenoor die parlement word versterk deur artikel 93 wat mosies van wantroue reël. Afhangend of dit 'n mosie van wantroue in die hele kabinet, of in die president of slegs in die ander lede van die kabinet is, is daar 'n verskeidenheid moontlikhede, met inbegrip van verpligte ontruiming van sy amp deur die president, vrywillige terugtrede of ontbinding van die parlement. 'n Belangrike en welkome verskil tussen die nuwe Grondwet en dié van 1983 is dat artikel 88(4)(b) dit duidelik maak dat slegs reeds verkose lede van die parlement ministers word.

Die president of die visepresidente, op 'n rotasiegrondslag, sit by kabinetsvergaderings voor.[48] Die klem val weer eens op die konsensussoekende gees onderliggend aan die idee van 'n regering van nasionale eenheid en op die behoefte aan effektiewe staatsbestuur.

Artikel 94 maak voorsiening vir die aanstelling van adjunkministers deur die president. Geen getal word genoem nie, en die prosedure is dieselfde as in die geval van die aanstelling van ministers.

'n Soort veiligheidsnet word deur artikel 95 gespan vir sover die president se party gemagtig word om die regering te vorm indien geen ander party aan die regering van nasionale eenheid wil deelneem nie.

(c) Ander instellings op nasionale vlak

Die Grondwet maak voorsiening vir 'n aantal ander instellings wat uitsluitlik of ook op nasionale vlak bedrywig sal wees. Hieronder tel die Openbare

47 Ingevolge a 233(4) beteken "na oorleg met" dat die president in goeie trou die siening van die betrokke persone moet aanhoor en 'n besluit neem, sonder om aan die siening gebonde te wees.

48 A 89(1).

Beskermer en liggame soos die Menseregtekommissie, die Kommissie op Geslagsgelykheid, die Kommissie op die Herstel van Regte in Grond en die Finansiële en Fiskale Kommissie.

Twee instellings wat kortliks afsonderlike vermelding verdien, is die Raad van Tradisionele Leiers en die Volkstaatraad. Albei het hoofsaaklik adviserende bevoegdhede en is duidelike bevestiging daarvan dat die opstellers van die Grondwet wel die diverse aard van die Suid-Afrikaanse bevolking in berekening gebring het.

3 2 3 2 Die provinsiale vlak

Terwyl 'n mens nog sou kon beweer dat die aard en vorm van die instellings op nasionale vlak nie heeltemal vreemd aan die Suid-Afrikaanse staatsreg is nie, verteenwoordig die provinsiale bedeling die opvallendste vernuwing.

Eerstens, in plaas van vier provinsies en tien "onafhanklike" en self-regerende tuislande, het Suid-Afrika nou nege provinsies, elk met 'n verkose provinsiale wetgewer en 'n provinsiale uitvoerende gesag van nasionale (of provinsiale) eenheid. In die tweede plek het provinsiale wetgewers nou wyer bevoegdhede as die eertydse provinsiale rade, en kan selfs eie provinsiale konstitusies aanneem.

Die oorgangsaard van die 1993-Grondwet is duidelik sigbaar in die vele bepalings oor provinsiale regering. Onvoldoende tyd gedurende die onderhandelingsproses, gevestigde streeksbelange, dispute oor grense en skerp verskille oor die status van provinsiale regering het hierdie regeringsvlak enigermate in die lug laat hang.

Artikel 124 is die voorbeeld by uitnemendheid. In subartikel (1) word die nege provinsies geskep en benoem met die voorbehoud dat indien 'n provinsiale wetgewer dit versoek, die parlement die naam moet wysig.[49] Subartikel (2) verwys na die grense van die provinsies wat in bylae 1 te vinde is. In die bylae word ten minste 14 betwiste gebiede gelys. Die res van die artikel bevat bepalings in besonderheid oor die uiteindelike vasstelling van die provinsiale grense. Petisies van inwoners en referendums is die hoeksteen van die prosedure. Die Onafhanklike Verkiesingskommissie bly ook voortbestaan en belas met spesifieke verantwoordelikhede ten opsigte van die finale beslag aan provinsiale grense.

Twee verdere omstrede provinsiale aspekte is wetgewende bevoegdhede en finansies.[50] Oorspronklik sou provinsies "konkurrente" bevoegdhede met die parlement oor die aangeleenthede in bylae 6 gehad het. Hardnekkige reaksie van sekere politieke organisasies, en die begeerte om hulle by die eerste verkiesing te betrek, het tot 'n wysiging gelei wat "konkurrente" uit die Grondwet verwyder en die lys aangeleenthede in bylae 6 laat vermeerder het.

Tans het die provinsiale wetgewers uitsluitlike bevoegdhede oor die aangeleenthede in bylae 6, onderworpe aan vyf uitsonderings:[51] (i) waar die provinsie die onderwerp nie effektief kan hanteer nie; (ii) waar eenvormige norme of standaarde oor die hele land benodig word vir die effektiewe uitvoering van 'n funksie; (iii) waar minimumstandaarde oor die hele land vereis word vir die

49 Die naam van die provinsie Natal is reeds voor die inwerkingtreding van die Grondwet gewysig na KwaZulu/Natal: a 1 van die Wysigingswet op die Grondwet van die Republiek van Suid-Afrika 2 van 1994.

50 A 126 en 155-159 onderskeidelik.

51 A 126(3) soos gewysig deur a 2(c) van Wet 2 van 1994.

lewering van openbare dienste; (iv) waar die handhawing van ekonomiese eenheid, die beskerming van die omgewing en die bevordering van verskillende aspekte van tussenprovinsiale verhoudinge en die nasionale veiligheid parlementêre reëlings vereis; en (v) waar 'n provinsiale wet 'n wesenlike negatiewe uitwerking het op die ekonomiese, gesondheids- of veiligheidsbelange van 'n ander provinsie of die land as geheel, of waar dit die implementering van nasionale ekonomiese beleid op die nasionale vlak sou belemmer.

Volgens artikel 126(5) moet wette van die parlement en dié van provinsies sover doenlik in harmonie met mekaar uitgelê word.

Die ander twispunt, fiskale aangeleenthede, het gelei tot wysigings aan al vyf die bepalings van die Grondwet oor provinsiale geldsake, selfs voordat die Grondwet in werking getree het. Die beginsel is te vinde in artikel 155(1): elke provinsie is geregtig op 'n billike deel van die nasionale inkomste. Waar dit aanvanklik egter beperk was tot nasionale inkomste uit die provinsie verkry, is dit uitgebrei na inkomste nasionaal verkry.[52]

Beperkings op provinsiale belastingbevoegdhede ingevolge artikel 156 en op die provinsiale leningsbevoegdheid kragtens artikel 157 is ook verminder. Daarbenewens het die provinsies ook die uitsluitlike bevoegdheid verkry om belasting te hef en heffings op te lê met betrekking tot casino's, dobbelary, weddenskappe en loterye.[53]

Provinsiale immuniteit teen te geredelike parlementêre inmenging is verder versterk deur die invoeging van nuwe subartikels op grond waarvan wetsontwerpe voor die parlement wat met provinsiale geld te doen het, nie as geldwetsontwerpe beskou sal word wat nie die toestemming van die senaat nodig het nie.[54]

Die verdere ontwikkeling van 'n stelsel van provinsiale regering

Dat die skrywers van die 1993-Grondwet besef het dat provinsiale regering nog aandag nodig het, blyk duidelik uit artikels 161(1) en 164(1). Eersgenoemde gebied die grondwetlike vergadering om voorkeurbehandeling te gee aan die ontwikkeling van 'n stelsel van provinsiale regering, terwyl artikel 164(1) dit aan die Kommissie op Provinsiale Regering opdra om die instelling van provinsiale regering te vergemaklik en die grondwetlike vergadering en die nasionale en provinsiale regerings daaroor te adviseer.

'n Aantal faktore sal die rigting waarin provinsiale regering gaan ontwikkel, beïnvloed. Een daarvan is die houding van die provinsies self. In KwaZulu/Natal byvoorbeeld het die IVP as meerderheidsparty uitgesproke standpunte oor groter outonomie vir provinsies. Dit was grootliks te danke aan hulle verbetenheid dat artikel 160 van die Grondwet tweemaal voor die inwerkingtreding daarvan gewysig is – eers om provinsies toe te laat om konstitusionele strukture te skep wat verskil van dié in die Grondwet, en daarna om voorsiening te maak vir die erkenning van die Zoeloe-koning.[55]

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52 Wysigings aangebring deur a 3 van Wet 2 van 1994.
53 A 156 (1B).
54 Vgl a 155(2A) 156(1A) 157(1A).
55 Deur a 8(a) van Wet 2 van 1994 en a 1 van Wet 3 van 1994 onderskeidelik.

3 2 3 3 Plaaslike regering

Plaaslike regering word deur hoofstuk 10 van die Grondwet gereël. Die hoofstuk bevat egter net 'n breë raamwerk, wat gesien moet word in die lig van afsonderlike onderhandelinge oor plaaslike regering tydens die onderhandelingsproses. Die Oorgangswet op Plaaslike Bestuur van 1993 speel hier 'n belangrike rol en moet saam met die bepalings van hoofstuk 10 van die Grondwet gelees word. Die sleutelbepalings oor plaaslike regering in die Grondwet is artikels 174(3) en 175, waarin die outonomie van plaaslike regering bevestig word. Onderworpe aan die bepalings van hoofstuk 10, is plaaslike regering 'n provinsiale aangeleentheid.[56] Plaaslike regering moet verder 'n demokratiese grondslag hê,[57] terwyl artikel 180 vereis dat 'n gedragskode vir lede en beamptes van plaaslike besture by wet vasgelê moet word. Dit sal 'n welkome vernuwing in Suid-Afrika wees as plaaslike bestuur onder die nuwe bedeling meer op die konstitusionele voorgrond skuif. Tot dusver was dit die aspoestertjie van die staatsreg, te oordeel aan die gebrek aan onlangse literatuur.[58]

3 2 3 4 Tradisionele owerhede

Onderworpe aan die bepalings van die Grondwet, val tradisionele owerhede onder provinsiale jurisdiksie.[59] Die Grondwet erken tradisionele owerhede en inheemse reg, en koppel tradisionele owerhede aan plaaslike regering en die provinsies. Voorsiening word ook gemaak vir 'n nasionale Raad van Tradisionele Leiers.[60]

3 2 3 5 Die Volkstaatraad

Hoofstuk 11A van die Grondwet is ingevoeg as gevolg van druk en onderhandelinge na die aanname van die Grondwet in 1993. Dit was deel van die poging om sogenaamde regse Afrikaners te oorreed om aan die verkiesing en aan die verdere konstitusionele proses deel te neem. Artikel 184B(3) bepaal dat daar by parlementswet voorsiening gemaak moet word vir die stappe wat deur die Volkstaatraad gevolg moet word in die nastreef van sy oogmerk, naamlik die bevordering van 'n volkstaat vir diegene wat dit verlang.[61]

3 2 4 Die regsprekende gesag

Die belangrikste verandering aan die regsprekende gesag is die instelling van die konstitusionele hof kragtens artikel 98(1) van die Grondwet. As die hof van finale instansie met betrekking tot enige saak oor die uitleg, beskerming en toepassing van die bepalings van die Grondwet, sal die hof 'n wesenlike uitwerking hê op die regspleging in Suid-Afrika.

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56 Bylae 6 van die Grondwet. Sien ook a 245(a) wat bepaal dat plaaslike regering net binne die raamwerk van hfst 10 en die Grondwet as geheel mag ontwikkel.

57 A 179.

58 In onlangse jare het drie bydraes oor plaaslike bestuur in Suid-Afrikaanse regstydskrifte verskyn: Van Wyk en Van Wyk "The observance by a local authority of a town planning scheme" 1990 *SAPR/PL* 256; Barrie en Carpenter "The legal framework within which local government functions" 1993 *SAPR/PL* 269 en "Ethics and insider trading in local government – a case of the law and the profits?" 1994 *SAPR/PL* 74.

59 Bylae 6 van die Grondwet.

60 Vgl hfst 11 van die Grondwet (a 181-184).

61 Vgl ook a 184A(2).

Die bestaande hofstrukture bly onaangeraak. 'n Moontlike komplikasie is die feit dat die konstitusionele hof en die bestaande appèlhof op gelyke voet gestel word, met 'n uitdruklike verbod op laasgenoemde om uitspraak te lewer oor enige aangeleentheid binne die jurisdiksie van die konstitusionele hof.[62] Ander afdelings van die hooggeregshof het egter konstitusionele jurisdiksie in eerste instansie benewens hulle gewone jurisdiksie.[63]

Die Regterlike Dienskommissie wat deur artikel 105 in die lewe geroep word, is 'n ander nuwigheid, met voorbeelde uit buurlande. Dit is 'n verteenwoordigende liggaam uit die regsprofessie, en het as opdrag[64] om aanbevelings te maak oor die aanstelling van regters (met inbegrip van regters van die konstitusionele hof) en om die nasionale en provinsiale regerings te adviseer oor enige saak rakende die regsprekende gesag en die regspleging.

3 2 5 Finansies

Hoofstuk 12 van die Grondwet behandel algemene finansiële sake. Hieronder tel die nasionale inkomstefonds, die jaarlikse begroting, spesiale pensioene en 'n hele aantal ander sake. Spesiale afdelings word gewy aan die ouditeur-generaal, die reserwebank en die nuwe Finansiële en Fiskale Kommissie. Laasgenoemde het 'n kritieke rol te speel in die fiskale verhouding tussen die verskillende vlakke van regering. Dit is opvallend dat die provinsies elk een verteenwoordiger in die 18-persoon-Kommissie het.[65] Staatsfinansies het tradisioneel nie eintlik prominent in die staatsreg gefigureer nie. Hopelik verander die situasie ook onder die nuwe Grondwet.

3 2 6 Oorgangsbepalings

Die oorgangsbepalings verdien om twee redes spesiale vermelding: enersyds is daar soveel van hulle dat hulle amper 'n wet op sigself is.[66] Andersyds weerspieël hulle die onderhandelde aard van die oorgang na 'n nuwe bedeling. Die meeste van hulle is duidelik daarop gerig om te verseker dat hierdie oorgang nie onverwagte verrassings oplewer nie. In die proses word onder meer pensioene en die posisie van amptenare beveilig, uitvoerige bepalings oor die rasionalisering van die staatsdiens aangetref, en geskied die verandering van onderwysstrukture slegs na *bona fide* onderhandeling. Dit is inderdaad 'n sonderlinge stuk oorgangswetgewing.

3 2 7 Die finale grondwetlike teks

Ten spyte van al die opwinding wat met die VPOP in Kempton Park en die verkiesing van 1994 gepaard gegaan het, moet onthou word dat die Grondwet van 1993 in eerste en laaste instansie 'n oorgangsgrondwet en as platform bedoel is vir die skryf van die "werklike" grondwet. Daarom moet hoofstuk 5 uitgesonder word. Ingevolge dié hoofstuk moet die parlement in sy hoedanigheid van grondwetlike vergadering binne twee jaar na die inwerkingtreding van die 1993-Grondwet 'n finale grondwetlike teks voorlê.[67] Artikel 73 skryf 'n hele

62 A 101(5).
63 Vgl a 101(3) en (4).
64 A 105(2).
65 A 200(1).
66 Vgl a 229-251.
67 A 73(1).

reeks stappe voor indien die grondwetlike vergadering nie daarin kan slaag om die "finale" Grondwet met die vereiste meerderhede aan te neem nie. Hieronder tel verwysing na 'n paneel van deskundiges, en in laaste instansie voorlegging aan die kiesers in 'n referendum waarin 60 persent ten gunste van die teks moet stem.

Selfs hierdie prosedure maak nie die hoofvereiste ongedaan nie: sertifisering deur die konstitusionele hof dat die Grondwet in ooreenstemming met die konstitusionele beginsels in bylae 4 is.[68]

4 SLOT

Dit sou onbillik wees om die Grondwet van 1993 op 'n skaal van goed tot sleg te probeer beoordeel. Dit moet eenvoudig aanvaar word vir wat dit is, naamlik 'n brug tussen die "ou" ondemokratiese, blankbeheerde apartheid-Suid-Afrika en 'n demokratiese orde. Dit beliggaam 'n ewewig en kompromis tussen politieke kragte wat oor 'n betreklike lang tydperk en in baie bepaalde omstandighede bereik is. Dit is ook duidelik 'n "konstitusie onderweg", as 'n mens dit so kan stel. Nie een van die partye wat by die onderhandelingsproses betrokke was, het werklik vyf jaar gelede ernstig gedink dat die eerste demokratiese grondwet so daar sou uitsien nie. Ofskoon die finale grondwet waarskynlik in wese veel met sy voorganger van 1993 gemeen sal hê, moet verfyning en ontwikkeling tog verwag word. Dit alleen is reeds voldoende regverdiging daarvoor dat elke regsgeleerde in Suid-Afrika 'n deeglike studie van die 1993-Grondwet maak en so spoedig moontlik enige kommentaar aan die Grondwetlike Vergadering stuur. Die klagte dat daar nie tydens die onderhandelinge in Kempton Park voldoende geleentheid vir bydraes van ander kundiges en belangstellendes gebied is nie, kan nou ondervang word. Hopelik sal die grondwetlike vergadering dit ook so sien, en ons mense daarbuite tydig raadpleeg.

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68 A 71(2).

The private sphere in constitutional litigation

JD van der Vyver
BCom Honns (BA) LLD LLDhc
Professor of Law, University of the Witwatersrand;
IT Cohen Professor of International Law and Human Rights, Emory University, Atlanta, Georgia

OPSOMMING

Die "private sfeer" in konstitusionele litigasie

Artikel 33(4) van die Grondwet van die Republiek van Suid-Afrika 200 van 1993 laat blyk dat daar "liggame" en "persone" is ten aansien van wie die Verklaring van Fundamentele Regte nie van toepassing is nie. Hierdie artikel identifiseer die "private sfeer" wat nie aan die Verklaring-bepalings onderworpe is nie.

Die verklaring geld vir (a) regsvoorskrifte en (b) handelinge. Wat regsvoorskrifte betref, geld dit vir die staatlike reg, insluitende wettereg, die gemenereg en gewoontereg, wat op hulle beurt publiekreg én privaatreg insluit. Die verklaring geld nie vir die interne gedragsreëls van nie-staatlike liggame, soos die kerk, 'n sportklub of handelsmaatskappy nie. Wat handelinge betref, geld die verklaring net vir administratiewe besluite en die optrede van die uitvoerende gesag.

Statutêre liggame is luidens artikel 233 ook "staatsorgane", maar word ooreenkomstig die bewoording van artikel 7(1) net by kontrole van die verklaring betrek vir sover hulle op enigeen van die regeringsvlakke (die nasionale, provinsiale of plaaslike vlakke) funksioneer. Statutêre liggame wat wel op 'n regeringsvlak optree maar wat binne die kader van die regsprekende gesag tereg kom, is ingevolge artikel 7(1) nie aan die verklaring onderworpe nie.

Die interne reg van nie-staatlike liggame en handelinge van private persone word wel ook indirek deur die verklaring geraak. Byvoorbeeld, interne dissiplinêre verrigtinge moet kragtens die gemenereg aan die eise van natuurlike geregtigheid voldoen, en luidens artikel 35(3) moet die toepassing en ontwikkeling van die gemenereg voortaan geskied met die oog op die "gees, strekking en oogmerke" van die verklaring. Die vereistes van 'n billike verhoor in strafsake, soos in artikel 25(3) uitgestippel, sal sekerlik nou by die gemeenregtelike konsep van "natuurlike geregtigheid" ingelees word. Soortgelyk kan dit wat vir doeleindes van die kontraktereg as *contra bonos mores* geag word, dalk met die oog op die "gees, strekking en oogmerke" van die verklaring uitgebrei word om ooreenkomste met 'n rassistiese strekking ongeldig te maak.

The Declaration of Fundamental Rights in the Constitution of the Republic of South Africa[1] governs (a) rules of law; and (b) juridical acts. However, not every rule of law or juridical act is subject to the Declaration's constraints. Section 7(1) states that Chapter 3 of the Constitution (the Declaration of

1 S 7(2) of Act 200 of 1993.

Fundamental Rights) is binding on legislative and executive organs of state at all levels of government. The Declaration is therefore primarily applicable to the relationship between state and individual, and does not operate between private individuals or bodies. However, an exception to this principle of vertical operation is contained in section 33(4), which provides:

> "This Chapter shall not preclude measures designed to prohibit unfair discrimination by bodies and persons other than those bound in terms of section 7(1)."

The purpose of this survey is to identify the private enclave of constitutional non-justiciability.

It will be shown that, in respect of rules of law, the Declaration applies immediately (directly) to state-imposed law – public as well as private law – and only mediately (indirectly) to non-state law (the internal rules of conduct of social institutions other than the state); and as far as actions are concerned, to administrative decisions and acts of the executive branch of government (on the national, provincial and local levels of government) only.

1 COMPARATIVE ANALYSIS

The matter under consideration has been depicted in Germany as the problem of *Drittwirkung*; that is, the tripartite operation of the German Basic Law (*Grundgesetz: GG*). The problem, as perceived in German jurisprudence, is focused upon the question whether the basic rights apply in state-subject (public-law) relations only or should also be taken to regulate subject-subject (private-law) relations. The problem is therefore also defined as one concerning the vertical (public-law) and horizontal (private-law) operation of the Basic Law.

While the problem in Germany is one based upon the distinction between public and private law, that is not the case in the United States of America. There, the private enclave is defined in terms of (the absence of) "state action". Since the public-private law divide plays no part in the American ruling in this regard, it is inappropriate to refer to the state of affairs in that country as a matter of horizontality or tripartite operation of the bill of rights.

The same applies in South Africa where, at least as far as the constitutionality *of law* is concerned, the distinction between public and private law is of no significance whatsoever. The South African arrangement, as indicated above, is founded on the distinction between the law of the state and the internal law of non-state insitutions. In this respect, the South African ruling more closely resembles the one obtaining in Canada, though the law as to application is not exactly the same in these two countries.

The problem of *Drittwirkung*

The bill of rights in the Basic Law of Germany has been held, as a general rule, to have mediate (indirect) and not immediate (direct) *Drittwirkung*. That is to say, the restraints emanating from the individual's constitutional rights and freedoms apply to legislative and administrative powers of government in the field of (public law) state-subject relations only; but when interpreting *all* legislation, including statutory law regulating matters of private law, German courts are required to take cognisance of the provisions of the bill of rights and, as far as possible, to give such legislation a meaning that coincides with the system

of values embodied in the Basic Law.[2] The German constitutional court sought to derive from the specific provisions of the bill of rights a certain "objective order of values" (*objektive Wertordnung*),[3] which has been proclaimed to be basic to the entire system of law, both public and private,[4] and which through statutory interpretation affords the bill of rights mediate *Drittwirkung*.

In one instance, though, the German bill of rights does operate immediately within the realm of private-law relations: Article 9.3 *GG* guarantees freedom of association in the context of labour relations and expressly provides that any agreement purporting to limit or exclude that freedom would be void.[5]

It might be noted that this exception to the rule against immediate *Drittwirkung* in the constitutional law of Germany finds justification in a certain analogy between public law – the real domain of the bill of rights – and employer-employee relations. Both are founded on conditions of authority and subordination, and since human rights protection addresses the abuse of authority by the repositories of such authority in power relations, there can be no serious objections to applying a bill of rights provision in the area of labour.

State action

The horizontal implementation of the American bill of rights is not a matter of contention in the United States. The major proscriptive provision of the American declarations simply proclaims that "Congress shall make no law . . .", without specifying whether the laws to be guarded against are confined to those that might abridge the rights and freedoms of the individual *vis-à-vis* the legislature and executive government. The laws which Congress and state legislatures are not permitted to make, could therefore in principle be ones that would affect the rights of an individual in the context of (horizontal) person-to-person relations.

However, the legislature and courts in the United States seem to have had an intuitive understanding of the truism that constitutional issues ought by and large to remain confined to the public-law arena. It has therefore become the practice to include the horizontal application of human rights principles (alongside certain public-law competences of the citizen) in a series of Civil Rights Acts. The Civil Rights Act of 1964 thus contains a chapter guaranteeing equal employment opportunities to all, irrespective of "race, color, religion, sex, or national origin";[6] and the Civil Rights Act of 1968 embodies within its inventory of civil rights the "fair housing law", which prohibits the owners of immovable property to discriminate against potential buyers or tenants of their property on grounds of "race, color, religion, or national origin".[7]

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2 See Lepa *Der Inhalt der Grundrechte* (1985) 13 – 15; Doehring *Staatsrecht der Bundesrepublik Deutschland* (1984) 207 – 209; Hesse *Grundzüge des Verfassungsrecht der Bundesrepublik Deutschland* (1985) par 351 – 357.

3 Alexy *Theorie der Grundrechte* (1985) 477.

4 See Alkema "The third-party application or 'Drittwirkung' of the European Convention on Human Rights" in Matscher & Petzold (eds) *Protecting human rights: the European dimension: studies in honour of Gérard J Wiarda* (1988) 34.

5 Lepa *supra* fn 2 176.

6 Civil Rights Act of 1964, Title VII, Pub L No 88 – 352, 78 Stat 241 §§ 701 – 16 (1964).

7 Civil Rights Act of 1968, Title VIII, Pub L No 90 – 284, 82 Stat 73, §§ 801 – 19 (1968).

The closest analogy in American law to the German notion of *Drittwirkung* finds expression in the doctrine of "state action" as first enunciated in the *Civil Rights Cases* of 1883.[8] In that case, Justice Bradley, referring to the Fourteenth Amendment, proclaimed:[9]

> "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment."

However, the US Supreme Court, in order to strike down discriminatory practices in private-law relations, at times bent backwards to construct "state action". For instance, in *Burton v Wilmington Parking Authority*,[10] the refusal of a restaurant owner to serve blacks was declared unconsitutional, and "state action" there consisted in the state's having rented space in a state-owned parking lot to the restaurateur. In *Pennsylvania v Board of Directors of City Trust*[11] and *Evans v Newton*,[12] stipulations in a will providing that certain properties (a school and park respectively) were to be used by whites only were struck down, the "state action" consisting in the state's having been nominated as a trustee to administer the properties concerned. On the other hand, in *Moose Lodge v Irvis*,[13] the fact that a club which practised racial discrimination was required to have a state liquor licence was held not to involve any "state action".

According to current American opinion, not all provisions of the bill of rights are aimed at "state action". It was held in *Jones v Alfred H Mayer Co*[14] that the Thirteenth Amendment was free from this "obstacle" and could therefore be implemented in purely private relations. Although the Thirteenth Amendment simply prohibited slavery and involuntary servitude, the court subscribed to the view that its provisions could be extended to cover almost all instances of racial discrimination as manifestations of "the badges and incidents of slavery".[15] The Thirteenth Amendment therefore provided the avenue for outlawing racial discrimination practised by public authority as well as private persons.

There are a number of cases in which the US Supreme Court (often uncritically) applied the norms embodied in the bill of rights to curtail private-law rights and competences of non-governmental persons and institutions. In *Martin v City of Struthers*,[16] the individual's right to privacy (protected in this instance by criminal sanction) was subordinated to the freedom of speech, press[17] and religion,[18] in order to allow Jehovah's Witnesses to knock on doors and ring doorbells for the purpose of handing out handbills and literature.[19]

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8 109 US 3 (1883).
9 *Idem* 11.
10 365 US 715 (1961).
11 365 US 230 (1957).
12 382 US 296 (1966).
13 407 US 163 (1972).
14 392 US 409 (1968).
15 *Idem* 441.
16 319 US 141 (1943).
17 Per Black J, announcing the judgment of the court, and emphasising the "broad scope" of freedom of speech and of the press (143).
18 Per Murphy J, concurring and joined by Douglas and Rutledge JJ (149-152).
19 The court in *Martin* declared unconstitutional a municipal ordinance prohibiting door-to-door distribution of handbills and circulars. "State action" was not expressly considered, but could presumably be construed because state institutions had enacted the ordinance containing criminal sanctions.

In *New York Times Co v Sullivan*,[20] the right of public officials to guard their reputation from public comment had to give way to freedom of the press. The court confined the capacity of such officials to claim compensation for libel to cases where it could be shown that a false statement was published with knowledge of its falsity, or with reckless disregard for the statement's accuracy.[21] In *Shelley v Kraemer*,[22] the court held that where private property rights are exercised in a discriminatory manner, courts of law may not enforce those rights.[23] In *Regents of the University of California v Bakke*,[24] the court, with a view to the equal protection provision of the Fourteenth Amendment,[25] scrutinised and overruled the university's student admission policy based on affirmative action.[26]

The Canadian variety

In terms of section 32(1) of the Canadian Constitution Act of 1982,[27] the Canadian Charter of Rights and Freedoms applies:

> "(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament . . .
>
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province."

This provision has been held to confine the application of the Charter to "government action" only.

The leading Canadian case dealing with "application of the Charter" was *Retail, Wholesale & Department Store Union v Dolphin Delivery Ltd*.[28] The case emanated from the stated intention of a trade union to picket the business

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20 376 US 254 (1964).

21 Brennan J, delivering the opinion of the court, discarded an objection founded on absence of "state action" (this was a civil case), stating that the court was required to apply "a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedom of speech and press" (*idem* 265). He went on to decide: "It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. . . . The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised" (*ibid*).

22 334 US 1 (1948).

23 The case concerned a private agreement that excluded persons other than whites from using or occupying certain residential units. Though the agreement itself did not involve "state action", its enforcement through a court action did. Vinson CJ, delivering the finding of the court, stated that "the action of state courts and judicial officers in their official capacities is to be regarded as action of the state within the meaning of the Fourteenth Amendment . . ." (*idem* 14).

24 438 US 265 (1978).

25 The application was also based on Title VI of the Civil Rights Act of 1964, which provides: "No person in the United States shall, on grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance" (Civil Rights Act of 1964, Pub L No 88 – 352, 78 Stat 252, § 601 (1964)). Doubt existed, however, whether a private individual could vindicate her rights under this provision. This question was left open by the court and therefore rendered significant the submissions based on the Fourteenth Amendment.

26 "State action" here took the form of federal financial aid to the medical school involved. The court did not rule out affirmative action to *admit* disadvantaged students, but declared unconstitutional the *exclusion* of the white student (Bakke) to make room for a disadvantaged applicant.

27 Enacted as Schedule B to the Canada Act 1982 (UK) 1982 c 11.

28 (1987) 33 DLR (4th) 174.

of the plaintiff because he was doing business with the associate of an enterprise with whom the trade union had entered into a labour dispute. The plaintiff sought an injunction against the trade union restraining it from executing its threat, basing his application on various provisions of the Canadian Charter of Rights. The matters to be decided included the question whether an action or the defence to the plaintiff's claim in purely private litigation could be founded on the Charter; that is, in the absence of any exercise or reliance on governmental action which would invoke the Charter. The court decided that it could not.

In the course of his judgment, McIntyre J, speaking for the majority of the court, decided that "government" within the meaning of section 32(1) does not mean government in the generic sense (the whole governmental apparatus of the state) but signified a branch of government.[29] In terms of that section, executive action would be subject to Charter scrutiny in both public and private litigation and regardless of whether such action rested on statutory authority or the common law.[30] The common law is, however, subject to the Charter only in so far as such law constitutes the basis of administrative or executive action, that is, in the case of prerogative powers.[31]

In *Tremble v Daigle*,[32] the Supreme Court of Canada likewise decided that the Canadian Charter of Rights and Freedoms could not be invoked in a civil action between two private parties. In that case, the father of an unborn child (unsuccessfully) sought an injunction against the mother to restrain her from undergoing an abortion, basing his application on the alleged right to life of the unborn.[33]

It should be noted that the problem in *Dolphin Delivery Ltd* and *Tremble* will not arise in South Africa: In terms of section 98(2)(a) and section 101(3)(a) of the Constitution, an action or defence to an action can indeed be founded on the Declaration of Fundamental Rights as such. However, one cannot simply base one's case on the Constitution while a legal provision that contradicts one's claim to a particular right or freedom remains in place. The legal provision must first be declared invalid by a court with jurisdiction in the matter.[34]

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29 *Idem* 194 – 195.
30 *Idem* 195.
31 *Ibid.*
32 (1990) 62 DLR (4th) 634 664.
33 Earlier, in *Morgentaler, Smoling & Scott v The Queen* (1988) 44 DLR (4th) 385, the supreme court found s 251 of the Criminal Code, which prohibited abortions except in certain specified circumstances, unconstitutional (by virtue of the fact that a pregnant woman who might be entitled to an abortion had to comply with tedious formalities that caused delays which in turn brought about physical and emotional tensions and thereby violated her constitutional right to personal security). In *Tremble*'s case, therefore, there was no law on the statute book that could be invoked to substantiate the application.
34 In *S v Maponya* 1994-05-23 case no CC 129/94 Roos J erroneously based the same conclusion on s 241(10) of the Constitution. That section deals only with "laws and other measures" regulating, as a transitional matter, the jurisdiction of courts and other matters pertinent to the administration of justice. In that case two attorneys sought audience in the supreme court on basis of the constitutional right of an accused to be represented by the legal practitioner of his own choice (see s 25(3)(e) of the Constitution) while the rule prohibiting attorneys from appearing in the supreme court remained part of South African law and without seeking an order declaring that rule unconstitutional.

The judgment in *McKinney v University of Guelph*[35] touched upon another aspect of the question of "application": Do the Charter provisions apply to the internal rules of a university (in this instance a regulation sanctioning the university's mandatory retirement policy based on age)? No clear answers emerged from the case. La Forest J (in whose judgment Dickson CJC and Gonthier J concurred) held that one cannot as a general statement allege that universities are not part of government for purposes of the Charter but rather that the appellant universities are not part of government given the manner in which they are organised and governed.[36] Wilson J (dissenting) decided that universities were indeed subject to the Charter. Sopingla J (concurring) likewise found that universities were subject to the Charter provisions but decided that the mandatory retirement provision was reasonable and therefore constitutional. L'Heureux-Dubé J (dissenting) held that public functions performed by a university may attract Charter review, but that the hiring and firing of employees do not fall within that category.

La Forest J (speaking for the majority) also noted that "government" within the meaning of section 32(1) must be interpreted as broadly as possible.[37] This observation coincides with the principle that a bill of rights should be "generously" interpreted to extend the confines of its protection over as wide a field as the language of the instrument would permit.

On what basis, then, ought one to decide whether an institution which does not obviously constitute part of the legislative or executive branch of government should nevertheless be regarded as "government" for purposes of subjecting its internal rules and regulations to Charter constraints? Different judges in *McKinney* preferred different criteria to be applied in this regard:

(a) The majority (La Forest J, with Dickson CJC and Gonthier J concurring) debated the matter on the basis of the *measure of autonomy* enjoyed by a university in regulating its internal affairs:[38]

> "Though the universities . . . are subject to government regulations and in large measure depend on government funds, they manage their own affairs and allocate these funds, as well as those from tuition, endowment funds and other sources."

(b) Sopinka J (concurring) followed a *functional approach*:[39]

> "I agree . . . that a university is not a governmental entity for the purpose of attracting the provisions of the *Canadian Charter of Rights and Freedoms*. I would not go so far as to say that none of the activities of a university are governmental in nature . . . I am of the opinion that the core functions of a university are non-governmental and therefore not directly subject to the Charter."[40]

So, too, did L'Heureux-Dubé J (dissenting):[41]

> "[W]hile I agree that universities may not have all the necessary governmental touchstones so as to be considered public bodies, neither can they be considered as wholly private in nature."

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35 (1991) 76 DLR (4th) 545.
36 *Idem* 643.
37 *Idem* 644.
38 *Idem* 642.
39 *Idem* 697.
40 Assuming that a university was "government", Sopinka J (*idem* 697 – 698) argued that the mandatory retirement policy in any event complies with the limitation requirements of the Charter (s 1).
41 *Idem* 677.

He went on to find that

> "while universities may perform certain public functions that could attract Charter review, I am unable to accept that the hiring and firing of their employees are not properly included within this category".[42]

(c) Wilson J (dissenting) proposed a three-tier test that *combines elements of the reasoning based on autonomy and functions*:[43]

- The "control" test: Is the institution part of the legislature or the executive or administrative branches of government and, if not, is it subject to control by one of those branches of government?[44]
- The "government function" test: Is performance of a given activity a governmental function?[45]
- The "governmental entity" test: Is the body a "governmental entity"; does it perform a task pursuant to statutory authority and perform that task on behalf of the government in furtherance of a governmental purpose?[46]

Cory J (concurring) agreed with that part of Wilson J's opinion.

2 *LES TRAVAUX PRÉPARATOIRE* OF THE SOUTH AFRICAN APPLICATION PROVISIONS

The problem of defining the range of application of a South African bill of rights has been a matter of profound controversy from the outset.

In its first report, the South African Law Commission explicitly considered the question of *Drittwirkung*,[47] but proceeded on the erroneous assumption that it was simply a question of

> "whether the fact of certain rights being protected in the Bill has the effect that infringements of those rights by (a) the State and (b) individuals and groups create any liability to pay damages".[48]

In its second report,[49] the Commission got it right as far as the meaning of *Drittwirkung* is concerned and opted to confine the operation of the proposed bill of rights on the vertical level of state-subject relationships only:[50]

> "The premiss in the Commission's proposed bill of rights is that it regulates the 'vertical' relation between state and subject. The affirmative action that we suggest specifically

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42 *Idem* 678. L'Heureux-Dubé J dissented on the question as to the constitutionality of s 9(a) of the Ontario Human Rights Code, 1981. It prohibited discrimination based on age in employment and confined "age" to "an age that is eighteen years or more and less than sixty-five years". This, he found, violated the equal protection and non-discrimination clauses in the Canadian Charter of Rights and Freedoms (s 15).

43 *Idem* 584 – 593.

44 See *Douglas/Kwantlen Faculty Association v Douglas College* (1988) 49 DLR (4th) 749, where it was decided that the measure of control exercised by the government over the affairs of the college generally, coupled with actual governmental involvement in the finalisation of the collective agreement, rendered the rules and regulations of the college subject to the Charter.

45 See *McKinney v University of Guelph* (1987) 46 DLR (4th) 193 216, where it was said: "The fact that municipal corporations are 'creatures of the legislature' is not determinative. It is the function that they were created to perform that is."

46 This test persuaded Wilson J (dissenting) that universities were subject to the charter.

47 *Provisional report on group and human rights* (Working Paper 25) (1989) par 14.122 – 132

48 *Idem* 14.125.

49 South African Law Commission *Interim report on group and human rights* (Project 58) (1991) 489 – 494.

50 *Idem* par 8.91.

> provides for the central legislature to enact specific laws in various fields that influence relations between individuals."

The Law Commission also subscribed to the German principle of affording indirect *Drittwirkung* to its proposed bill of rights by instructing courts of law to interpret all legislation "into agreement with the bill of rights as far as possible".[51]

The ANC's proposed bill of rights[52] included several clauses that would create obligations at the instance of persons and institutions other than the state and thus, to that extent, afforded horizontal application to that instrument. In the context of workers' rights, employers are instructed to provide a safe, clean and dignified work environment, to pay reasonable wages, and, within reason, to make allowance for workers' holidays.[53] Employers are furthermore instructed to pay equal wages for equal jobs and to afford equal access to employment.[54] A practice whereby employers could compel children of their employees to work for them is declared unlawful.[55] Educational institutions, the media, advertising agencies and other social institutions are placed under an obligation to discourage sexual and other types of stereotyping.[56] All "private bodies", along with the state and public institutions, are mandated

> "to prevent any form of incitement to racial, religious or linguistic hostility and to dismantle all structures and do away with all practices that compulsorily divide the population on grounds of race, colour, language, or creed".[57]

The legislature is authorised to enact laws that would compel non-governmental organisations and private bodies to take positive steps to counteract past discriminatory practices founded on race or sexual distinction (affirmative action).[58]

Kempton Park, for reasons that could not possibly redound to anybody's credit, decided to disregard the draft proposals of both the South African Law Commission and the ANC[59] – as well as other proposals for a bill of rights that had seen the light of day since 1986 and left it to the Technical Committee on Constitutional Issues to table its own design for a South African Declaration of Fundamental Rights. The application provision of the Technical Committee's first draft, which was attached to its Ninth Report, dated 10 August 1993, provided:[60]

> "The provisions of this Chapter shall –
> (a) bind the legislative, executive and, where appropriate, the judicial branches of government at all levels as well as all statutory bodies and functionaries;

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51 *Idem* par 8.94.
52 ANC Constitutional Committee *A Bill of Rights for a new South Africa* (1990).
53 Art 6 par 10.
54 Art 6 par 11.
55 Art 9 par 6.
56 Art 7 par 5.
57 Art 14 par 3.
58 Art 14 par 9.
59 These two institutions are singled out for special mention because their constitutional proposals, much more than those of anyone else, had been exposed over a long period of time to comments, critique and recommendations of a wide range of interest groups and reflected in their final result the input of a representative section of the South African community.
60 See s 7(1) of the *Draft Outline* of the Constitution of the Republic of South Africa, 1993, attached to the Ninth Report of the Technical Committee on Constitutional Issues, dated 1993-08-10. Up to and including the Technical Committee's Eighth Report, dated 1993-07-26, the Committee had not yet had anything to report in respect of the proposed chapter on fundamental rights.

(b) bind, where just and equitable, other bodies and persons; and
(c) be enforced by the designated authority."

This provision was repeated in the *Draft Outline* of the Constitution of the Republic of South Africa, 1993, attached to the Technical Committee's Tenth and Eleventh Reports, dated 20 August 1993.

The proposals concerning the protection of fundamental rights that went into the various reports of the Technical Committee on Constitutional Issues was prepared by the smaller Technical Committee on Fundamental Rights during the transition period. The draft that was finally incorporated in the Interim Constitution began taking shape in the *Tenth Progress Report* of the latter Technical Committee, dated 5 October 1993. The only real difference is that the Technical Committee's draft included "all statutory bodies and functionaries",[61] while this phrase was omitted from the final act.[62]

3 JURISPRUDENTIAL CONSIDERATIONS

Before delving into the meaning to be attributed to the current application provisions, it may be useful to consider for a moment the reasons and a jurisprudential framework for limiting the impact of a bill of rights as far as the scope of its application is concerned.

The main arguments advanced by spokespersons of the ANC in favour of subjecting the entire body of South African law to a bill of rights embraced the following general submissions:

- Since a constitution is intended to reflect the *Grundnorm* of the legal system as a whole, its basic rights provisions should regulate the entire spectrum of the law, including private-law matters and the internal rules of conduct of institutions other than the state.
- The South African constitution should guard against discriminatory practices in the private sphere that may be utilised to perpetuate apartheid practices *de facto*.
- Financial incentives (absence of state subsidies) to discourage discriminatory institutions in the private sphere may not deter the rich and will therefore perpetuate the exploitation of economic imbalances in the community.

The main arguments for excluding the universal operation of a bill of rights include the following:

- Historically, the notion of human rights protection was designed to restrict the exercise of governmental powers.
- Logically, since a constitution is a legal instrument defining and confining the powers of government, a constitutional bill of rights ought likewise to address the powers of government and nothing else.

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61 See s 7(1) of *The Draft Chapter as Now Proposed* attached to the Technical Committee's *Tenth Progress Report*, dated 1993-10-10, which provides: "The provisions of this Chapter shall bind the legislature and executive organs of State and all levels of government including all statutory bodies and functionaries."

62 It will be argued later that the definition of "organ of state" in s 233(1)(ix) of the Constitution (which includes statutory bodies) does not render statutory bodies subject to the Declaration of Fundamental Rights.

- As a matter of justice, the equilibrium between conflicting rights and obligations in accordance with the Aristotelian principle of commutative justice (*sic utere tuo ut alienum non laedas*) may be disturbed if certain rights (those mentioned in the Constitution) were to be given a preferred status in private-law relations and within institutions other than the state over those not mentioned in the Constitution.
- As a matter of political freedom, excessive control by the state of purely private matters would result in a totalitarian régime.

The choice is indeed a difficult one to make. Take the following example: Freedom of speech has been interpreted in the United States to mean that one may claim constitutional protection for very much saying whatever one may wish. Article 20 of the International Covenant on Civil and Political Rights,[63] on the other hand, demands of its member states to outlaw any propaganda of war and the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.[64]

Or take the following dilemma: Given our history of racial discrimination, an urgency seems to prevail to outlaw all manifestations of racism. Yet, apartheid South Africa was also notorious for its repressive laws. Silencing those with racist tendencies through criminal sanctions would again result in repressive state absolutism.

Finally, consider the problem of freedom versus totalitarian rule: Totalitarianism per definition denotes the situation in the political community where state authority is relied upon to mould the private lives of the citizens or to dictate to non-state institutions how to regulate their internal affairs.

Analysis will show that even in countries that tend to reduce the "private sphere" to its bare minimum, legislatures and the courts seek to establish certain confines of bill of rights application with due deference to freedom and privacy of the individual and of non-state institutions. In the United States, for example, intrusion into the private domain has remained confined to certain provisions of the bill of rights only: in particular, the rule against discrimination. And not all instances of discrimination by private persons or in privately owned institutions came to be proscribed, but only those that had a public touch to them: discrimination in public education; discrimination in the work place; discrimination in the sale and renting of homesteads and farm land; discrimination in respect of other institutions and facilities which, although privately owned, render a service to the public at large, such as restaurants, movie theatres, laundromats and parking areas.

In South Africa, too, one should clearly identify areas of contention within the "private sphere" and call upon the legislature to exercise its powers under section 33(4) of the Constitution. Casuistic intervention in the isolated areas of public concern would address the problems of discrimination that warrant such intervention and at the same time avoid the dangers of totalitarianism.

The problem of totalitarianism at once also illustrates that the problem under consideration is not simply a matter pertaining to the traditional divide between

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63 GA Res 2200, 21 UN GAOR Supp (No 16) 52, UN Doc A/6316 (1967).

64 Ratification of the Covenant by the US was consequently subjected to a reservation in terms of which the US did not regard itself bound by this provision of the Covenant. See *Report of the Senate Commission on Foreign Relations*, 102D Congress 2nd Session, Senate Executive Report 102 – 123 21 – 24.

public and private law. It also addresses the distinction between group entities, with on the one hand, the state and, on the other, social institutions other than the state, such as churches, sports clubs, the family, business corporations and the like.

For a proper understanding of the problem of application, the dual distinction between public and private law and between the law of the state and the internal law of non-state institutions is of the utmost importance. Public *and* private law belong to the domain of the law of the state. Non-state law denotes the internal rules of conduct with legal validity of social institutions other than the state.[65]

4 APPLICATION PROVISIONS IN THE DECLARATION OF FUNDAMENTAL RIGHTS

Section 7(1) and (2) of the Constitution of the Republic of South Africa, 1993 provides:

> "(1) This Chapter shall bind the legislative and executive organs of state at all levels of government.
>
> (2) This Chapter shall apply to all law in force and all administrative decisions taken and acts performed during the operation of this Constitution."

These subsections thus render the Declaration provisions applicable to (a) law and (b) decisions and acts in the sense of actions.

Application of the Declaration of Fundamental Rights to law

The following propositions reflect the state of affairs pertaining to the Declaration's effect upon law:

The Declaration applies to state-imposed law only and not to non-state law

The following considerations substantiate this conclusion:

(a) Section 7(1) of the Constitution confines the binding force of the Declaration to legislative (and executive) "organs of state at all levels of government" and therefore excludes non-governmental organisations from its operation.

(b) The law which, in terms of section 33(2), may not limit the protected rights and freedoms embraces "the common law, customary law or legislation" – concepts which all denote different categories of the law of the state.

(c) Section 33(4) of the Constitution, which authorises the legislature to enact "measures designed to prohibit unfair discrimination by bodies and persons other than those bound in terms of section 7(1)", was inserted in the final draft to make provision for civil rights legislation in the private sphere of non-state

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65 As to the distinction between state-imposed law and non-state law, see Du Plessis *Inleiding tot die algemene regsleer of jurisprudensie in besonder die staatlike reg* (1943) 16 – 20; Dooyeweerd *De strijd om het souvereiniteitsbegrip in de moderne rechts- en staatsleer* (1950) 54 – 56; Van Zyl and Van der Vyver *Inleiding tot die regswetenskap* (1982) 339 – 342. The fact that the internal rules of conduct of institutions other than the state do constitute law, is generally recognised. See, eg, in the jurisprudence of the European Court of Human Rights, the *Barthold Case* PECHR, Series A, vol 90 (1985), par 46 (holding that the rules of professional conduct of a veterinary council constitutes "law"). Gray *The nature and sources of the law* (1927) 308 – 309 likewise referred to "[t]he Law of a country or other organized body of men", defining such law as "the rules of conduct that . . . [the country's] courts follow and holds itself out as ready to enforce".

institutions and would be rendered tautological should a court hold that such institutions are in any event bound to uphold Declaration principles within their domestic sphere of sovereignty.

Reference in section 7(2) to "all law in force" does seem to bring the rules of conduct posited internally by non-state institutions within the confines of the Declaration. It is submitted, however, that this provision was inserted to proclaim expressly that the Declaration applies to all existing law and not only to laws enacted or formed after the Declaration entered into force.[66] This subsection deals with the question of retroactivity and its emphasis is on the closing phrase: "during the period of operation of this Constitution". In the context of retroactivity, it distinguishes between law on the one hand and administrative decisions and acts on the other: the Declaration applies to all law in force during the period of operation of the Constitution, be it statutory law, the common law or customary law, and including law enacted or established before 27 April 1994; whereas, in the case of administrative decisions or acts, only those taken or performed after the Constitution came into operation are subject to the Declaration's constraints. Section 7(2) in that sense lines up with section 33(2), which brings statutory, customary and common law within the ambit of the Declaration. When read in conjuction with section 7(1), section 33(2) and section 33(4), the phrase "all law in force" in section 7(2) must therefore be given the meaning of state-imposed law.

Within the confines of state-imposed law, the Declaration applies at the vertical (public-law) as well as the horizontal (private-law) level

Three arguments may be advanced in support of this proposition:

(a) Section 7(1) of the Constitution expressly subjects "all legislative . . . organs of state" to the provisions of the Declaration and therefore mandates the legislature, when enacting statutory law, to uphold the constitutionally protected rights and freedoms, regardless of the nature of such law within the context of the public/private-law divide.

(b) Section 33(2) of the Constitution renders null and void any "law, whether a rule of the common law, customary law or legislation" which limits any of the constitutionally protected rights and freedoms on grounds other than those mentioned in section 33(1); and since the common law and customary law by and large regulate matters of private law, it is evident that this branch of the law is not excluded from the testing power of the constitutional court.

(c) Many provisions of the Declaration relate to private-law matters, such as labour relations (section 27) and property (section 28).

As to (c), it could of course be argued that the horizontal application of the Declaration applies only to those private-law rights expressly mentioned in the Declaration and that protection afforded by the more general provisions, such as the right to life[67] and privacy,[68] should be confined to instances of state interference in the public-law arena. However, the contentions founded on sections 7(1) and 33(2) would refute this submission.

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66 It thus avoids the problem considered in *S v Marwane* 1981 3 SA 588 (B) (1982 3 SA 717 (A)) in respect of the Declaration of Fundamental Rights in the Republic of Bophuthatswana Constitution Act 18 of 1977 (B).

67 S 9.

68 S 13.

Non-state institutions whose domestic rules of conduct with juridical validity are not subject to the Declaration apparently include statutory bodies

Section 7(1) provides that the Declaration shall apply to "all legislative . . . *organs of state* at all levels of government".[69] Section 233(1)(ix) defines an "organ of state" as including "any statutory body or functionary". However, section 7(1) refers to "organs of state *at all levels of government*".[70] The "levels of government" contemplated by section 7(1) are the national, provincial and local government institutions. The primary question to be considered, therefore, is whether statutory bodies such as a university or the Association of Law Societies function on any of the levels of government.

The definition of "organ of state" as including "any statutory body or functionary" renders the autonomy test enunciated by the majority in the Canadian case *McKinney v University of Guelph*[71] inapplicable in South Africa. The autonomy enjoyed by an institution created by statute has a bearing upon the measure of independence of that institution *vis-à-vis* its creator (the government), which in turn may demonstrate that the institution, being dictated to by government, in effect constitutes part of "government". The question whether that is indeed the case in any given instance has been rendered rhetorical by the definition under consideration.

When considering whether any particular statutory body, as (technically) an "organ of state", complies with the second requirement for attracting the application of the Declaration to its internal rules and regulations – that is, operates at any of the levels of government – one is therefore constrained to apply the functional test: Are the functions performed by the statutory body "governmental" in nature? The relative approach preferred by some of the judges in *McKinney* suggests that some functions performed by a statutory body may be "governmental" in nature and others not. If South Africa were to follow this approach, the question would in each instance be more specific: Is the function in dispute one that belongs to the domain of "government"?

In applying the functional test, further fundamental problems need to be addressed. How is one to define the functions of government? Should one confine such functions to those that traditionally fall into the category of administering the affairs of state, or should one include all functions which the government has assumed as part of its concerns? Educating students and promoting sport are not part of "governing the country" in the strict sense, but the South African government has accepted responsibilities in this regard and created ministerial portfolios to deal with such matters. Does this mean that (autonomous) statutory bodies whose function it is to provide tertiary education or to promote sport must now be taken to function within the confines of "government"?

There are no simple answers to the problem and the point of view one may prefer will depend on an even more basic consideration: Should one define "government" or "governmental functions" as widely as possible to extend the Declaration's reach into the domestic enclave of as many statutory bodies as one possibly can, or ought one on the other hand to accord as much respect

69 Emphasis added.
70 Emphasis added.
71 *Supra* fn 35.

as possible to the internal autonomy of institutions that do not obviously constitute part of "government"?

There are good reasons why one ought not simply to follow the opinion expressed by La Forest J in *McKinney*'s case, referred to earlier in support of the first option.[72] The South African Constitution expressly accords juristic persons the rights contained in the Declaration of Fundamental Rights "where, and to the extent that, the nature of the rights permits"[73] – which is not the case in Canada. Autonomy is a juristic person's right to privacy and is to such social entities what the right to life is to natural persons. Avoiding state intervention in the internal affairs of non-state institutions, albeit through bill of rights constraints, is therefore in itself a constitutional value to be cherished and a political principle to be nurtured in deference to the kind of freedom that opposes totalitarianism.

Whatever the outcome of this debate, statutory bodies performing the functions of government within the confines of the judicial branch of state authority will, in terms of section 7(1) of the Constitution, in any event not be subject to the Declaration of Fundamental Rights.

Although the internal rules of conduct of non-governmental statutory bodies are not subject to the Declaration, that is not the case as far as the statutory provisions sanctioning the power of law-making of such bodies are concerned

Two sets of circumstances may emerge in this regard:

(a) The enabling provisions may sanction the making of non-state law by the non-governmental statutory body which would substantively violate the Constitution; or

(b) the enabling provision may, from the fundamental rights perspective, be neutral.

It is submitted that, in the case of (a), both the empowering provision and the non-state law enacted pursuant to that provision would be null and void: the empowering provision, because of the Declaration of Fundamental Rights; and the non-state provision, because its enabling foundation would have become a nullity.

If, on the other hand, the enabling provision does not expressly authorise or prohibit the making of a domestic rule of conduct that would violate any Declaration provision, but the non-governmental statutory body, acting in terms of that authority, lays down a domestic rule of conduct which indeed violates a Declaration provision, then the enabling provision in an Act of Parliament may or may not be unconstitutional.

Here one may be guided by the doctrine of "purposive discrimination" developed by the US Supreme Court in the same context.

The problem was first considered in the case of *Yick Wo v Hopkins*,[74] where it was decided that if a law is fair on the face of it but is applied and administered by public authority with "an evil eye and unequal hand", then the *de facto* denial of equal justice as well as the legislation authorising such conduct will be unconstitutional. In more recent judgments of the US Supreme Court,

72 *Supra* fn 37.
73 S 7(3).
74 118 US 356 (1886).

it was held that for an ostensibly neutral enactment to be found in violation of the equal protection provision of the Fifth and Fourteenth Amendments, it must be shown that, in enacting the law, the legislature was prompted by a "discriminatory purpose".[75]

An example in point would be the Prevention of Illegal Squatting Act 52 of 1951. The problem of squatting in South Africa is almost entirely confined to the black community, and implementation of the act therefore amounts to *de facto* discrimination. There can, furthermore, be little doubt that legislation on squatting was enacted, and from time to time amended, with the specific purpose of dealing with black urbanisation. The act – in spite of being on the face of it racially neutral – should therefore be regarded as an instance of "purposive discrimination" and would as such come under scrutiny of section 8 of the Constitution.

The above submission was raised in the Bophuthatswanan case of *Kekana Royal Executive Authority v Minister of Law and Order*.[76] However, Comrie J gave the argument short shrift: Section 3B of the act – the provision which in effect excludes spoliation proceedings when a squatter dwelling has been demolished and which was in issue in that case – makes no distinction between black squatters and white squatters, and a subsection of this provision that does refer to race is administrative in nature. The court did not consider the doctrine of purposive discrimination and it is submitted that the judgment was for that reason wrong.[77]

The Declaration may, through the operation of section 35(4) of the Constitution, have an indirect impact on the internal affairs of non-state institutions

That section provides:

> "In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects (*sic*) of this Chapter [ie the Declaration of Fundamental Rights]."

Internal disciplinary hearings of a non-state institution are not subject to any Declaration provisions *per se*. However, in terms of the common law, the proceedings must comply with the demands of "natural justice" as preconditions of a fair trial. Thusfar, South African courts have not regarded the right to legal representation as a component of "natural justice".[78]

Section 25(3) of the Constitution outlines the norms implicated by the notion of a fair trial in criminal proceedings, and those norms include the right to legal representation. It is fair to conclude that disciplinary proceedings of a non-state institution will in future have to comply with the norms specified in section 25(3): not because of section 25(3) as such, but because of the common-law rules pertaining to a fair trial, which are now to be adjusted, in view of section 35(3), to include, amongst other things, a right to legal representation.

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75 See eg *Washington v Davis* 426 US 229 (1976); *Mobile v Bolden* 446 US 55 (1980); see also Gunther *Cases and materials on constitutional law* (1980) 711 – 745; Lockhart, Kamisar, Cooper *The American Constitution: cases and materials* (1981) 863 – 876.

76 1993-06-17 case no M20/93 (BGD).

77 See Van der Vyver "Comparative law in constitutional litigation" 1994 *SALJ* 30 – 31.

78 See eg *Hoskins v Van der Merwe* 1992 1 SA 921 (W) 922 – 924; and, in general, Van der Vyver *Die beskerming van menseregte in Suid-Afrika* (1975) 159 – 163.

Application of the Declaration of Fundamental Rights to conduct

As far as decisions and acts in the sense of human conduct are concerned, the declaration applies on the vertical level only.

Section 7(1) is abundantly clear in this regard. It provides that "[t]his Chapter shall bind all . . . executive organs of state at all levels of government". Section 7(2) similarly confines the operation of "[t]his Chapter" to "all *administrative* decisions taken and acts performed during the period of operation of this Constitution".[79]

Decisions and acts of officials of the executive branch of state authority at all levels of government (national, provincial and local), including those of statutory bodies or functionaries[80] that perform an executive function on any of those levels of government, are therefore the only instances of conduct (as opposed to law) that come within the confines of the Declaration.

Decisions, conduct or behaviour of private persons (including juristic persons) are not covered by the above provisions; and when one reads section 33(4), it becomes clear that such actions are excluded from the constitutional testing power of the courts. That section addresses unfair discriminatory law and practices that *cannot* be contested on authority of the Declaration but which may be outlawed by the legislature, should the need arise, through the medium of civil rights legislation. The persons whose actions may be censured under this provision are "bodies and persons other than those bound in terms of section 7(1)".

Take the following examples:

Billy Bigot had two girl-friends. He decided to marry Annie because she was Catholic and rejected Sannie because she was a Protestant. Later Billy deserted Annie because she converted to Judaism.

William Wills left his only possession, a farm in the Ventersdorp district, to his son (an artist) and not to his daughter (who holds a PhD in agriculture), because he believed that the land should remain in the family through the male line.

Peter Purité put up his house in Sandton for sale or for rent under the express condition that only white buyers or tenants will be considered.

Manley Male, owner of the Charlton VC Hotel, will not permit gays on the premises of the hotel.

The acts of Billy Bigot, William Wills, Peter Purité and Manley Male fall within the domain of private law and therefore belong to the "private sphere" not covered by the controlling mechanisms of the Declaration of Fundamental Rights. Under section 33(4), legislation would be permissible to proscribe discrimination based on religion in the law of husband and wife, or on the basis of gender in the law of succession, or with a view to race in the law of contract, or on the basis of sexual orientation in respect of privately owned public amenities, but such statutory prohibitions will not form part of the Declaration régime.

Conduct of persons other than officials of the executive branch of government, or of statutory bodies or functionaries acting within any of the levels

79 Emphasis added.
80 See s 233(1)(ix) of the Constitution.

of government, may, by virtue of section 35(3) of the Constitution, be affected by the indirect application of Declaration principles to the law supporting such conduct. For example, in terms of the common law, contracts which are *contra bonos mores* are invalid, and it may well be that the concept of *boni mores* will henceforth be redefined in view of what would be "justifiable in an open and democratic society based on freedom and equality". Peter Purité may find, therefore, that a contract prompted by racism turns out to be unenforceable on basis of a revised conception, inspired by the Declaration of Fundamental Rights, of the *boni mores*.

CONCLUSION

The a-constitutional "private sphere" is made up of:

(a) domestic rules of conduct with legal validity of social institutions other than the state or state organs on any of the levels of government; and

(b) conduct other than administrative decisions or acts of bodies or officials constituting part of the executive branch of state authority on all levels of government.

However, the "private sphere" will not remain unaffected by the new constitutional régime. The constitutional ethos projected by the Declaration of Fundamental Rights will in many ways penetrate the "private sphere"; and legislation enacted pursuant to section 33(4) may compel persons and institutions within the "private sphere" to toe the human rights line.

Die tweede applikant beweer dat die stadsraad se besluit [*om sekere parke vir die eksklusiewe gebruik van blankes aan te wys*] *hom 'erg ontstel en teleurgestel' het, en dat hy (en talle ander swartes) 'beledig en te na gekom' voel daardeur. Hierdie bewerings word nie ontken nie. Daar is geen rede waarom die tweede applikant se bewerings nie aanvaar sal word as 'n juiste beskrywing van sy subjektiewe gevoelens nie. Getoets aan 'n objektiewe maatstaf, is daar by my geen twyfel nie dat dit aanvaarbaar is dat die stadsraad se besluit inderdaad deur iemand in die tweede applikant se posisie as beledigend en krenkend ervaar sou word. Daar was dus 'n skending van die tweede applikant se* dignitas. *Dat diskriminerende maatreëls op 'n rassegrondslag op mense se* dignitas *'n inbreuk kan maak, is meer as 50 jaar gelede al aanvaar in 'n minderheidsuitspraak in hierdie Hof; sien* Minister of Posts and Telegraphs v Rasool *1934 AD 167,* per *Gardiner Wn AR op 189 – 91 . . .* Dignitas *is 'n diep ingewortelde begrip in ons reg, en, wat my betref, 'n kosbare een* [*Die applikant het gevolglik* locus standi *om hersiening van die stadsraad se besluit te vra.*] (*per* Botha AR in *Jabobs v Waks* 1992 1 SA 521 (A) 541 – 542).

Die beregting van fundamentele regte gedurende die oorgangsbedeling[1]

Johan Kruger *SC*
BIur et Art LLD
Professor in Regstoepassing, Potchefstroomse Universiteit vir CHO

SUMMARY

The adjudication of fundamental rights during the transitional period

Chapter 3 of the South African Constitution, Act 200 of 1993, is the product of political compromise. Although it contains a broad spectrum of those rights that one would expect to find in a bill of rights, there are also some omissions which may pave the way for social engineering by the government of the day. Furthermore, and although chapter 3 purports to apply only to the "vertical" relationship between the state and its subjects, there are clear indications in the chapter that "horizontal" application (or "Drittwirkung") of the fundamental rights enshrined in it, will follow.

For constitutional adjudication to find legitimacy in the eyes of the population, certain minimum requirements will have to be complied with: (i) the bench of the constitutional court should be representative of the composition of the population and (ii) the constitutional court should be readily (and where possible, directly) accessible. Although provision is made for direct access, in principle, the hybrid nature of the system as well as the difficulties in finding suitable criteria for direct access may thwart these good intentions.

The constitutional court will have to develop a new approach to interpretation, as the theories hitherto followed by Southern African courts fall short of the requirements for interpreting a bill of rights. In that regard, a leaf could be taken from the book of the German constitutional court in that an objective (and possibly, hierarchical) order of values should be identified and utilised as a point of departure when chapter 3 stands to be interpreted. The constitutional principles could provide such a basic order of values immanent to the bill of rights and the constitution as a whole.

1 INLEIDEND

Die Suid-Afrikaanse staatsvorm staan op die vooraand van 'n ingrypende ommekeer. In die besonder word fundamentele regte vir die eerste keer as beregbare regte in die Grondwet verskans.[2] Hierdie feit hou ingrypende implikasies vir die ganse Suid-Afrikaanse regsorde in.

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1 Intreerede gelewer aan die Potchefstroomse Universiteit vir CHO op 1993-10-15. Die oorspronklike intreerede is, waar nodig, aangepas ten einde dit in ooreenstemming te bring met die Grondwet van die Republiek van Suid-Afrika 200 van 1993, soos dit op 1994-01-27 deur die staatspresident geproklameer is.

2 Hfst 3. Geriefshalwe word na hfst 3 as "die handves" verwys.

Die oorgangsgrondwet[3] het op 27 April 1994 – die datum van die eerste volledige demokratiese algemene verkiesing – in werking getree en sal voortduur totdat die demokraties verkose parlement (wat ook as grondwetlike vergadering sal funksioneer) 'n "finale" grondwet daarstel. Die oorgangsgrondwet bepaal in artikel 4:

> "Oppergesag van die Grondwet:
> (1) Hierdie Grondwet is die hoogste reg van die Republiek en enige wet of handeling wat met die bepalings daarvan onbestaanbaar is, is, tensy uitdruklik of by noodwendige implikasie anders in hierdie Grondwet bepaal, nietig in die mate waarin dit aldus onbestaanbaar is.
> (2) Hierdie Grondwet bind alle wetgewende, uitvoerende en regsprekende staatsorgane op alle regeringsvlakke."

Die "finale" grondwet wat nou deur die grondwetlike vergadering geskryf moet word, moet voldoen aan grondwetlike beginsels waarop reeds by die onderhandelingsforum ooreengekom is.[4] Dat die aard en wese van die nuwe staatsvorm radikaal van die vorige staatsvorm verskil, word duidelik wanneer na die grondwetlike beginsels[5] gekyk word. Om maar 'n paar voorbeelde te noem: die Grondwet stel die hoogste reg daar en sal alle staatsorgane bind;[6] diskriminasie op enige gronde sal verbode wees;[7] daar sal 'n skeiding van magte wees tussen die wetgewende, uitvoerende en regsprekende gesag met behoorlike wigte en teenwigte ten einde verantwoordingdoening en deursigtigheid te verseker;[8] daar sal 'n bevoegde, onafhanklike en onpartydige regbank wees wat bevoeg sal wees om die Grondwet en alle fundamentele regte te beskerm en af te dwing;[9] daar sal 'n verteenwoordigende regering wees wat 'n veelparty demokrasie sal omvat, asook gereelde verkiesings, algemene volwasse stemreg, 'n gemeenskaplike kieserslys en proporsionele verteenwoordiging.[10]

In die besonder bepaal grondwetlike beginsel II:

> "Elkeen moet alle universeel aanvaarde fundamentele regte, vryhede en burgerlike vryhede geniet, waarvoor voorsiening gemaak moet word en wat beskerm moet word deur verskanste en beregbare bepalings in die Grondwet, wat opgestel moet word na behoorlike inagneming van, onder andere, die fundamentele regte vervat in Hoofstuk 3 van hierdie Grondwet."

Aldus word in beide die oorgangsgrondwet en die "finale" grondwet voorsiening gemaak vir die beskerming van fundamentele regte wat beregbaar sal wees. Daar kan dus met redelike sekerheid gesê word dat ten minste die fundamentele regte wat tans in hoofstuk 3 van die oorgangsgrondwet verskans word, vir

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3 Die begrip "oorgangsbedeling" ivm die sg oorgangsgrondwet word gebruik met verwysing na die tydperk tussen die eerste demokratiese algemene verkiesing (wat op 1994-04-27 plaasgevind het) en die eerste daaropvolgende algemene verkiesing. Hoewel die oorgangsgrondwet (a 68(2) saamgelees met a 73(1)) bepaal dat 'n nuwe grondwet binne twee jaar vanaf die datum van die eerste sitting van die grondwetlike vergadering aangeneem moet word, sal die wesenskenmerke van die huidige hfst 3 waarskynlik in so 'n nuwe grondwet vervat wees (vgl Bylae 4, Grondwetlike beginsel II).

4 Ingevolge die bepalings van a 74 is die grondwetlike beginsels onwysigbaar en onherroepbaar, en ingevolge a 71(1)(a) en (2) moet die "finale" grondwet voldoen aan die grondwetlike beginsels en deur die konstitusionele hof as sodanig gesertifiseer word.

5 Bylae 4 tot die oorgangsgrondwet.

6 Grondwetlike beginsel IV.

7 Grondwetlike beginsel III.

8 Grondwetlike beginsel VI.

9 Grondwetlike beginsel V.

10 Grondwetlike beginsel VIII.

die lewensduur van die oorgangsgrondwet op beregbare wyse beskerming sal geniet. Voorts, en in die lig van grondwetlike beginsel II, bestaan daar 'n hoë waarskynlikheid dat ten minste die fundamentele regte wat tans in die oorgangsgrondwet beskerm word, ook in die "finale" grondwet beskerming sal geniet en beregbaar sal wees.

Teen dié agtergrond word vervolgens aandag aan die volgende aspekte geskenk:

- die omvang van die fundamentele regte wat in die oorgangsbedeling beskerming geniet;
- die hofstrukture en prosedures in verband daarmee wat in die vooruitsig gestel word vir die beregting van fundamentele regte;
- 'n aantal belangrike kenmerke waaraan by die beregting van fundamentele regte voldoen moet word ten einde die grondslae vir 'n legitieme en juridies verantwoordbare bedeling daar te stel; en
- konstitusionele regspraak.

2 DIE OMVANG VAN DIE BESKERMING VAN FUNDAMENTELE REGTE[11]

Die omvang van die beskerming van fundamentele regte hang grotendeels van die inhoud van die handves self af; naamlik die regte daarin vermeld en die wyse waarop die handves geformuleer is.

'n Handves van fundamentele regte behoort na die aard daarvan soveel as moontlik waardes wat deur die oorgrote deel van die bevolking as hoogste waardes beleef en gekoester word, te beliggaam.[12] In dié opsig is die handves onderskeibaar van die res van die grondwet; dit is naamlik 'n eiesoortige dokument omdat die klem daarin nie soseer val op hoe die staatsgesag wel uitgeoefen mag word nie, maar eerder op hoe die staatsgesag nié uitgeoefen behoort te word nie. Die beperkinge wat op staatsoptrede geplaas word, geskied deur erkenning te gee aan sekere fundamentele regte van die staatsburger wat nie sonder meer deur die staat aangetas of weggeneem mag word nie. In die handves word die status van die staatsburger *vis-à-vis* die staat en sy gesag by uitstek neergelê.

Om die voorgaande redes is dit belangrik dat die waardes wat in die handves opgeneem word so verteenwoordigend as moontlik van die grootste gemene deler van die bevolking se hoogste waardes sal wees.

By inhoudgewing aan die voorgestelde handves is daar by die onderhandelingsraad klaarblyklik uitgegaan van die vertrekpunt dat 'n volledige en legitieme handves slegs deur 'n demokraties verkose parlement neergelê kan word, en nie deur 'n sogenaamde onverteenwoordigende en nie-demokratiese liggaam soos die onderhandelingsraad nie. Die premisse onderliggend aan die vertrekpunt

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11 Vir doeleindes hiervan word daar nie soseer op die inhoud van die handves ingegaan soos dit in hfst 3 van die oorgangsgrondwet beliggaam is nie: daar word bloot kortliks na sekere opvallende breë kenmerke van hfst 3 verwys.

12 Labuschagne "Doelorganiese regsnormvorming: opmerkinge oor die grondreëls van die uitleg van 'n handves van menseregte" 1993 *SAPR* 128 verklaar dat 'n handves veral in twee opsigte 'n unieke regsdokument is: (a) Dit beliggaam grondnorme waarop 'n regstelsel rus. Ander wetgewing word juis aan dié grondnorme getoets. (b) Anders as gewone wetgewing is 'n handves van menseregte duursaam: dit word nie maklik uitgevaardig en nie maklik herroep nie.

is dat dit die prerogatief van die meerderheidsparty in die grondwetlike vergadering sal wees om 'n "volledige" handves daar te stel.[13] Dié vertrekpunt verloor uit die oog dat meerderheidspartye kom en gaan en dat vandag se meerderheid môre se minderheid kan wees; dat 'n handves méér as net die politieke voorkeure en programme van 'n toevallige meerderheidsparty op 'n gegewe tydstip behoort te beliggaam en te weerspieël.

Hoewel daar toegegee moet word dat die produk soos dit tans daar uitsien, veel omvattender is as wat aanvanklik beoog is, is dit opvallend dat daar slegs met enkele sosio-ekonomiese (oftewel tweede generasie) regte gehandel word, en dit terwyl dit 'n welbekende feit is dat sosio-ekonomiese regte hoog op die agenda van 'n party soos die ANC staan.[14] Terwyl ek nie 'n voorstander daarvan is dat sosio-ekonomiese regte in 'n handves self beskerm moet word nie, kan sosio-ekonomiese regte wel op aanvaarbare en juridies houdbare wyse hanteer word deur van sogenaamde "directive principles" gebruik te maak – 'n meganisme wat reeds met welslae in ander regstelsels aangewend word.[15] Deur 'n groot aantal sosio-ekonomiese regte op generlei wyse te hanteer nie, dui maar op een waarskynlikheid en dit is dat die ANC, as regering, op 'n wyse wat hy verkies met sosio-ekonomiese regte sal wil handel. Daar kan gevolglik gevra word of Suid-Afrika weer 'n periode van maatskaplike manipulasie ofte wel "social engineering" tegemoet gaan waar die party wat die eerste algemene verkiesing wen, die handves sal gebruik as 'n manipulasiebasis vanwaar sy besondere politieke en sosio-ekonomiese agenda geloods word.[16] Indien dit die benadering van 'n party soos die ANC is, sal dit noodwendig daartoe lei dat beide die oorgangshandves en die finale handves aan legitimiteit inboet.[17] Dit sal jammer wees. Die daarstel van 'n handves bied geleenthede wat hulle selde in 'n land se geskiedenis voordoen. Die hoeksteen van 'n suksesvolle bedeling

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13 Die daarstel van 'n nuwe grondwet moet ingevolge a 73(1) van die oorgangsgrondwet binne twee jaar vanaf die datum van die eerste sitting van die grondwetlike vergadering geskied.

14 Die konsep-handves van die ANC bevat bv in a 11 ("Social, Educational and Welfare Rights") 'n uitvoerige lys sosio-ekonomiese regte.

15 Hfst 11 van die Namibiese Grondwet, gelees met a 23, lê 'n lys aanwysende beginsels oftewel "directive principles" neer aan die hand waarvan sosio-ekonomiese aangeleenthede aangespreek kan word. Die noodwendige implikasie van hfst 11 is dat die inhoud daarvan deur die howe in aanmerking geneem sal word wanneer sosio-ekonomiese aansprake bereg moet word. In die Indiese Grondwet bepaal a 37 mbt die aanwysende beginsels: "The provisions contained in this part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws."

16 Dat die regbank soms meegedoen het aan die maatskaplike manipulasie van die regering van die dag, strek tot sy oneer. Vgl bv die *dictum* van Holmes AR in *Minister of the Interior v Lockhat* 1961 2 SA 587 (A) 602D – E waar die omstrede Groepsgebiedewet 77 van 1957 beskryf is as "a colossal social experiment and a long-term policy. It necessarily involves the movement out of group areas of members of people throughout the country. Parliament must have envisaged that compulsory population shifts of persons occupying certain areas would inevitably cause disruption and, within the foreseeable future, substantial inequalities".

17 Die noodsaak dat 'n handves – selfs al is dit teoreties van 'n "verbygaande aard" – *legitiem* moet wees, is goed raakgesien deur die Tegniese Komitee rakende Fundamentele Regte van die veelparty-onderhandelingsproses, wat in hulle tweede verslag aan die onderhandelingsraad verklaar dat "the way in which fundamental rights and freedoms are entrenched during the transition (and the degree of success with which this could be done) will inevitably impact on the legitimacy of the means and mechanisms for the protection and enforcement of these rights and freedoms in the eventual dispensation".

gemik op die beskerming van fundamentele regte lê in die legitimiteit daarvan. Eensydige politieke agendas en doelwitte kan die daarstel van 'n legitieme handves slegs nadelig raak.

'n Aspek van die handves wat vermelding verdien (al is dit net omdat dit waarskynlik tot talle probleme aanleiding kan gee), is die vraag na die trefwydte van die handves, naamlik in watter mate die handves veronderstel is om, benewens die "vertikale" werking daarvan, ook "horisontaal" toepassing te vind. Ondanks die bepalings van artikel 7(1) en 7(2)[18] bepaal artikel 33(4): "[H]ierdie Hoofstuk belet nie maatreëls wat daarvoor ontwerp is om onbillike diskriminasie deur ander liggame en persone as dié wat ingevolge artikel 7(1) gebonde is, te verbied nie". Klaarblyklik open artikel 33(4) die deur vir wetgewing wat daarop gemik is om "private diskriminasie" te verhoed. Hoewel so 'n bepaling in beginsel te verwelkom is, sal sorg gedra moet word dat die bepaling nie as 'n agterdeur gebruik word waardeur onbeperkte en ongekwalifiseerde aanwending van die handves op die terrein van die privaatreg aanwending sal vind nie. Vir sover artikel 33(4) wel gemelde moontlikheid skep, behoort die howe by die toepassing daarvan deeglik met die bepalings van artikel 35(3) rekening te hou.[19] Laasgenoemde artikel lê 'n plig op die howe om by die toepassing van onder andere die gemenereg (dus, by implikasie ook die privaatreg) kennis te neem van die gees, strekking en oogmerke van hierdie hoofstuk. Een van die implikasies van laasgenoemde bepaling is dat die "gees, strekking en oogmerke" van die handves deeglik deur die hof verreken moet word waar dit gaan om die "toepassing en ontwikkeling" van die gemenereg. Maatreëls wat die privaatreg raak en wat ingevolge artikel 33(4) neergelê word, moet daarom versoenbaar wees met die "gees, strekking en oogmerke" van die handves.

Getoets aan die voorgaande, ontstaan daar klaarblyklik 'n spanningsverhouding tussen byvoorbeeld die verbod op diskriminasie[20] enersyds, en die bepalings met betrekking tot vryheid van assosiasie,[21] vryheid van godsdiens[22] en onderwys[23] andersyds. Die vraag is gewoon of dit in ooreenstemming met die "gees, strekking en oogmerke" van die handves sou wees indien 'n bepaalde godsdiensgroep 'n private onderwysinstelling tot stand bring vir die uitsluitlike gebruik deur lede van daardie godsdiensgroep. Sou dit 'n verskil maak indien dit 'n bepaalde taal- of kultuurgroep is wat dieselfde doen?

Terloops kan gemeld word dat die toevoeging van 'n uitlegklousule[24] te verwelkom is veral omdat belangrike riglyne vir die uitleg van die handves daarin neergelê word. In die besonder is dit te verwelkom dat daar uitdruklik[25] bepaal

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18 7(1): "Hierdie Hoofstuk bind alle wetgewende en uitvoerende staatsorgane op alle regeringsvlakke." 7(2): "Hierdie Hoofstuk is van toepassing op alle reg wat van krag is en op alle administratiewe besluite geneem en handelinge verrig gedurende die tydperk waarin hierdie Grondwet in werking is."

19 35(3): "By die uitleg van enige wet en die toepassing en ontwikkeling van die gemene reg en gewoontereg, neem 'n hof die gees, strekking en oogmerke van hierdie Hoofstuk behoorlik in ag."

20 A 8(2).

21 A 17.

22 A 14.

23 A 32, in die besonder 32(c).

24 A 35. Vgl ook die kommentaar van Du Plessis en De Ville "Bill of rights interpretation in the South African context (3): comparative perspectives and future prospects" 1993 *Stell LR* 358–359.

25 A 35(3); vgl Kruger *Die wordingsproses van 'n Suid-Afrikaanse menseregtebedeling* (LLD-proefskrif PU uir CHO 1990) hfst 6.

word dat 'n hof die "gees, strekking en oogmerke" van die handves behoorlik in ag moet neem by die uitleg van enige wet, die gemenereg en gewoontereg. Dieselfde beginsel behoort uiteraard te geld by die uitleg van die handves en die res van die Grondwet.[26]

3 LEGITIEME BEREGTING[27]

3 1 Die hofstrukture

Die stelsel van konstitusionele beregting in die oorgangsgrondwet is 'n hibriede of "gemengde" stelsel: die "gewone" hooggeregshowe het wel (al is dit beperkte) jurisdiksie om sake van 'n konstitusionele aard (en dus ook met betrekking tot fundamentele regte) te verhoor.[28] As hof van finale instansie met betrekking tot onder andere die beregting van fundamentele regte, word 'n konstitusionele hof ingestel.[29] Die konstitusionele hof is 'n nuwe hof wat met betrekking tot konstitusionele beregting die kragtigste regsprekende orgaan sal wees. Só bepaal die oorgangsgrondwet byvoorbeeld dat 'n beslissing van die konstitusionele hof alle persone en alle wetgewende, uitvoerende en regsprekende staatsorgane bind,[30] en dat die appèlafdeling geen jurisdiksie het om te beslis oor enige aangeleentheid wat binne die jurisdiksie van die konstitusionele hof val nie.[31]

Deur te kies vir 'n afsonderlike konstitusionele hof wat buite die gewone hofstrukture staan, het die onderhandelingsraad myns insiens die korrekte keuse gemaak.[32] Konstitusionele beregting is uit die aard daarvan meestal 'n ongemaklike konglomeraat van reg en politiek-verwante dispute: dit dra die ondertone van politieke oorwegings of hou direkte of indirekte politieke gevolge in. Om daardie rede is dit verstandig om die finale seggenskap in sulke sake toe te vertrou aan 'n hof wat buite die gewone hofstruktuur staan en wat hopelik toegerus sal wees om sodanige sake op 'n sensitiewe wyse te hanteer. Die ervaring in ander lande waar afsonderlike konstitusionele howe bestaan, het geleer dat 'n sensitiewe hantering van sake wat dikwels polities gelaai is, die legitimiteit van sodanige hof eerder verhoog as verlaag.[33]

3 2 Die regbank en die samestelling daarvan

Daar kan min twyfel bestaan dat die huidige regbank van die hooggeregshof nie as verteenwoordigend van die samestelling van die breë bevolking beskou

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26 Sien par 5 *infra*.

27 Die begrip "legitimiteit" word hier gebruik in die sin van die geloofwaardigheid en algemene aanvaarding wat 'n instelling en dié se doen en late in die oë van die breë bevolking geniet. Die begrip "legitimiteit" (of liewer die beweerde gebrek daaraan) word deesdae te gerieflik en te dikwels as 'n wapen tot verdagmakery gebruik. Wanneer 'n instansie na struktuur of personeel nie presies na die sin van 'n belangegroep of 'n organisasie is nie, word dit as "illegitiem" afgemaak. Dié begrip moet daarom met groot verantwoordelikheid, omsigtigheid en die hoogste moontlike mate van objektiwiteit aangewend word.

28 Vgl a 101(2) en (3) van die Grondwet. Daarvolgens sal die hooggeregshof die jurisdiksie (met inbegrip van die inherente jurisdiksie) wat onmiddellik voor die inwerkingtreding van die oorgangsgrondwet in hom gesetel het, behou en daarbenewens bykomende jurisdiksie verkry oor oa enige beweerde skending of dreigende skending van 'n fundamentele reg soos in hfst 3 verskans.

29 A 98(1) en (2) van die Grondwet.

30 A 98(4).

31 A 101(5).

32 Vgl Kruger "A constitutional court for South Africa?" 1993 (1) *Consultus* 13 – 20.

33 Meningspeilings in Duitsland het getoon dat die *Bundesverfassungsgericht* die mees legitieme openbare instelling is en groter openbare aansien geniet as bv die parlement, die "gewone" howe, die media en universiteite.

kan word nie. Die redes daarvoor is deels te vinde in die konvensies en strukture van die regsprofessie, maar is ongetwyfeld ook te wyte aan diskriminasie op grond van ras en geslag. Benewens bedenkinge oor die samestelling van die huidige regbank ontstaan die vraag na die mate waarin die regbank daarin kon slaag om fundamentele regte, soos in ons gemenereg beliggaam, te beskerm. Oor dié onderwerp is reeds boekdele geskryf en vir my doeleindes is dit onnodig om daarby stil te staan.[34] Daar word volstaan met die opmerking dat daar weinig twyfel kan bestaan dat ten minste 'n deel (indien nie die grootste deel nie) van die bevolking die ervaring het dat die regbank nie altyd sterk in die bres getree het om fundamentele regte teen owerheidsingrype te beskerm nie. Anders gestel: die persepsie bestaan dat die regbank diskriminerende wetgewing sonder veel skroom of teenspraak aanvaar het en maar al te geredelik (en positivisties-dienstig) toegepas het.

Hierdie denkwyse hou egter die risiko in dat die kind saam met die badwater uitgegooi kan word, met ander woorde dat die hoë gehalte van regspraak wat ongetwyfeld ook deur die Suid-Afrikaanse regbank gelewer is, misken kan word. Boonop is so 'n benadering eensydig en moet daarom afgewys word. Waar dit egter hier om die beskerming en beregting van fundamentele regte gaan, kan die persepsie dat die regbank illegitiem is, nie geïgnoreer word nie en moet dit trouens behoorlik verreken word by die samestelling van die beoogde konstitusionele hof.

Die instel van 'n Regterlike Dienskommissie is 'n baie belangrike wysiging van die *status quo* wat deur die oorgangsgrondwet teweeggebring word.[35] Regters van die hooggeregshof word deur die president, handelende op advies van die Regterlike Dienskommissie, aangestel.[36]

Die Regterlike Dienskommissie verteenwoordig 'n goed gebalanseerde deursnit van belange.[37] Die regbank van die konstitusionele hof bestaan uit 'n president, vier regters uit die geledere van die regters van die hooggeregshof en ses ander regters wat óf 'n toegelate advokaat óf 'n toegelate prokureur moet wees en wat vir 'n kumulatiewe tydperk van ten minste tien jaar aldus gepraktiseer het, óf vir die gemelde periode 'n regsdosent aan 'n universiteit was.[38] Onder hierdie ses persone mag daar 'n maksimum van twee persone wees wat nie aan die voorgaande vereistes voldoen nie maar wat weens hul opleiding en ervaring,

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34 Vgl in dié verband Kruger *Die wordingsproses van 'n Suid-Afrikaanse menseregtebedeling* hfst 5 en die bronne daarin aangehaal.

35 A 105.

36 A 104(1). Dit is opmerklik dat die president hier bloot handel *op advies van* die Regterlike Dienskommissie. Die omvang van die diskresie waaroor die president in die verband beskik, word duidelik wanneer a 104(1) met a 233(3) en (4) vergelyk word. A 233(3) bepaal nl dat waar van 'n funksionaris vereis word om 'n besluit *in oorleg met* 'n ander funksionaris te neem, vir sodanige besluit die *instemming* van daardie funksionaris vereis word. A 233(4) bepaal dat indien sodanige besluit *na oorleg met* 'n ander funksionaris geneem word, sodanige besluit in goeie trou geneem moet word nadat daardie ander funksionaris geraadpleeg is en ernstige oorweging aan die sienswyse van daardie funksionaris gegee is. In effek sal die Regterlike Dienskommissie se advies aan die president dus nie bindend wees nie, hoewel die konvensie hopelik sal ontwikkel dat die president hom in die grootste moontlike mate aan sodanige aanbevelings sal hou.

37 Uit 'n moontlike maksimum van 19 lede word daar voorsiening gemaak vir 10 persone uit die regspraktyk (dws regters, advokate en prokureurs), een regsprofessor en agt polities aangewysde verteenwoordigers.

38 Sien in die algemeen a 99(2).

kundigheid op die gebied van die staatsreg het, welke kundigheid relevant moet wees tot die toepassing van die Grondwet en Suid-Afrikaanse reg.[39]

Die president van die konstitusionele hof word aangestel deur die (staats-) president in oorleg met die kabinet en die hoofregter.[40] Die vier regters afkomstig van die regbank van die hooggeregshof word op 'n soortgelyke wyse aangestel. Die ses ander regters word insgelyks deur die president in oorleg met die kabinet en na raadpleging van die president van die konstitusionele hof aangestel. Sodanige aanstellings deur die president word gedoen uit 'n lys van aanbevelings (bestaande uit tien name vir die eerste rondte) en saamgestel deur die Regterlike Dienskommissie.[41] Sou sodanige aanbevole name vir die geheel of gedeelte daarvan nie aanvaarbaar wees vir die "aanstellende owerhede" nie, word die Regterlike Dienskommissie dienooreenkomstig in kennis gestel en ook van redes voorsien. Die Regterlike Dienskommissie hou dan verdere aanbevelings voor aan die instansies wat die aanstellings doen, waarna laasgenoemde die nodige aanstellings uit die lys aldus deur die Regterlike Dienskommissie verskaf, moet maak.[42]

Uit voorgaande is dit duidelik dat die president en sy kabinet die finale sê by die aanstel van regters van die konstitusionele hof het. Soos reeds hierbo aangetoon is,[43] beteken die uitdrukking "in oorleg met" dat die instemming van die betrokkenes verlang word. Ingevolge die filosofie van 'n regering van nasionale eenheid word die kabinet saamgestel uit lede van verskillende politieke partye.[44] Die oorgangsgrondwet bevat geen voorskrifte met betrekking tot meerderhede wat vir kabinetsbesluite vereis word nie.[45] Teoreties kan die situasie dus ontstaan dat die kabinet nie eenstemmigheid kan bereik oor watter ses persone aangestel moet word nie en dat die meerderheidsparty in die kabinet dan gewoon by meerderheidsbesluit die ses kandidate wat vir daardie party aanvaarbaar is, mag aanstel.

Hoewel dit in beginsel verwelkom moet word dat die Regterlike Dienskommissie 'n betreklik substantiewe seggenskap in die aanstellingsprosedure van regters van die konstitusionele hof sal hê, is dit jammer dat die finale seggenskap steeds by die uitvoerende gesag (en, soos hierbo aangetoon is, soms slegs by die meerderheidsparty in die kabinet) sal berus. Die vraag ontstaan of die aanstellingsmetode soos dit deur die Tegniese Komitee rakende Konstitusionele Sake aan die Onderhandelingsraad voorgestel is, nie tot 'n beter gebalanseerde – en dus verteenwoordigende – konstitusionele regbank sou gelei het nie. Die kern van dié komitee se voorstel was dat 'n staande komitee van die parlement bestaande uit een lid van elke party wat in die parlement verteenwoordig is, en nadat onderhoude met genomineerde kandidate *in camera* gevoer is, 'n eenparige aanbeveling aan die parlement sou doen. Sou 'n eenparige aanbeveling nie gemaak kon word nie, het die voorstel voorsiening gemaak vir 'n ontknopingsmeganisme, naamlik dat 75% van die lede van die staande komitee

39 A 99(2)(c)(ii).
40 A 99(1) gelees met a 99(3).
41 A 99(5)(a).
42 A 99(5)(b) en (c).
43 Vgl vn 36 *supra*.
44 A 88.
45 A 89(2) bepaal slegs dat die kabinet sal funksioneer op 'n wyse wat in ooreenstemming is met "die konsensus-soekende gees onderliggend aan die konsep van 'n regering van nasionale eenheid, sowel as die behoefte aan effektiewe staatsbestuur".

agt regters sou aanwys, en die oorblywende 25% twee regters. 'n Verdere vereiste was dat die aanbevelings van die staande komitee nie in die parlement gedebatteer sou word nie.

Een van die hoofbesware wat teen die tegniese komitee se voorstel geopper is, is dat dit die aanstelling van regters van die konstitusionele hof sou verpolitiseer. Daarteenoor kan geargumenteer word dat die huidige metode eweneens ruim geleentheid vir politisering bied. Ongeag welke metode van aanstelling gebruik word, moet egter aanvaar word dat, juis vanweë die kwasiepolitieke aard van konstitusionele beregting asook die wydlopende invloed wat die beslissings van die konstitusionele hof op die staatkundige ontwikkelingsproses sal hê, die aanstelling van daardie regters inderdaad 'n hoogs verpolitiseerde aangeleentheid is en sal bly. Daar kan alleen maar gehoop word dat alle betrokkenes die aanstelling van sodanige regters op 'n hoogs verantwoordelike wyse sal hanteer, sodat die regbank van die konstitusionele hof uiteindelik deur die bevolking gesien en beleef word as 'n bekwame en verteenwoordigende regbank waarvan die integriteit (en politieke onpartydigheid) bo verdenking staan.

Die drie opvallende verskille tussen die "kandidatelys" waaruit regters tans aangestel word en die moontlike kandidate vir die konstitusionele hof, is dat (i) prokureurs (wat nie noodwendig oor 'n LLB-graad hoef te beskik nie) ook tot daardie regbank aangestel kan word, (ii) nie-regsgeleerdes (tot 'n maksimum van twee) in beginsel tot die amp verhef kan word en (iii) regsdosente ook daarvoor verkiesbaar is. In beginsel moet kategorieë (i) en (iii) verwelkom word. Die wysheid daarvan om nie-regsgeleerdes in hierdie belangrike amp aan te stel, moet egter ernstig betwyfel word. Dit is nouliks verstaanbaar hoe so 'n persoon geag kan word kundigheid te hê ten aansien van die staatsreg en die toepassing van die oorgangsgrondwet en die Suid-Afrikaanse reg as hy of sy nie oor 'n regskwalifikasie beskik nie. Dit behoef weinig betoog dat die interpretasie, aanwending en toepassing van die oorgangsgrondwet (soos trouens enige ander grondwet) die hoogste mate van (regs-) kundigheid verg. Trouens, daar is 'n sterk saak voor uit te maak dat grondwetlike beregting, as 'n hoogs gespesialiseerde terrein, buitengewone kundigheid vereis ten aansien van byvoorbeeld hermeneutiese beginsels en metodiek.

3 3 Toegang

Dit is 'n bekende feit dat die bestaande hofstelsel 'n groot element van ontoeganklikheid vertoon. Dié ontoeganklikheid is hoofsaaklik te wyte aan koste en tydsduur: litigasie (veral in die hoër howe) is duur en tydrowend. In dié verband speel die verdeling van die regsprofessie in 'n balie en 'n sy-balie geen geringe rol nie. Bowendien is regsbystand wat deur middel van instansies soos die regshulpraad, regsklinieke en nie-regeringsinstellings verleen word, hoewel baie belangrik, steeds 'n druppel in die emmer.

'n Handves moet geredelik tot die beskikking van die bevolking wees. Dit beteken gewoon dat individue in die samelewing – en dan veral individue wat normaalweg nie die hoë koste verbonde aan hooggeregshoflitigasie kan dra nie – in 'n posisie gestel moet word waar hulle hul geredelik op die handves kan beroep. 'n Konstitusionele hof wat struktureel sodanig geposisioneer is dat dit slegs met die grootste moeite, koste en tyd bereik kan word, sou ooglopend nie geredelik toegang aan die individu verleen nie. Dit is daarom uiters noodsaaklik

dat 'n metode bedink moet word om veral aan die individu direkte toegang tot die konstitusionele hof te gee, al is dit net in bepaalde omstandighede.

Die oorgangsgrondwet skep die moontlikheid[46] dat daar in die reëls van die konstitusionele hof voorsiening gemaak kan word vir direkte toegang waar dit in belang van geregtigheid sou wees. Die vraag is of die beoogde doelwit (naamlik direkte toegang vir veral individuele litigante) deur middel van die neerlê van reëls bereik sal kan word, veral wanneer in ag geneem word dat sodanige reëls binne die breë raamwerk van die strukturele en prosedurele bepalings[47] van die Grondwet moet bly.

Die uitdrukking "direkte toegang" impliseer immers dat die konstitusionele hof sonder die wesenlike tussenkoms van enige ander hof genader behoort te kan word. In ander jurisdiksies waar daar 'n prosedure van direkte toegang bestaan,[48] word voorsiening gemaak vir 'n siftingsmeganisme inherent aan die konstitusionele hof self om sake met meriete te onderskei van sake sonder *prima facie* meriete.[49] So 'n "ingeboude" siftingsmeganisme as deel van die struktuur van die konstitusionele hof is egter afwesig in die stelsel soos dit in die Grondwet beskryf word. Die enigste moontlik wyses waarop "direkte toegang" gevolglik gestruktureer kan word, is óf deur die neerlê van kriteria waaraan voldoen moet word wanneer die konstitusionele hof direk genader word, óf om die hooggeregshof as "siftingsmeganisme" te laat funksioneer.

Ten aansien van eersgenoemde moontlikheid (die neerlê van kriteria) lê die probleem by die vind van geskikte kriteria. Sou die kriterium dié van "groot dringendheid" wees, sou sodanige dringendheid ooglopend méér moet omvat as die dringendheidsgraad wat vereis word vir die bring van 'n dringende aansoek na die hooggeregshof.[50] Maar selfs al sou 'n verhoogde dringendheidsgraad neergelê word, kan daar steeds verwag word dat die konstitusionele hof oorval sal word met aansoeke wat na bewering aan die gestelde dringendheidsgraad voldoen. Só 'n prosedure sou dus nie noodwendig deug nie, veral nie wanneer sodanige aansoeke elke keer in die ope hof en deur meer as een konstitusionele regter aangehoor moet word nie. 'n Ander moontlike kriterium is dié van "groot openbare belang". Weer eens, en weens die gebrek aan 'n siftingsmeganisme, kan so 'n kriterium 'n geweldige hoë werkslading vir die konstitusionele hof meebring.

Weens die hibriede aard van die stelsel van konstitusionele beregting in die Grondwet, en die gebrek aan 'n siftingsmeganisme verbonde aan die konstitusionele hof self, wil dit voorkom of die hooggeregshof as 'n siftingsmeganisme sal moet dien. Artikel 102(1) maak byvoorbeeld daarvoor voorsiening dat 'n aangeleentheid wat binne die uitsluitlike jurisdiksie van die konstitusionele hof val, deur 'n hooggeregshof na die konstitusionele hof verwys kan word indien dit in belang van geregtigheid is.[51] Hoewel hierdie 'n tydbesparende prosedure vir 'n litigant kan wees, is dit ooglopend nie noodwendig 'n kostebesparende

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46 A 100(2).
47 A 102.
48 Bv die prosedure van die "Verfassungsbeschwerde" in die Duitse reg.
49 Vir 'n samevattende uiteensetting van die funksionering van die siftingsmeganisme in die *Bundesverfassungsgericht*, sien Kruger 1993 (1) *Consultus* 18.
50 Vgl Hooggeregshofreël 6(12).
51 Dit is opvallend dat die kriterium "in belang van geregtigheid" in hierdie artikel ooreenstem met die kriterium vir direkte toegang in a 100(2).

prosedure nie. Ten einde koste-effektief en koste-besparend te kan wees, moet daar minstens voorsiening gemaak word vir 'n prosedure waar 'n individuele litigant, indien hy dit sou verkies, sy aansoek by 'n regter in kamers kan bring, sonder die vereiste dat die saak in die openbare hof (en by implikasie deur gebruikmaking van regsverteenwoordiging) beslis moet word.

Dit is jammer dat die bepalings van die oorgangsgrondwet nie reeds uitdruklik voorsiening maak vir 'n siftingsmeganisme gekoppel aan die konstitusionele hof self nie. Die gevolg van dié leemte is voortgesette onsekerheid oor die effektiewe toegang tot dié hof, veral vir die individuele litigant wat 'n dreigende of werklike inbreukmaking op van sy fundamentele regte wil laat bereg.

4 DIE REGSPRAAK VAN DIE KONSTITUSIONELE HOF

Dit sal die taak van die konstitusionele hof wees om 'n geheel nuwe regstradisie in Suid-Afrika in te lei en te skep. Die mate waarin die konstitusionele hof daarin sal slaag om die grondslae vir 'n legitieme nuwe regsbedeling daar te stel, hang ten nouste saam met die wyse waarop die Grondwet (waarby die handves van fundamentele regte ingesluit is) deur die hof geïnterpreteer en toegepas sal word. As gevolg van die *Grundnorm* van parlementêre soewereiniteit soos wat dit tot dusver in ons reg geheers het, het die howe hulle gehou by 'n formalistiese en positivistiese uitlegbenadering wat min (indien enige) ruimte laat vir die verrekening van buite-tekstuele faktore by die uitleg van wetgewing.[52] Dit het daartoe aanleiding gegee dat faktore soos moraliteits- of beleidsoorwegings weinig, indien enige, direkte of indirekte rol by sodanige uitleg speel.[53]

Dit is voorts opmerklik dat die howe op enkele uitsonderings na tot dusver geweier of nagelaat het om by die uitleg van aktes van fundamentele regte dié uitgediende benadering te vervang deur 'n gepaste benadering. Die gepaste benadering behels onder andere dat waarde-oordele aangewend moet word in die proses van interpretasie. Daarmee saam moet 'n nuwe metodologie gevolg word wanneer handveste uitgelê word.[54]

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52 Vgl Kruger "Regspositivisme en die 'ongeskrewe teks' van die (nuwe) grondwet" 1991 *SAPR* 229; Kruger "Positivism: the old warhorse lives on" 1992 *SAPR* 312; Kruger "Value judgements versus positivism" 1991 *SAPR* 290; Du Plessis en De Ville "Bill of rights interpretation in the South African context (1): diagnostic observations" 1993 *Stell LR* 63; Du Plessis en De Ville "Bill of rights interpretation in the South African context (2): prognostic observations" 1993 *Stell LR* 199; Du Plessis en De Ville 1993 *Stell LR* 356 .

53 Vgl Kruger 1993 (1) *Consultus* 14 waar die huidige benadering van ons howe soos volg verduidelik word: "Considerations 'outside' of the text (eg of morality) ought not to play a role in the process of ascertaining what the law is. What is important (according to the current theory) is to ascertain what Parliament 'intended'. In the process of finding this intention, the 'clear words' of the statute should be read in their ordinary and grammatical meaning. What is even more important, however, is that implicit in this approach, lies a 'command' of the legislature. Apart from certain exceptions, for example, where the words are ambiguous, the 'command' forbids the court to read anything into the text which does not explicitly appear from the clear wording itself. In fact the court is bound to almost slavishly give effect to the (fictitious) intention, once the latter has been ascertained, regardless of considerations of morality, policy or whatever. Furthermore, 'policy considerations' are a prohibited area to the court: the reasons why the enactment reads as it does, are irrelevant and constitute a sphere where the court should not interfere."

54 Tav die aanwending van waarde-oordele en 'n nuwe metodologie vgl Kruger *Die wordingsproses van 'n Suid-Afrikaanse menseregtebedeling* hfst 6; Kruger 1991 *SAPR* 237; Kruger 1993 (1) *Consultus* 15 – 17; Du Plessis en De Ville 1993 *Stell LR* 202 – 204; Du Plessis en De Ville 1993 *Stell LR* 358 – 363.

'n Handves van fundamentele regte is 'n unieke dokument en 'n besondere en *sui generis*-benadering word geverg by die uitleg daarvan.[55] Die aanwending van waarde-oordele is waarskynlik die uitstaande kenmerk van die metode van uitleg wat by handveste gevolg word. Die kernprobleem wanneer waarde-oordele aangewend word, is dat laasgenoemde ewe maklik kan bestaan uit die subjektiewe waardes van elke individuele regter. Dit is dus nodig dat daar 'n balans gevind moet word tussen streng en formalistiese positivisme enersyds en die blote subjektiewe aanwending van waardes andersyds.

Gemelde probleem geniet die aandag van konstitusionele regslui wêreldwyd. In 'n land soos Kanada waar die "gewone" howe ook konstitusionele aangeleenthede bereg en die regstradisie (soortgelyk aan die in Suid-Afrika) op die *Grundnorm* van parlementêre soewereiniteit geskoei is, het die ervaring oor die afgelope dertig jaar geleer dat die Kanadese regbank baie moeilik wegbeweeg van die positivisme wat op sodanige soewereiniteit gebou is.[56] Ook in die VSA, en ondanks die feit dat daardie land se "Bill of Rights" reeds meer as tweehonderd jaar bestaan, worstel die regbank steeds om objektiewe maatstawe vir die aanwending van waarde-oordele te vind. In dié land word gangbaar onderskei tussen regters met 'n formalistiese benadering en dié met 'n instrumentalistiese benadering.[57] Die instrumentaliste is voorstanders van die aanwending van waarde-oordele. Interessant genoeg het daar oor die afgelope aantal jare 'n denkskool in die Verenigde State ontstaan wat poog om die subjektiewe elemente uit die aanwending van waarde-oordele te weer. Die bekendste voorstander van dié denkskool is waarskynlik Robert Bork. Bork poog om 'n objektiewe maatstaf (of maatstawwe) te vind in die "intent of the original framers" van die Grondwet van die VSA.[58]

Daar kan min twyfel bestaan dat die benadering wat deur die Duitse grondwetlike hof in die verband gevolg word, tans toonaangewend is.[59] Hierdie hof

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55 Van der Vyver "Comparative law in constitutional litigation" 1994 *SALJ* 23 ev is skerp krities teen die benadering dat 'n handves van fundamentele regte 'n unieke dokument is wat 'n eie uitlegbenadering verg. Met verwysing na die benadering wat in Bophuthatswana gevolg is, sê Van der Vyver dat handveste net soos ander wetgewing vatbaar is vir ekstensiewe interpretasie, maar dat die toonaangewende beginsel by die uitleg van 'n handves die "common-law" metode is, naamlik "the courts should seek to reduce the specific dictates of the Declaration of Fundamental Rights to a general principle that reflects the 'spirit of the Constitution' and to apply that principle to the novel contingency at hand".

56 Vgl bv Beatty "The rule (and role) of law in a new South Africa: some lessons from abroad" 1992 *SALJ* 422 – 424; Trakman "Interpreting a bill of rights: Canada and South Africa compared", referaat gelewer by die kongres oor die interpretasie van menseregte-aktes in Potchefstroom gedurende April 1992.

57 Vgl Tushnet "The judiciary and institutions of judicial review" 1992/1993 (8) *The American University Journal of International Law and Policy* 510 ev. Van der Vyver "Sovereignty and human rights in constitutional and international law" 1991 (5) *Emory International LR* 321 377 onderskei op sy beurt tussen "mechanical interpretationists" en "revisionists".

58 Die teorie, waarna verwys word as die "original intent-theory", is volgens Bork "[t]he Philosophy of Original Understanding – that a judge is to apply the Constitution according to the principles intended by those who ratified the document". Vgl Bork "Neutral principles and some First Amendment problems" 1971 *Ind LJ* 3; Bork *The tempting of America: The political seduction of the law* (1990) 160 ev; Peck *The bill of rights and the politics of interpretation* (1992) 161 – 178; Calder "Lessons from (North) America" 1992 *SALJ* 211 ev. Vir 'n bespreking van die hooftrekke van die Amerikaanse benadering, sien Van der Vyver 1991 (5) *Emory International LR* 375 – 384.

59 Vgl Van der Vyver *idem* 384 – 392. Dit sou jammer wees indien die Suid-Afrikaanse howe by die toepassing van die Grondwet (en veral die handves van fundamentele regte) nie

onderskei wesenlik tussen vier benaderings tot interpretasie, naamlik die grammatiese, sistematiese, teleologiese en historiese metodes.[60] Die benadering om "waarde-oordele" aan te wend, sentreer hoofsaaklik om die teleologiese metode, dit wil sê om te vra na die doelwitte en mikpunte immanent aan die Grondwet self. Die Duitse konstitusionele hof neem as vertrekpunt dat die Grondwet 'n "logies-teleologiese entiteit" is. Gevolglik word beide die strukturele inhoud van die Grondwet en die mikpunte, doelwitte en oogmerke immanent aan die Grondwet in aanmerking geneem by die uitleg daarvan. Grondliggend aan die logies-teleologiese eenheid van die Grondwet is die konsep van 'n "objektiewe waarde-orde".[61] Volgens hierdie konsep het die opstellers van die Grondwet sekere basiese waarde-keuses gemaak, en wel in 'n hiërargiese orde. Die belangrikste van hierdie waardes is die vrye en demokratiese basiese orde waarvan menslike waardigheid 'n hoeksteen vorm. Uitgaande van die vrye demokratiese basiese orde as die fundamentele waarde word verskeie ander fundamentele waardes onderskei wat die Grondwet onderlê en daarin geïmpliseer is. Daaronder kom te pas die beginsels van populêre soewereiniteit, die skeiding van magte, die legaliteit van die administrasie, 'n veelpartystelsel, die wettigheid van politieke opposisie en die fundamentele regte van persone (insluitende regspersone, waar toepaslik).

Volgens die logies-teleologiese beginsel vorm gemelde onderliggende en basiese waardes 'n permanente basis van die Grondwet en is hulle bowendien objektief van aard omdat hulle 'n onafhanklike realiteit of bestaansreg ingevolge die Grondwet het. Aldus word 'n stel basiese en objektiewe waardes gepostuleer aan die hand waarvan die Grondwet geïnterpreteer en toegepas word.

'n Benadering gegrond op 'n stel basiese en objektiewe waardes behoort ook deur die Suid-Afrikaanse konstitusionele hof ontwikkel te word, veral aangesien die Grondwet 'n hof verplig om by die uitleg van wetgewing sekere waardes in ag te neem.[62] Uiteraard sal die howe kennis neem van ontwikkelinge wat reeds in die verband in ander jurisdiksies plaasgevind het.[63]

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vervolg van vorige bladsy

ook behoorlik sal kennis neem van die hoogs verfynde ontwikkelinge wat op dié gebied in die Duitse konstitusionele reg plaasgevind het nie. Ongeag die goeie leiding wat ongetwyfeld ook in die Engelstalige literatuur te vinde is, mag nie uit die oog verloor word nie dat die regstaatprinsiep, waarop die huidige en die volgende grondwet geskoei is en sal wees, sy oorsprong in die Duitse publiekreg het.

60 Die grammatiese metode (wat waarskynlik grotendeels vergelykbaar is met die metode wat deur ons howe gevolg word) berus op 'n verbale of woordelikse analise van woorde en uitdrukkings; die sistematiese metode is daarop ingestel om spesifieke probleme in die Grondwet as dele van die gehele grondwetlike werklikheid te verstaan; die teleologiese metode verteenwoordig 'n soeke na die doelwitte en mikpunte immanent aan die Grondwet; die historiese metode behels 'n soeke na die "oorspronklike bedoeling" van die opstellers met verwysing na die waardes wat deur hulle neergelê is (vgl Kommers *The constitutional jurisprudence of the Federal Republic of Germany* (1989) 49). Dit is interessant om daarop te let dat volgens Kommers die "oorspronklike" bedoeling in die Duitse reg nie verwys na die subjektiewe bedoeling van die oorspronklike opstellers nie: die subjektiewe bedoeling van die oorspronklike opstellers is slegs 'n hulpmiddel by interpretasie en nie 'n onafhanklike bron nie.

61 Alexy *Theorie der Grundrechte* (1985) 477.

62 A 35(1) verplig die hof om by die uitleg van die bepalings van hfst 3 die waardes wat 'n oop en demokratiese gemeenskap gebaseer op vryheid en gelykheid ten grondslag lê, te bevorder. A 35(3) verplig die hof om by die uitleg van enige wet en die toepassing en ontwikkeling van die gemenerege en gewoontereg, die gees, strekking en oogmerke van hfst 3 behoorlik in ag te neem.

63 Die verwysing in a 35(1) dat 'n hof kennis kan neem van "buitelandse hofbeslissings" kom ietwat oorbodig voor aangesien dit vanselfsprekend is. Daar kan gevra word waarom die verwysing beperk is tot "buitelandse hofbeslissings" en nie ook ander buitelandse bronne insluit nie.

Daar word aan die hand gedoen dat die howe by die beslaggewing aan sodanige basiese en objektiewe stel waardes in 'n besonder gunstige posisie verkeer, aangesien die grondwetlike beginsels[64] sterk aanduidende riglyne bevat aangaande die geïmpliseerde waardes van sowel die oorgangs- as die nuwe grondwet.[65] Die grondwetlike beginsels kan myns insiens beskou word as 'n sinopsis van die wesenskenmerke en waardes immanent aan die oorgangsgrondwet en waaraan die nuwe grondwet sal moet voldoen.[66] Dit bied daarom 'n permanente basis vir die ontwikkeling van 'n stel basiese en objektiewe waardes aan die hand waarvan die Grondwet geïnterpreteer kan word.[67] As sodanig bied die grondwetlike beginsels geleentheid vir die ontwikkeling van 'n regswetenskaplik verantwoordbare uitlegbenadering waardeur regsekerheid verhoog en die slaggate van subjektiewe en arbitrêr gekose waarde-oordele vermy kan word.

Die grondwetlike beginsels is die primêre maar nie die enigste kenbron nie waaruit 'n vaste en objektiewe waardesisteem gekonstrueer en ontwikkel kan word. Intra-tekstueel stel die voorrede en die strukturele samehang van die gehele Grondwet eweneens belangrike riglyne daar. Ekstra-tekstueel kan faktore soos historiese verloop en samehang, sekere vooraf beraadslagings, die gemeenskapsopvatting, sosiale waardes en nasionale aspirasies (soos die strewe na nasionale eenheid) belangrike rigtingwysers wees.[68]

Uiteraard sal nie alle samestellende dele van die grondwetlike beginsels noodwendig in elke gegewe geval ewe toepaslik wees nie. Die eerste vraag wat aan die orde kom, is na die wenslikheid al dan nie van 'n hiërargiese orde van waardes. Sou die weg van 'n hiërargiese orde wel gevolg word, berus die ontwikkeling daarvan primêr by die konstitusionele hof. Laasgenoemde sou telkens moet beoordeel watter waarde(s) in elke gegewe geval toepaslik is en, indien nodig, wat die "rangvolgorde" van sodanige waardes is.

Die belangrike punt is egter dat die Suid-Afrikaanse konstitusionele hof in die grondwetlike beginsels 'n vaste vertrekpunt het wat benut moet word ten einde te verhoed dat die aanwending van waarde-oordele in ons konstitusionele regspraak in die spreekwoordelike "los getjommel" ontaard. Vaste riglyne en grondslae wat regswetenskaplik verantwoordbaar is, moet vanaf die wegspringslag deur die konstitusionele hof neergelê word.

5 SLOTBESKOUING

Die Suid-Afrikaanse handves van fundamentele regte is 'n kompromisdokument: enersyds ontbreek dit aan die hantering van sekere aangeleenthede (soos sosio-ekonomiese aangeleenthede) en andersyds weerspieël dit tipiese Suid-Afrikaanse

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64 Soos vervat in bylae 4.

65 A 68(2) van die Grondwet bepaal nl dat die grondwetlike vergadering 'n nuwe grondwet moet skep, welke grondwet aan die grondwetlike beginsels moet voldoen. Dit sal die taak van die konstitusionele hof wees om te sertifiseer dat die nuwe grondwet wel daaraan voldoen (a 71(1)(a) en 71(2)).

66 A 71(1)(a) en 71(2) van die Grondwet.

67 Met die grondwetlike beginsels as uitgangspunt kan ander "elemente" en "faktore", bv sosiale waardes, aanvullend daartoe aangewend word ten einde 'n stel fundamentele en objektiewe waardes (as die "ongeskrewe teks" van die Grondwet) te identifiseer en ontwikkel. Tav ander sodanige elemente en faktore vgl Kruger 1991 *SAPR* 233 ev.

68 Oor intra- en ekstra-tekstuele kontekstualisering vgl Du Plessis en De Ville 1993 *Stell LR* 366 – 378.

probleemgebiede en werklikhede.[69] In die algemeen kan die handves egter bestempel word as 'n moderne regsdokument wat leengoed afkomstig uit ander menseregtedokumente bevat en wat die potensiaal inhou vir die ontwikkeling van 'n juridies-verantwoordbare bedeling waarvan fundamentele regte die grondslag sal vorm.

Juis omdat dit 'n kompromisdokument is, sal die inhoud wat die konstitusionele hof daaraan gee van deurslaggewende belang wees. Om maar enkele voorbeelde te noem van gevalle waar leiding van die konstitusionele hof deurslaggewend sal wees:

- Die reg op lewe[70] word weliswaar gewaarborg, maar wat is die implikasie daarvan vir die oplê van die doodstraf of die toepassing van aborsie?
- Wat is die omvang en betekenis van die "reg om regte in eiendom te verkry en te hou,"[71] en samehangend daarmee, wat beteken die verwysing na "die geskiedenis van die verkryging" (van eiendom) met betrekking tot onteiening?[72]
- Watter uitwerking gaan die waarborge met betrekking tot akademiese vryheid[73] en wetenskaplike navorsing,[74] gelees met die reg om onderwysinstellings gebaseer op gemeenskaplike taal, kultuur of godsdiens te vestig,[75] op die bestaande hoër onderwysbedeling hê? En daarmee saam: in watter mate en hoe lank sou onderwysstrukture wat wesenlik op ras en rasbevoordeling gebou is, kan bly voortbestaan?
- Gaan daar grense en perke vir regstellende aksie gestel word en, indien wel, aan die hand van watter kriteria?

Die sleutel tot die legitimiteit van die handves lê in die afdwingbaarheid van die regte daarin vervat terwyl die effektiewe afdwinging van die fundamentele regte weer grootliks van hoftoeganklikheid afhang. Die hibriede stelsel van grondwetlike beregting wat deur die Grondwet daargestel word, kan tot gevolg hê dat toegang tot die howe in die algemeen en die konstitusionele hof in die besonder steeds 'n wesenlike probleem bly. Daarom sal die reëls wat deur artikel 100(2) voorsien word, werklik op 'n verbeeldingryke wyse verligting moet bring deur veral aan die gewone, gemiddelde persoon groter toegang tot die hofstelsel te verleen.

Voorts, veral waar dit om die interpretasie van die handves gaan, moet die talle ooreenkomste met Vastelandse stelsels wat deur sowel die Grondwet in die breë as die handves in die besonder vertoon word, ten volle benut word. Dit sou verarmend en verskralend op die potensiaal van die handves en die effektiewe toepassing daarvan inwerk indien regslui (wat regters, praktisyns en akademici insluit) benewens bruikbare Anglo-Amerikaanse bronne, nie ook put uit die hoogs verfynde en regswetenskaplik verantwoordbare bronne wat veral in die Duitssprekende lande beskikbaar is nie. In hierdie vroeë stadium lyk dit

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69 In die verband staan veral die wyse waarop met grondkwessies (a 8(3)(b)) gehandel word, asook die voorsiening wat vir regstellende aksie (a 8(3)(a)) gemaak word, voorop.
70 A 9.
71 A 28(1).
72 A 28(3).
73 A 14(1).
74 A 15(1).
75 A 32(c).

reeds of in sekere kringe met 'n heel benutbare stelsel soos die Kanadese op loop gegaan word, terwyl die talle Vastelandse bronne geïgnoreer word.[76]

Die grondslae wat tot 'n groot hoogte bepalend sal wees vir die legitimiteit, juridiese kwaliteit en "algemene rigting" van die bedeling wat ons binnegaan, sal waarskynlik reeds gedurende die oorgangsbedeling deur veral die konstitusionele hof gelê moet word. Regslui moet daarom van meet af aan alles in die stryd werp om grondslae te help lê wat aan toekomstige geslagte Suid-Afrikaners die vastigheid van 'n materiële regstaat sal verseker.

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76 Die vraag is of 'n onvermoë om tale anders as Engels te lees, nie vir die skeeftrekking verantwoordelik is nie.

The functioning and structure of the constitutional court

CJ Claassen *SC*
BCom LLB
Johannesburg Balie

OPSOMMING

Die funksionering en struktuur van die konstitusionele hof

Die artikel gee eerstens 'n oorsig van die geskiedkundige agtergrond wat gelei het tot die formulering van hoofstuk 7 van die nuwe Grondwet van die Republiek van Suid-Afrika 200 van 1993. Gedurende die veelparty beraad te Kempton Park was dit vroeg reeds duidelik dat die beoogde konstitusionele hof sowel oorspronklike as appèlbevoegdheid sou hê.

Die funksie van die konstitusionele hof word bespreek na aanleiding van artikels 98, 100, 101, 102 en 103 van hoofstuk 7. Die jurisdiksie van hierdie hof word bepaal deur 'n vergelyking tussen die bepalings van artikels 98(2) en 101(3) te trek. Hierdie artikels maak voorsiening vir samelopende jurisdiksie van die konstitusionele hof en gewone hooggeregshowe, asook vir 'n eksklusiewe jurisdiksie wat eie aan die konstitusionele hof is. Sekere vertolkingsprobleme ontstaan as gevolg van die bewoording van artikel 98(3). Daar word aan die hand gedoen dat die oplossing te vinde is in 'n wye vertolking van die bepalings van artikels 98 en 101 ooreenkomstig die vertolkingsteorieë van handveste van menseregte wat in Europa ontstaan het. Jurisdiksionele probleme sal waarskynlik opgelos kan word deur middel van die reëls van die konstitusionele hof wat gepromulgeer sal word, onder andere die probleem ten aansien van die vraag of die konstitusionele hof 'n hof van eerste instansie sal wees al dan nie.

Die hooggeregshof se grondwetlike jurisdiksie word in artikels 101, 102 en 103 vasgelê. Hierdie howe sal beslis howe van eerste instansie met betrekking tot sodanige geskille wees. 'n Vertolkingsprobleem ontstaan uit die bewoording van artikel 101(3)(c) aangesien die Engelse weergawe die woorde "any law" gebruik terwyl die Afrikaanse weergawe die woord "enige wet" bevat. Aangesien die Engelse weergawe van die Grondwet as die getekende teks beskou word, en die woorde "any law" in die Engelse weergawe 'n wyer betekenis het as slegs 'n verwysing na wetgewing, word aan die hand gedoen dat die Engelse weergawe aanvaar word omdat dit waarskynlik ook enige gemeenregtelike reël en plaaslike en internasionale gewoontereg insluit.

Artikels 101, 102 en 103 beoog 'n skema waarvolgens grondwetlike geskille vanaf die laerhowe na die hooggeregshowe en vandaar na die konstitusionele hof verwys kan word. In sekere gevalle is sodanige verwysings verpligtend en in ander gevalle kan die hooggeregshof *mero motu* grondwetlike geskille na die konstitusionele hof verwys. Probleme kan ontstaan by sake wat veelvuldige geskilpunte het waarby grondwetlike geskilpunte inbegrepe is. Artikel 102(3) en (4) kan probleme oplewer in die praktyk. Moet die geskilpunte verdeel word in grondwetlike geskille aan die een kant en nie-grondwetlike geskille aan die ander kant? Die appèlhof het geen jurisdiksie om grondwetlike geskille aan te hoor nie maar artikel 102(4) bepaal uitdruklik dat 'n saak met veelvuldige geskilpunte tog na die appèlhof verwys moet word. As die appèlhof nie die grondwetlike geskille mag bereg nie, moet dit sodanige geskille na die konstitusionele hof vir beslegting verwys. Maar wat gebeur as die konstitusionele hof nie die grondwetlike geskille kan besleg voordat al die ander feitegeskille deur die appèlhof besleg is nie? Die reëls van die konstitusionele hof wat nog gepromulgeer moet word, sal die moontlikheid van 'n skaakmat posisie in so 'n geval uit die weg ruim. 'n Verdere vraag wat ook geopper word, hou verband met die jurisdiksie van laerhowe om grondwetlike geskille aan te hoor. Daar word aan die hand gedoen dat selfs laerhowe ook verplig sal wees om die konstitusie toe te pas en af te dwing.

Die artikel maak laastens ook voorstelle in verband met aangeleenthede wat deur middel van die reëls van die konstitusionele hof hanteer moet word.

INTRODUCTION

On 27 April 1994, a new day dawned in the constitutional history of South Africa with the coming into effect of the new Constitution of the Republic of South Africa 200 of 1993.[1] This act now constitutes the supreme law of the Republic of South Africa and any law or act inconsistent with its provisions, will be of no force and effect to the extent of such inconsistency. The Constitution also binds all legislative, executive and judicial organs of state at all levels of government.[2] As such, the Constitution will be the fundamental law from which all power and authority emanates.

The purpose of this article is to concentrate mainly on chapter 7 of the new Constitution, which is entitled "The Judicial Authority and the Administration of Justice".[3] The provisions of the bill of rights in chapter 3 of the Constitution will not be discussed. Rather, this investigation will look at the structures and powers of the judicial authority as set out in chapter 7.

It is important, however, to recognise that the introduction of a justiciable[4] bill of rights[5] will have a profound influence on the powers and functions of the courts. The supreme court (provincial and local divisions) and the constitutional court referred to in chapter 7, are vested with so-called "testing rights" which will enable these courts to invalidate any legislation or executive act which conflicts with the provisions of the fundamental law as expressed in the Constitution. For the past 100 years, such powers of judicial review have been beyond the jurisdiction of our courts. The courts had no substantive testing rights.[6] South African judges have been the subject of criticism for having applied unjust laws under a positivist rule, but it must be borne in mind that they did not have the protection afforded by a justiciable bill of rights which would have authorised them to resist unjust laws.[7] Not since the days of *Brown*

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1 S 251(1).
2 S 4.
3 S 96 – 109.
4 To be justiciable, a bill of rights must be contained in a constitution which allows for: (i) the invalidation by an independent judiciary of legislation and executive and/or state conduct which conflict with the bill of rights; (ii) the entrenchment of the bill of rights in the constitution.
5 S 7 – 35.
6 *R v Ndobe* 1930 AD 484: *Ndlwana v Hofmeyr* 1937 AD 229: Such limited testing rights as were available to the courts extended only to formal aspects of legislation and certain constitutional guarantees, eg those relating to the Coloured vote in the Cape of Good Hope and language rights – South Africa Act 1909 s 34 35 137 152; Act 32 of 1961 s 59 108 118; Joubert 5 *LAWSA* 6 n 2 3; *Harris v Minister of the Interior* 1952 2 SA 428 (A); *Minister of the Interior v Harris* 1952 4 SA 769 (A) 779 *et seq*.
7 Of this, the American legal philosopher, Edmond Cahn, said in an essay entitled "The parchment barriers" (in Cahn (ed) *Confronting injustice* (1962) 115): "If this is so (and surely the evidence of current history shows that it is), then every democratic nation owes its judges a bill of rights with which they can safeguard basic human privileges and immunities. In the deepest moral sense, it is no longer optional to adopt or not to adopt a national bill of rights; it has become a categorical duty. The American judge can look

v Leyds[8] have the judges of a supreme court in Southern Africa possessed such powers of judicial review. Now, however, the new Constitution endows judges with testing rights by replacing a system of parliamentary sovereignty with a constitutional dispensation known as a *Rechtsstaat* with a justiciable bill of rights. It signals the resurrection of the *Brown v Leyds* reasoning in which Kotzé CJ and Ameshoff J so eloquently and courageously[9] defended the right of the supreme court of the South African Republic (Transvaal) to test the constitutionality of executive proclamations and a "Volksraadsbesluit" which had the force of law.[10] It will not be surprising, therefore, if the aforesaid reasoning of those eminent judges will once again become standard references for the interpretation and application of the new Constitution and the function and role of the judges under it. Similar creativity and courage will be required of the judges interpreting and applying their new-found and/or resurrected testing powers under the Constitution.

HISTORICAL BACKGROUND

During the first plenary meeting of the Convention for a Democratic South Africa (CODESA 1) the subscribing parties adopted a Declaration of Intent committing themselves to bring about a democratic South Africa with a new constitution. Various working groups were established in pursuance of these objectives. Working group 2 was charged with drawing up a set of constitutional principles to be embodied in the new constitution and to recommend an appropriate body or process to draft such constitution. This working group was, however, unable to file a report to CODESA 2. The management committee of CODESA 2 requested the last chairperson of working group 2 to prepare a report on the status of the discussions of this working group prior to CODESA 2.

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continued from previous page

compassionately at his brother on the South African bench and say, 'There, but for the Bill of Rights, go I'.

The twentieth century impels us beyond even Jefferson's position. In his time it was enough to say, 'The people are entitled to a bill of rights against every government on earth'. Facing the inhumanities of our own day we must add, 'and judges too are entitled to a bill of rights against every democratic legislature and executive on earth'. The experience of the South African judges points an unmistakable moral: Every democratic nation owes a solemn obligation to its judges to adopt a written bill of rights beyond the reach of legislature and executive. In the years since World War II most of the new democratic nations in Europe and Asia have acknowledged the obligation and followed the American lead. Parchment barriers, indeed! Yes, they are only parchment barriers, these guarantees and bills of rights, never perfect, never self-executing, always precarious as all human arrangements must be; but in them the judge can find his textual authority and personal valour and moral salvation."

8 1897 4 OR 17.

9 The judges in *Brown v Leyds* were threatened with dismissal while the case was pending if they were to exercise the so-called testing right. Despite this threat, they declared the law as they saw it. Kotzé CJ was subsequently dismissed and replaced by Gregorowski CJ (see Kotzé *Memoirs and reminiscences* vol 2 229; *Madzimbamuto v Lardner-Burke* 1968 2 SA 284 (RAD) 333F – H; Dugard *International law – A South African perspective* (1994) 181 – 182).

10 Judges in the OFS had a similar testing right. The 1854 Constitution of the Republic of the Orange Free State was also interpreted as allowing for a testing right by the court (see *Raath v 'T Gouvernement OVS* 1880 OFS 15 17; Thompson "Constitutionalism in the South African Republics" 1954 *Butterworths SA LR* 55).

This report indicated areas of agreement and areas on which no agreement existed. There were, however, certain areas of commonality with regard to general constitutional principles, which subsequently formed the basis for further negotiations during 1993.

At a Multi-Party Planning Conference held on 5 and 6 March 1993, it was resolved to embark upon a third round of negotiations not later than 5 April 1993. Facilities were put in place in terms of which a Multi-Party Negotiation Forum was reconvened on 1 and 2 April at the World Trade Centre, Kempton Park. On 7 May 1993 the Negotiating Council resolved to appoint various technical committees to facilitate the structuring of the discussions by presenting reports to the Negotiating Council. The technical committees of particular reference in this investigation, were the Technical Committee on Constitutional Issues (hereinafter referred to as the Constitutional Technical Committee) and the Technical Committee on Fundamental Rights during the Transition (hereinafter referred to as the Fundamental Rights Technical Committee).[11]

The Fundamental Rights Technical Committee commenced its research by comparing the various bill of rights proposals for South Africa which had already been published by various political parties and the South African Law Commission.[12] During this third round of negotiations, this committee was the first to consider various mechanisms available for the enforcement of fundamental rights. In its Third Progress Report, dated 28 May 1993, it advised, *inter alia*, as follows:

> "The Committee has no doubt that an *eventual* constitutional dispensation (drafted by a democratic constitution-making authority) should seriously contemplate a full package of adjudication mechanisms, including at least:
>
> § A Constitutional Court, with appellate and *well-defined original jurisdiction*, as the final arbiter on constitutional and rights issues."[13]

The Constitutional Technical Committee expressly advised the Negotiating Council that it favoured a system of a separate constitutional court entirely independent of the Appellate Division. It substantiated its view in the following terms:

> "(a) Adjudication on constitutional issues, including disputes between the different organs of the state, requires a specialised knowledge of constitutional law coupled with an understanding of the dynamics of society.
>
> (b) If the Constitutional Court is established as a chamber of the Appellate Division, the Chief Justice has to decide which chamber will hear cases in which there are both constitutional and non-constitutional issues. This is not likely to be an unusual occurrence, and has 2 consequences, neither of which is desirable:
>
> (i) The Chief Justice has to decide which court will hear such cases, which in effect gives the Chief Justice a discretion on the composition of the court. Although this is the present convention in the functioning of the Appellate Division, it should be avoided in the very sensitive area of constitutional appeals.

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11 See par 5.1 of the minutes of the meeting of the Negotiating Council 1993-05-07 as well as Addendum B to the minutes. The Constitutional Technical Committee consisted of Mr F Cachalia, Adv A Chaskalson, Prof GE Devenish, Adv E Moseneke, Adv N Ngoepe, Prof W Olivier, Dr F Venter, Prof M Wiechers and Adv W Olivier; the Fundamental Rights Technical Committee consisted of Prof HM Corder, Prof LM du Plessis, Mr G Grové, Ms DS Nene and Adv Z Yacoob.

12 See Fundamental Rights Technical Committee, First Progress Report 1993-05-14.

13 See Third Progress Report, Technical Committee on Fundamental Rights during the Transition par 6 1 3. Emphasis supplied.

(ii) In cases where constitutional issues are referred to the Ordinary Chamber, precedents on important constitutional issues may be established by judges who are not constitutional judges; conversely, if such cases are referred to the Constitutional Chamber, precedents on important issues of 'ordinary law' may be established by the constitutional judges.

(c) Given the crucial nature of its tasks, the Constitutional Court should be able to establish its own identity and its own legitimacy, distinct from that of the Appellate Division. It should be the court of final instance for all cases dealing with constitutional issues. It should have its own judges, appointed according to procedures which need not necessarily be the same as those followed in the appointment of other judges. It should have its own rules and procedures, appropriate for constitutional litigation, which need not necessarily be the same as the rules and procedures of the Appellate Division. It should be able to establish its own identity and its own legitimacy.

(d) The Appellate Division ordinarily sits in panels of 3 to 5 judges to enable it to deal with its extensive workload. A constitutional chamber should be composed differently and should function on the basis that all constitutional judges sit in all the cases that come before it. This will ensure that the views of the different judges within the court, coming from different backgrounds, are brought to bear in all cases of a constitutional nature. It will also avoid a situation in which some of the constitutional judges are excluded from deliberations on some constitutional cases, which would be a consequence of the panel system. If provision is made for the constitutional chamber to sit as a full panel in all cases that come before it, it will in effect become a separate court. It should therefore be established as a separate court and not as part of the Appellate Division."

It would therefore appear that the traditional debate about the question whether the ordinary courts or a special constitutional court should be granted jurisdiction to decide constitutional issues, did not really feature as a major bone of contention during the negotiating process. These traditional arguments for and against a separate, specialist constitutional court may be set out briefly. The arguments *in favour* of a separate constitutional court are:

(a) It serves as a single source of decisions on the proper interpretation, implementation and application of a constitution, thus establishing a co-ordinated development of a body of constitutional jurisprudence.

(b) Where the justiciability of a constitution promotes a floodgate of litigation, a separate constitutional court will reduce the workload of the ordinary courts if all such litigation is channelled to it.

(c) The composition of a specialist constitutional court which may consist of experts in the field of constitutionalism, will enhance the development of a human rights culture in a country. This may be an important consideration in a country, like South Africa, which has a history of human rights violations.

(d) In a divided and heterogeneous society with a history of discrimination and denial of human rights, a separate constitutional court manned by new appointees will comply with the "clean slate" approach, giving legitimacy to its decisions, especially if the appointees are more representative of all the sections of the population. It will be a confidence-building measure which may help to heal the wounds of the past.

(e) Constitutionalism requires judges to make value-oriented and quasi-political decisions because the court is asked to review legislative and executive acts. This process of reasoning, which often requires a paradigm shift in legal philosophy, is often foreign to lawyers of the old school steeped in a tradition of positivism

and parliamentary sovereignty. Thus, it is said, judges of the ordinary courts may not be suited to this function.[14]

The arguments *against* a separate constitutional court and in favour of the ordinary courts exercising constitutional judicial review jurisdiction, are:

(a) The possibility of political manipulation through the appointment of judges will be greater in the case of a separate constitutional court.

(b) Judges of the ordinary courts have a wide experience of the other aspects of the legal system and can therefore apply judicial review supported by such knowledge and experience.

(c) It would cause less duplication and be more cost-effective to utilise the existing court system in the judicial review of legislative and executive acts.[15]

The proposals of the Constitutional Technical Committee in its Twelfth and Twenty Fifth Reports, constitute a compromise solution between its proposal and that of the Fundamental Rights Technical Committee. This compromise is actually a hybrid system, in part a parallel and in part an integrated system. It allows for the ordinary courts to decide certain constitutional issues and a separate constitutional court with original and final jurisdiction in constitutional disputes. It can be seen from the above historical survey that the decision to go this hybrid route was made at a fairly early stage in the negotiating process. In agreeing to this hybrid system, the Negotiating Council was obviously motivated by a desire to introduce the best attributes of both the parallel and integrated systems into the new administration of justice. How successfully this hybrid scheme will operate in practice, will remain to be seen. Some of its practical implications will be discussed in the paragraphs below.

THE SCHEME OF THE JUDICIAL AUTHORITY ESTABLISHED IN TERMS OF CHAPTER 7 OF THE NEW CONSTITUTION

It should be borne in mind that at the time of writing this article (May 1994) no enabling legislation governing the operation of the constitutional court had been drafted or promulgated. Many of the questions highlighted here may well be addressed in the ensuing legislation and/or rules of court yet to be drafted.

Broadly speaking, chapter 7 provides for the appointment of the various judicial officers of the constitutional court, supreme court and other courts. It further prescribes the jurisdiction of the respective courts, their interrelationship, direct access to the constitutional court, appeal procedures and the necessity to prescribe rules of court. It also establishes a Judicial Service Commission, the seat of the constitutional court and Appellate Division of the supreme court and regulates the use of languages in court proceedings, attorneys-general and the establishment of a Magistrates Commission.

This investigation will, however, concentrate only on the functioning and structure of the respective courts which flow from the jurisdictional interrelationship established in sections 98, 100, 101, 102 and 103 of chapter 7. In

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14 See Asmal "Constitutional courts – a comparative survey" 1991 *CILSA* 315; Wallington and McBride *Civil liberties and a bill of rights* (1976) 104–108; Jaconelli *Enacting a bill of rights* (1980) 31; Nicolson "Ideology and the South African judicial process" 1992 *SAJHR* 50.

15 Forsyth "Interpreting a bill of rights: The future task of a reformed judiciary?" 1991 *SAJHR* 1.

summary, the main features of the judicial structures established in these sections are as follows:

(a) A separate constitutional court is established which will function as the court of final instance for all constitutional issues to the exclusion of the Appellate Division.

(b) The constitutional court is given exclusive jurisdiction in certain constitutional matters.

(c) Direct access to the constitutional court is allowed for under certain circumstances.

(d) The supreme court (provincial and local divisions) will have jurisdiction to hear and decide constitutional disputes subject to certain limitations.

(e) The Appellate Division retains its appellate jurisdiction in all other matters.

(f) Other courts including inferior courts are not vested with jurisdiction to pronounce upon the validity of laws but have a discretion to postpone the proceedings pending an application to the supreme court and the constitutional court for a decision on such validity.

THE JURISDICTION OF THE CONSTITUTIONAL COURT

This is dealt with in section 98 of the act. Section 98(2) gives the constitutional court jurisdiction throughout the Republic as the court of final instance over *all matters* relating to the interpretation, protection and enforcement of the provisions of the Constitution. It then proceeds to specify a list of matters which are included in this wide definition of its jurisdiction.[16] However, the jurisdiction of the constitutional court overlaps to a certain extent with that of the provincial and local divisions of the supreme court (hereinafter referred to as the "provincial courts"). Section 101 establishes the jurisdiction of the provincial courts. Section 98(3) expressly provides that the constitutional court shall be the *only* court having jurisdiction over matters referred to in subsection (2) "save where otherwise provided in section 101(3) and (6)".

How are the respective areas of jurisdiction of the constitutional court and the provincial courts determined? One must establish by a process of subtraction what the exclusive jurisdiction of the constitutional court comprises: such

16 S 98(2) sets out the court's powers as follows:
"The Constitutional Court shall have jurisdiction in the Republic as the court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of this Constitution, including –
(a) any alleged violation or threatened violation of any fundamental right entrenched in Chapter 3;
(b) any dispute over the constitutionality of any executive or administrative act or conduct or threatened executive or administrative act or conduct of any organ of state;
(c) any inquiry into the constitutionality of any law, including an Act of Parliament, irrespective of whether such law was passed or made before or after the commencement of this Constitution;
(d) any dispute over the constitutionality of any Bill before Parliament or a provincial legislature, subject to subsection (9);
(e) any dispute of a constitutional nature between organs of state at any level of government;
(f) the determination of questions whether any matter falls within its jurisdiction; and
(g) the determination of any other matters as may be entrusted to it by this Constitution or any other law."

exclusive jurisdiction will exist in all areas where there is no overlapping or "concurrent jurisdiction" with the provincial courts. It is therefore necessary first of all to establish the areas of concurrent jurisdiction between the provincial and constitutional courts. Once that has been done, what remains of the areas of jurisdiction enumerated in subsection 98(2) will constitute the exclusive jurisdiction of the constitutional court.

A comparison of the provisions of section 98(2) with those of section 101(3) reveals that the constitutional court and the provincial courts have concurrent jurisdiction in the following matters:

(a) any alleged violation or threatened violation of any fundamental right entrenched in chapter 3 of the Constitution;[17]

(b) any dispute over the constitutionality of any executive or administrative act or conduct or threatened executive or administrative act or conduct of any organ of state;[18]

(c) any inquiry into the constitutionality of any law other than an act of parliament;[19]

(d) any dispute of a constitutional nature between local governments or between a local and provincial government;[20]

(e) any dispute over the constitutionality of a bill before a provincial legislature.[21]

The above-mentioned matters will be referred to as the area of "concurrent jurisdiction". It will be noticed that the matters in (a) and (b) above are framed in exactly the same terms for both courts. Concurrent jurisdiction in (c), (d) and (e) is established on the strength of the principle that the greater includes the lesser. Thus the two courts have concurrent jurisdiction to the extent of the lesser.

The exclusive jurisdiction of the constitutional court

We can now establish the exclusive jurisdiction[22] of the constitutional court by excluding all matters within the concurrent jurisdiction from the matters enumerated in section 98(2). What remains after such subtraction will be the matters falling within its exclusive jurisdiction. The remainder of the items mentioned in section 98(2) are:

(a) any inquiry into the constitutionality of an act of parliament;[23]

(b) any dispute over the constitutionality of any bill before parliament;[24]

(c) any dispute of a constitutional nature between organs of state where one of the parties is a national organ of state;[25]

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17 S 98(2)(a) 101(3)(a).
18 S 98(2)(b) 101(3)(b). "Organ of state" is defined in s 233(1)(ix) as including any statutory body or functionary.
19 S 98(2)(c) 101(3)(c).
20 S 98(2)(e) 101(3)(d).
21 S 98(2)(d) 101(3)(e).
22 The term "exclusive jurisdiction of the Constitutional Court" is referred to four times in ch 7, namely in s 102(1), (3), (17) 103(4)(a).
23 S 98(2)(c).
24 S 98(2)(d).
25 S 98(2)(e).

(d) matters peculiarly entrusted to it by the Constitution or any other law;[26] and

(e) as court of final instance regarding the interpretation, protection and enforcement of the Constitution, all appeals and referrals from the supreme court (including those from the Appellate Division) on constitutional issues.[27]

The above-mentioned matters will be referred to as matters within the exclusive jurisdiction of the constitutional court.

A question which immediately comes to mind, is whether the constitutional court is also a court of *first* instance. Section 98(2) expressly states that the constitutional court is a court of *final instance* over all the matters enumerated in that provision. At first glance, this may indicate an intention that *all* constitutional issues must first be raised in the lower courts, after which a party may appeal to the constitutional court as court of final instance. This interpretation is, however, placed in doubt by section 98(3) which provides that the constitutional court will be the *only* court having jurisdiction to deal with the matters enumerated in subsection (2), "save where otherwise provided in section 101(3) and (6)".

What is the true meaning of section 98(2) and (3)? Two possible interpretations present themselves:

(a) If the emphasis is to be placed on the statement that the constitutional court is to be the court of *final instance* over all matters mentioned in section 98(2), it may mean that no court other than the constitutional court shall sit as court of appeal in respect of matters enumerated in section 98(2).

(b) If, however, the emphasis is to be placed on the word "only" in section 98(3), it could mean that the constitutional court will be the only court having original jurisdiction (as a court of first instance) over matters enumerated in section 98(2), except in regard to matters mentioned in section 101(3) and (6), in which case it may not be the only court having original jurisdiction.

The interpretation in (a) above would have been clear beyond any doubt but for the proviso to section 98(3). Without this proviso, it would have been clear that the intention was to establish the constitutional court as the *only court of final instance* in all constitutional matters. The provincial courts, although having jurisdiction to hear certain constitutional disputes, would be regarded as courts of first instance and not courts of final instance in regard to such disputes. It would simply mean that disputes within the provincial courts' jurisdiction and, by agreement, those beyond such jurisdiction, are to be commenced in the provincial courts with a right of appeal on constitutional issues to the constitutional court as court of final instance. This interpretation assumes that it was the legislator's intention that most constitutional litigation should commence in the lower courts and rise to the constitutional court by way of appeal procedures. The only exception would be in cases which fall within the exclusive jurisdiction of the constitutional court where the parties are unable to reach agreement to submit such a dispute to the provincial courts. In such instances the proceedings will have to commence in the constitutional court as court of first instance. This interpretation of section 98(2) and (3) is, however, tinged with doubt because

26 S 98(2)(g).
27 S 98(2), (3) 102.

of the existence of the proviso in subsection (3). Is this proviso intended to convey that the constitutional court is *not* the only court of final instance in matters provided for in section 101(3) and (6)? In other words, does the proviso convey that the constitutional court is the only court of final appeal except in regard to matters mentioned in section 101(3) and (6), where the provincial courts may also be regarded as courts of final appeal? This must surely be an absurd proposition. It is submitted that it could never have been the intention to establish the provincial courts as courts of final instance, whether in respect of constitutional or any other matters. Furthermore, any such proposition will conflict directly with the express provisions in section 102(11) and (12), both of which evince an intention that the provincial courts cannot be regarded as courts of final instance. In the result, it is submitted that a proper interpretation of section 98(2) and (3) actually renders the proviso in subsection (3) redundant or superfluous.[28] However, if a meaning must be ascribed to the proviso to obviate the necessity of declaring it redundant or superfluous, one can turn to the interpretation in (b) above for assistance.

This interpretation of the proviso in section 98(3) is more sensible and also consistent with the provisions of section 101. The intention would then be to accord original jurisdiction to the constitutional court as the only court to hear matters enumerated in section 98(2), save that, in similar matters also mentioned in section 101(3) and (6), it may have *concurrent original jurisdiction* with provincial courts. In this interpretation, the proviso does not qualify the appeal jurisdiction of the constitutional court; it only qualifies the exclusivity of the constitutional court in constitutional matters. In other words, the constitutional court may not be the *only* court having original jurisdiction in the matters enumerated in section 101(3).

It is submitted that this interpretation is also in accordance with the following considerations:

(i) The modern tendency is to allow direct access to a specialist constitutional court. Under the German Constitution, individuals may file directly to the constitutional court as court of first instance, all constitutional complaints against any governmental action which has violated their fundamental, substantive or procedural rights under the Constitution. This remedy was so popular and extensively used, that the two chambers of the German Constitutional Court had to rearrange their respective jurisdictions to accommodate the flood of references to it.[29] It is hoped that a similar vigorous human rights consciousness will also develop in South Africa. A constitutional court having a wide original jurisdiction to act as court of first instance, will greatly enhance the development of such a human rights culture.

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28 It is a well-established canon of construction that a statute should be so construed that, if it can be prevented, no clause, sentence or word should be rendered superfluous, void or insignificant (see *The Queen v Bishop of Oxford* 1879 4 QB 245 261; *Attorney-General, Transvaal v Additional Magistrate, Johannesburg* 1924 AD 421 436; *Cornelissen v Universal Caravan Sales (Pty) Ltd* 1971 3 SA 158 (A) 174; *S v Weinberg* 1979 3 SA 89 (A) 98; Steyn *Uitleg van wette* 5ed 19 and cases cited there). However, this is no ordinary statute, but a Constitution which is to be given a broad interpretation (see *Nyamakazi v President of Bophuthatswana* 1992 4 SA 540 (BGD) 556–567).

29 Kommers *The constitutional jurisprudence of the Federal Republic of Germany* (1989) 15–17.

(ii) Considerations such as time and cost restraints may dictate that in certain cases it will be necessary and beneficial to utilise the constitutional court as court of first instance. For example, violations of fundamental rights or unconstitutional conduct by the executive may be so gross or detrimental that a speedy and final decision on this, side-stepping the provincial courts, would be just and equitable. Original jurisdiction for the constitutional court will result in a speedier remedy which, in turn, will further stimulate respect for the constitutional court and human rights in South Africa.

(iii) The pilosophy of an Appellate Division having no original jurisdiction is not echoed in the structure of the constitutional court as set out in chapter 7. The exclusive jurisdiction accorded to the constitutional court will necessarily cause it to act as a court of first instance. Thus the concept of exclusive jurisdiction militates against any interpretation completely denying it original jurisdiction. This concept of exclusive jurisdiction presupposes that the constitutional court is vested with exclusivity (and thus original jurisdiction) in certain areas, and commonality (and thus concurrent original jurisdiction) in other areas.

(iv) This interpretation also tallies with the historical development of the jurisdiction of a future constitutional court: It is in line with the proposals of both the Fundamental Rights Technical Committee[30] and the Constitutional Technical Committee[31] that a "well-defined appeal and original jurisdiction" for a future constitutional court should be established.

(v) This interpretation is also consistent with section 100(2), which permits the rules of court for the constitutional court to provide for "direct access" to the constitutional court where justice demands this in respect of "any matter over which it has jurisdiction", which, of course, would include matters within both its exclusive and its concurrent jurisdiction. Section 100(2) is a discretionary provision and it is submitted that it would be desirable if the president of the constitutional court and the chief justice were to include in such rules provision for direct access in all matters falling within the "concurrent jurisdiction" of the two courts. If the drafters of the rules of court do exercise a discretion in allowing direct access in the instances referred to above, it may be advisable that such rules should also make it possible, in the case of original litigation commenced in the constitutional court, for the court *mero motu*, or on application of an aggrieved party, to order that the litigation in fact be commenced in a provincial court rather than the constitutional court; in other words, the constitutional court should, in terms of the rules of court, have a discretion to decline original jurisdiction if justice so demands.

Nothing is said about the manner in which the constitutional court will become seized of a matter within its exclusive and thus original jurisdiction, that is, whether such litigation is to be commenced by way of summons, petition, motion proceedings or other informal means.[32] These will have to be provided for in detailed rules of court to be prescribed by the president of the constitutional court in consultation with the chief justice.[33] The drafters of these rules will

30 See its Third Progress Report MF (1993-05-14), par 6.1.3 and its alternative options for the structure of the courts (1993-08-16).

31 See its Twelfth Report (1993-09-02).

32 Under the German Constitution an individual may engage the constitutional court by writing a letter (see Kommers *op cit* 16).

33 See s 100(1).

have to make some policy decisions regarding certain procedural matters to be regulated in such rules, such as:

(a) whether the hearing of *viva voce* evidence will be prohibited or allowed, and if so, under what circumstances;

(b) whether evidence on affidavit only will be allowed;

(c) the extent to which oral arguments and/or written submissions by litigants and/or their representatives will be permitted; and

(d) the rights of audience and representation of litigants.

It is not possible to consider all the implications of the pros and cons of the policy decisions regarding the philosophy to be adopted in such rules of court at this stage. It will therefore suffice to make only certain general observations here. It is submitted that the element of tactical surprise in constitutional litigation should be limited even more than in normal litigation. The procedures in the highest constitutional court of the land should be freed from cheap tactical advantages to be scored by litigants and/or their representatives at the expense of the proper development of constitutional jurisprudence in South Africa. In particular, when it comes to oral argument before the full constitutional court, a procedure should be devised whereby the judges give advance warning to the parties and/or their representatives of any particular problems they may have in adjudicating a case. This will enable the parties to prepare a proper and considered response to any such questions raised by the judges. By doing this, they will do themselves justice and will duly assist the court in coming to a fair and proper decision. It is submitted that the present procedure adopted in the Appellate Division, where questions are put to counsel without advance warning, does not promote justice and equity: it does not enable counsel to be of maximum assistance to the judges in having their concerns properly dealt with, nor is it satisfactory to the litigants who often feel aggrieved about not being forewarned about the questions raised in argument. This type of procedure, it is submitted, is not apposite to the proper dispensation of constitutional litigation, where a large proportion of such litigation will affect a wider spectrum of parties than merely the litigants themselves.

As recommended by the Constitutional Technical Committee, direct access to the constitutional court is possible. The following are instances of such direct access at the instance of state organs and which are recognised in the Constitution:

(a) certification that the text of the new Constitution complies with the constitutional principles in schedule 4;[34]

(b) a referral at the instance of the president of any dispute of a constitutional nature between parties represented in parliament or between organs of state at any level of government;[35]

(c) referrals at the instance of state organs at any level of government in regard to a dispute of a constitutional nature[36] or referrals concerning the constitutionality of any bill before parliament or a provincial legislature; and

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34 See s 71(2), (3) 73(6).
35 See s 82(1)(d).
36 S 98(2)(e).

(d) referrals of the texts of a provincial constitution for a ruling that it does not conflict with the constitutional principles.[37]

A question which may arise here, is whether or not the words "direct access" as used in section 100(2) include the public's direct engagement of the constitutional court as court of first instance. During the Multi-Party Process the term was used to describe the referral of inter-statal disputes to a constitutional court. All of the instances referred to above which are acknowledged by the Constitution as instances of direct access to the constitutional court, normally fall within the category of inter-statal constitutional disputes or concerns. Usually, in such inter-statal disputes or concerns, the ordinary courts are bypassed and the dispute is referred directly to the constitutional court. The constitutional court then acts simultaneously as a court of first and final instance in resolving such disputes. It will therefore be necessary to regulate the mechanisms for submitting such inter-statal disputes for consideration by the constitutional court. That is why it was necessary to include a provision such as section 100(2). However, section 100(2) goes further and permits the constitutional court to make rules for exercising direct access in respect of "any matter over which it has jurisdiction". Now this is a wide provision which may extend direct access jurisdiction to all matters within its jurisdiction, that is, all the matters enumerated in section 98(2). The Constitution therefore contemplates the possibility of allowing direct access to the constitutional court akin to the German example, provided the drafters of the rules of court in their discretion include the necessary procedures for this. If they do, the private sector may have direct access to the constitutional court in disputes such as violations of fundamental rights, the constitutionality of executive conduct and acts of parliament and other legislation, all of which are likely to involve the participation of the private sector. The term "direct access" in the Constitution would then be consistent with the modern trend to allow individuals quick and direct access to a final, specialist constitutional court.[38] Although the Constitutional Technical Committee may not originally have intended the meaning of the term "direct access" to extend beyond referrals to the constitutional court of inter-statal disputes and concerns, it would seem that the Constitution as presently drafted would permit the inclusion of direct public engagement of the constitutional court within the meaning of "direct access". If the rules of court yet to be drafted do accommodate such a concept of direct access, the court will have to take cognisance of and regulate a possible flood of litigation by the private sector seeking direct access to the constitutional court.

The exclusive jurisdiction of the constitutional court is qualified by the provisions of section 101(6). In terms of this subsection, parties to constitutional litigation may, by agreement, extend the jurisdiction of provincial courts to hear matters within the exclusive jurisdiction of the constitutional court. The only limitation placed on this power to extend the jurisdiction of the provincial courts is that such courts may not be accorded constitutional appeal jurisdiction by agreement; in other words, all constitutional appeals lie exclusively to the constitutional court.[39] Apart from that, parties to litigation may commence all

37 See s 160(4), (5).

38 See eg s 93(1)(4a) and (4b) of the German Constitution which allows direct access in the form of "constitutional complaints". See further the discussion *supra* 421 – 422.

39 See s 101(6) read with s 101(5) 102(6), (12).

constitutional issues in provincial courts by agreement. For example, private individuals in dispute over the constitutional validity of an act of parliament, may ask a provincial court to decide such validity, provided both agree to accord the provincial court such jurisdiction.[40] This is a sensible provision because it is quite conceivable that issues regarding the constitutionality of legislation or executive conduct may arise, intentionally or unintentionally during the proceedings before a provincial court.[41] Cost implications may then make it necessary and feasible to agree to have the entire dispute, including the constitutional dispute, decided by the provincial court.

THE JURISDICTION OF THE SUPREME COURT

The supreme court is defined as consisting of the Appellate Division and provincial and local divisions.[42] The jurisdiction of the supreme court is dealt with in sections 101, 102 and 103.

The first point of interest is that the supreme court's inherent jurisdiction existing prior to the commencement of the the Constitution, is retained.[43] "Inherent jurisdiction" has been defined as being that reservoir of power which entitles the court to entertain a claim or give any order which at common law it would be entitled so to entertain or give, particularly but not exclusively in the procedural field.[44] The meaning and extent of the supreme court's inherent jurisdiction have been well established by judicial precedent. Will its inherent jurisdiction also extend into the field of its "additional" constitutional jurisdiction as set out in section 101(3) (a)-(g)? It is submitted that its inherent jurisdiction ought to extend to any statutory jurisdiction bestowed upon the supreme court. There ought to be no exception in the case of the "additional" jurisdiction arising out of section 101(3). It is therefore doubtful whether circumstances may arise in constitutional litigation where the boundaries of its inherent jurisdiction are unclear.

However, should such an occasion arise, the supreme court will have to interpret the Constitution as to the limits of its constitutional as well as its inherent jurisdiction. The power to determine such jurisdiction is expressly conferred in section 101(3)(f).

The supreme court is afforded its "further" constitutional jurisdiction "by this Constitution or by any law".[45] That part of the "further" jurisdiction which is conferred by the Constitution is specifically set out in section 101(3), but it is expressly limited to provincial and local divisions of the supreme court. The Appellate Division is specifically excluded from this "further jurisdiction".[46] It was necessary to set out the powers of constitutional judicial review

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40 The rules of court will have to provide whether such agreement must be in writing.

41 The possibility of disputes beyond its jurisdiction arising during litigation before a provincial court is acknowledged in s 102.

42 See s 101(1).

43 See s 101(2).

44 *Ex parte Millsite Investment Company (Pty) Ltd* 1965 2 SA 582 (T) 585G; see also *Pollak on jurisdiction* 2ed 26 – 31.

45 See s 101(2). At present, the jurisdiction of the provincial and local divisions is regulated largely by the Supreme Court Act 59 of 1959. Further legislation may be necessary to regulate the provincial courts' constitutional jurisdiction.

46 The Appellate Division is a court of appeal having no original jurisdiction to sit as a court of first instance. If at all, it could in any event only have had jurisdiction to hear constitutional issues by way of appeals. But this is also expressly prohibited (see s 101(5) 102(12)).

expressly, since the inherent jurisdiction of the supreme court did not include such powers in the past. This "additional" jurisdiction is described as follows:

(a) any alleged violation or threatened violation of any fundamental right entrenched in chapter 3;[47]

(b) any dispute over the constitutionality of any executive or administrative act or conduct or threatened executive or administrative act or conduct of any organ of state;[48]

(c) any inquiry into the constitutionality of any law other than an act of parliament, regardless of whether such law was passed or made before or after the commencement of the Constitution;[49]

(d) any dispute of a constitutional nature between local governments or between a local and provincial government;[50]

(e) any dispute over the constitutionality of a bill before a provincial legislature subject to section 98(9);[51]

(f) the determination of questions whether any matter falls within its jurisdiction;[52] and

(g) the determination of any other matters as may be entrusted to it by an act of parliament.[53]

It is clear from these provisions that the provincial courts will be courts of first instance with regard to the exercise of this "further jurisdiction", although this is not stated expressly.

Are provincial courts vested with jurisdiction in matters relating to the "interpretation, protection and enforcement of this Constitution" in the same way as is expressly provided for the constitutional court in section 98(2)? It would be ludicrous to suggest that the provincial courts are denied this jurisdiction. On principle, a court cannot be granted constitutional powers of review of legislative and executive acts without also being authorised to interpret, protect or enforce the provisions of such a constitution. For example, a provincial court cannot decide whether a fundamental right has been violated without directly or indirectly interpreting the relevant provision in chapter 3 of the Constitution. Once it has interpreted the fundamental rights provision and found a violation to exist, it will as of necessity enforce the bill of rights in the order it makes in its judgment. If it does not do so, its finding will hang in the air and it will

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47 S 101(3)(a).

48 S 101(3)(b). Organ of state includes any statutory body or functionary (see s 233(1) (ix)).

49 S 101(3)(c). This provision is clearly retrospective and problems of interpretation such as those experienced in *S v Marwane* 1982 3 SA 717 (A) will not arise.

50 S 101(3)(d).

51 S 101(3)(e). There is an obvious drafting error in subsections 3(e) and (4). As subsection (3)(e) stands, the direct reference to s 98(9) gives a provincial court the same powers to certain disputes referred to it, *inter alia*, by the speaker of the National Assembly to decide the constitutionality of any bill before parliament. This is beyond a provincial court's jurisdiction. Subsection (3)(e) should have read: "subject to subsection (4)". Furthermore, in subsection (4) the words *mutatis mutandis* should have been included to indicate that the provincial courts were intended to have powers to hear and make orders with respect to the constitutionality of a bill before a provincial legislature, "similar" to that of the constitutional court when hearing and deciding the constitutionality of any proposed legislation.

52 S 101(3)(f).

53 S 101(3)(g).

be guilty of not protecting the provisions of the Constitution. In fact, such powers of enforcement are specifically accorded to the provincial courts.[54] It must therefore be concluded that the "additional" jurisdiction bestowed upon provincial courts in section 101(3) includes the power to interpret, protect and enforce the Constitution.

Another question of interpretation arises with regard to the relationship between subsections 3(a) and (c). It has been suggested that the powers of the provincial courts to adjudicate violations of rights entrenched in chapter 3 should not be subject to the restrictive jurisdiction regarding acts of parliament in subsection (c).[55] It is argued that most violations will concern the constitutionality of a law of parliament and that subsection (a) should be given a wide interpretation to allow provincial courts jurisdiction in such matters. It is said that such a wide jurisdiction will relieve the constitutional court of an otherwise unmanageable case load. It is submitted that this is not a convincing argument. The comparison[56] between the jurisdictions of the constitutional court and the provincial courts leads expressly to the establishment of the exclusive jurisdiction of the constitutional court. The validity of an act of parliament is expressly stated to be beyond the jurisdiction of the provincial courts and within the exclusive jurisdiction of the constitutional court. Any interpretation which would permit a provincial court jurisdiction to consider the validity of an act of parliament would fly in the face of these express jurisdictional provisions. It is precisely to overcome this lack of jurisdiction of the provincial courts that the legislator expressly allowed the extension by agreement of the latter court's jurisdiction in section 101(6). If this express distinction in jurisdictional powers can be negated by a mere "wide" interpretation, the "spirit, purport and objects" of the Constitution may be undermined.

In terms of section 101(3)(c), the provincial courts are authorised to enquire into the constitutionality of "*any law* applicable within its area of jurisdiction". It is submitted that the term "any law" is wide enough to embrace any common law, customary law (both local and international), provincial legislation (including provincial constitutions), local legislation and any executive legislation (national, provincial and local). However, the Afrikaans version of this section uses the word "wet" where the English version uses the word "law". Does the Afrikaans version indicate an intention to limit the jurisdiction to the constitutionality of *statutory legislation* only? (The Afrikaans text of the Constitution was signed by the State President.) The Afrikaans version could have used the word "reg" instead of the word "wet". However, section 15 of the Constitution of the Republic of South Africa Amendment Act 2 of 1994 provides expressly:

> "Notwithstanding the fact that the Afrikaans text of the principal Act is the signed text, the English text of that Act shall, for the purposes of its interpretation, prevail as if it were the signed text."[57]

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54 S 101(4).

55 See Cachalia *et al Fundamental rights in the new Constitution* (1994) 14.

56 S 98(2)(c) 101(3)(c).

57 According to Arthur Chaskalson SC, this amendment became necessary because the Afrikaans version of the Constitution was signed in error. It was felt that the English version should carry more weight because all the drafts which were prepared for discussion at the Multi-Party Process were in English. Only after acceptance of the final draft was it translated into Afrikaans.

Section 33(2) and (3) expressly distinguishes between "common law, customary law or legislation". This may indicate an intention to distinguish between statutory law on the one hand and common and customary law on the other. Throughout these provisions, the English text uses the word "law" without distinguishing between statutory ("wetgewing") and other sources of law. It seems more appropriate that the jurisdiction of the courts should be extended to pronounce on the validity of any law whether it be common, customary or statutory law. Why should a particular rule of common law which is in conflict with the provisions of the Constitution, be excluded from the courts' jurisdiction to declare it unconstitutional? For the Constitution to be the "supreme law" of the country, all law, whether common, customary or statutory, will have to be subservient to the Constitution and thus liable to be declared invalid by the courts. After all, a rule of common law cannot be equated with an act of parliament and it is only the latter type of law which is expressly excluded from provincial courts' jurisdiction. When there is uncertainty in the version in one of the official languages of a statutory provision, consideration of the version in the other official language may serve to remove such uncertainty.[58] However, this is not an ordinary statutory provision. It is the supreme law contained in the Constitution. In accordance with the more liberal[59] interpretation applicable to constitutions, an extended rather than a restrictive interpretation of the word "law" should be preferred. It is submitted that the English version is more in consonance with such a broad interpretation than the more limiting word "wet" used in the Afrikaans version. This interpretation may, of course, result in certain courts in certain provinces declaring a rule of common law unconstitutional, while it may still be regarded as constitutional in other provinces.

Customary international law is also of particular interest. Customary international law, unless inconsistent with the Constitution or any act of parliament, is now also part of the law of the Republic.[60] In interpreting and enforcing the bill of rights, the courts are entitled to take cognisance of various international human rights instruments and the interpretation of similar provisions and terminology in them as laid down by the various international courts of justice.[61] The provincial courts, it is submitted, will also be entitled to declare rules of customary international law invalid and therefore inapplicable to South Africa if they are in conflict with the Constitution.

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58 *Minister of Law and Order v Patterson* 1984 2 SA 739 (A) 754G – H; Steyn *Die uitleg van wette* 142 – 143.

59 See *Nyamakazi v President of Bophuthatswana* 1992 4 SA 540 (BGD) 566 – 567; Du Plessis "The interpretation of Bills of Rights in South Africa: taking stock" in Kruger and Currin (eds) *Interpreting a Bill of Rights* (1994) 17 – 23.

60 S 231(4); see also Dugard *International law – a South African perspective* 339 – 341.

61 See s 35(1). The more well-known international human rights instruments are the Universal Declaration of Human Rights approved by United Nations General Assembly on 1948-12-10 in terms of Resolution 217A(iii); flowing from this declaration, the International Covenant on Civil and Political Rights and its sister, the International Covenant on Economic, Social and Cultural Rights; the European Convention on Human Rights; African Charter of Human and Peoples' Rights. The rulings and decisions of the Human Rights Committee established in terms of the "Covenant on Civil and Political Rights", the Commission on Human Rights established in terms of art 68 of the UN Charter, the European Commission of Human Rights and the European Court of Human Rights, are instructive in explaining and interpreting general human rights concepts and terminology.

PROCEDURAL MATTERS

Section 102 deals with various procedural matters arising out of the inter-relationship between the various courts. In particular, it deals with the following aspects of this relationship:

(a) Referrals to the constitutional court by the supreme court (both the Appellate Division and provincial courts).

(b) Appeals to the constitutional court and appeals to the Appellate Division.

(c) Interventions by relevant government organs.

(d) Disputes between organs of state (inter-statal disputes).

This article will only deal with items (a), (b) and (c).

Referrals

The Constitution makes provision for two types of referral to the constitutional court. These are compulsory and *mero motu* referrals.

Compulsory referrals

Sections 102 and 103 contemplate four types of compulsory referral of matters to the constitutional court.

Compulsory referrals under section 102(1)

This subsection provides that a provincial court *shall* refer a dispute to the constitutional court for its decision where all of the following circumstances prevail:

(i) where the issue may be decisive for the case; and

(ii) the issue falls within the exclusive jurisdiction of the constitutional court; and

(iii) the provincial court considers it to be in the interest of justice to refer the issue to the constitutional court.

(i) The requirement of decisiveness

It should be noted that referral is obligatory when the issue *may* (not *must*) be decisive for the case. Even where there is some doubt, it is submitted, a court will lean towards regarding the issue as decisive. This argument flows from the fact that the issues at stake concern the validity of acts of *parliament* or the conduct of a *national* organ of state. In most cases it will be of paramount importance in a *Rechtsstaat* that such issues be finally decided as soon as possible. And the very essence of the remedy in section 102(1) contemplates a speedy decision by way of referral to the constitutional court. Instances where the court will *not* regard the issue as decisive are, for example, where the issue is only subsidiary to the main dispute or where the main issue can be decided without deciding the constitutional issue.

(ii) The requirement of exclusive jurisdiction

What type of constitutional issue is contemplated to become the subject of a section 102(1) referral? As indicated earlier,[62] exclusive jurisdiction exists in five instances, in regard to issues concerned with:

(a) the validity of an act of parliament;

(b) the constitutionality of a bill before parliament;

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62 See *supra* 419 – 420.

(c) a constitutional dispute between a national organ of state and another organ of state;

(d) matters entrusted to it by law or the Constitution; and

(e) constitutional appeals from the provincial courts or a referral from the Appellate Division.

It is submitted that, in practice, only (a) and (c) could become the subject of a compulsory referral in terms of section 102(1).[63] Thus referrals under section 102(1) of issues falling within the exclusive jurisdiction of the constitutional court will arise only where a provincial court is concerned with the constitutionality of an act of parliament and/or the conduct of organs of state, one of which is a national organ of state.

(iii) The requirement that it must be in the interest of justice

If the *only* issue in the case is a constitutional issue within the exclusive jurisdiction of the constitutional court, then presumably it will also be decisive of the entire matter. In such an instance it is submitted that the provincial court will have little option but to refer it to the constitutional court after hearing any relevant evidence and making the necessary findings on it. Any refusal to refer the matter in these circumstances is appealable to the constitutional court.[64] In such an instance the provincial court has either no or very little discretion to refuse a referral of the matter. It is then very difficult to ascribe any content to the remaining requirement that such referral "be in the interest of justice" where the only issue at stake is a decisive constitutional issue within the exclusive jurisdiction of the constitutional court. Presumably, the only instance where it would be in the interest of justice *not* to refer such a single issue to the constitutional court, is where the parties have agreed in terms of section 101(6) to vest the provincial court with jurisdiction to determine the issue.

Section 102(1) also contemplates a case in which multiple issues exist, one of which may be a decisive constitutional issue within the exclusive jurisdiction of the constitutional court. In such circumstances, when will it not be "in the interest of justice" to refer the matter to the constitutional court? Where the first two requirements are present, and in the absence of an agreement in terms of section 101(6), it seems almost axiomatic that the court will refer the issue to the constitutional court. What is the point of deciding subsidiary issues which are not decisive of the matter (other than findings of fact on relevant evidence) if the constitutional issue is "decisive" of the whole matter and it is a decision which in any event is beyond the jurisdiction of the court? It will merely be a waste of time and money. It is submitted that in most instances it will be in the interest of justice to refer the matter to the constitutional court when the first two requirements are present. It is more readily conceivable that the court

63 An issue contemplated in (b) would never come before a provincial court. In terms of s 98(9), only the speaker of the National Assembly, the president of the Senate or the speaker of a provincial legislature may request the constitutional court to decide the constitutionality of a bill before parliament. As to an issue contemplated in (d), such matters are normally the "direct access" matters referred to in s 71(2) and (3), 73(6), 82(1)(d) and 160(4) and (5). No state organ will refer a matter to a provincial court where the Constitution expressly states that it is to be referred to the constitutional court. As to the issues contemplated in (e), they speak for themselves. They will never form the subject of a s 102(1) referral.

64 See s 102(17).

will regard it as not in the interest of justice to refer the issue to the constitutional court, where either or both requirements (i) or (ii) are absent. It may, however, be possible to find some content to the requirement that the referral is to "be in the interest of justice" with reference to the merits or demerits of the particular constitutional issue. Thus if the constitutional issue has no merit in the opinion of the judge, he may find for that reason that it is not "in the interest of justice" to refer the matter to the constitutional court. Conduct or any law which is *prima facie* constitutional, for example, ought not to be the subject of expensive, time-consuming and protracted constitutional litigation. The court may in such circumstances find that, although it may be a decisive constitutional issue within the exclusive jurisdiction of the constitutional court, there is no merit in the claim of unconstitutionality and it would not be in the interest of justice to clog the constitutional procedures with such a dispute.

By refusing a referral on this ground, the court will not have given a definitive judgment on the constitutionality of the issue other than to find that it is not in the interest of justice to refer the matter to the constitutional court for decision. If not taken on appeal, such refusal may, however, in effect become a definitive judgment that the conduct or law complained of is in fact constitutional. When the court does decide to refer a matter to the constitutional court, it will again not give a definitive judgment as to the constitutionality of the issue in dispute. It will merely act as a conduit pipe to refer the matter to the constitutional court.

Compulsory referrals under section 102(6)

This section provides for compulsory referrals to the constitutional court of constitutional disputes by the Appellate Division in circumstances where the latter cannot decide an appeal on facts or law, without first having a constitutional issue decided by the constitutional court.

Compulsory referrals under section 102(13), (14) and (15)

These subsections regulate disputes between organs of state (other than a dispute referred to in section 101(3)(d) regarding the constitutionality of actual or threatened executive or administrative conduct of one of the organs of state). In such a case, one of them may apply to a provincial court to refer such dispute to the constitutional court for its decision. The provincial court is obliged to do so if it is of the opinion that the actual or threatened conduct "*may* be unconstitutional". If so, it will refer the matter to the constitutional court after having heard evidence and made findings on it.

In this instance, the provincial court does not decide the constitutional issue. It merely acts as a conduit pipe. All it has to decide is whether or not the disputed conduct *may* be unconstitutional. All it is required to say is: "I think such conduct may be unconstitutional." Such a finding is not definitive of the issue, but merely a password for onward transmission to the constitutional court for a definitive decision. It is merely a case of "to refer or not to refer, that is the question". Similarly, a refusal to refer the matter cannot be regarded as definitive either. It merely represents a view that the disputed conduct *may* not be unconstitutional. However, a refusal to refer such dispute will have a consequential definitive effect, if not appealed against,[65] because the organ of state will then persist with the disputed conduct.

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65 See s 102(16) which allows an appeal to the constitutional court against a provincial court's refusal to refer the matter to the constitutional court.

Once again, the test for deciding whether or not to refer the matter is not a stringent one. Clear and blatant attempts to have conduct which is obviously constitutional declared invalid, will not pass this test. It is submitted that where the constitutionality of the complained conduct is in doubt, it ought to be referred to the constitutional court for the sake of clarity and upholding the Constitution rather than bringing it into disrepute by allowing a perception to prevail that unconstitutional conduct by an organ of state is condoned or tolerated.

Compulsory referrals under section 103(3) and (4)

These subsections provide for a compulsory referral of a constitutional issue which has arisen in other courts. The presiding officer in such other court may postpone the proceedings to enable a litigant to apply to a provincial court, either to decide the issue itself or to refer it to the constitutional court, if the issue is within the latter's exclusive jurisdiction. The application will be successful if certain prerequisites are present:

(i) where the decision regarding the validity of the law in question is material to the adjudication of the matter; and

(ii) there is a reasonable prospect that the law will be held to be invalid; and

(iii) it is in the interest of justice to do so.[66]

Where all three requirements are present, the provincial court is obliged to hear and decide the matter or, if the matter is within the constitutional court's exclusive jurisdiction, to refer it to the constitutional court after making any findings of fact on any evidence relevant to the issue.

It will be noted that the test is a stringent one: the issue *must* be material to the adjudication of the matter, not *may* be, as in the case of section 102(1) and (14). It is difficult to understand why the referral of constitutional litigation concerning the validity of a law which arises in courts other than the supreme court, is subject to a more stringent test than referrals of similar constitutional litigation arising in provincial courts. It may be that the framers of this clause preferred constitutional matters in lower courts to be decided on the assumption that the law in question is valid, leaving it to the aggrieved party to raise such invalidity on appeal to a provincial court. The difficulty with this approach is that the hearing on appeal of a constitutional issue will not be a fresh hearing, but will be limited to the four corners of the appeal record. That could prove unsatisfactory, not only to the appellant but also to the judges hearing the appeal. The problem arises from the fact that such other courts have to apply all law as they find it, be it common law, statute law or any other law. Because they cannot decide the constitutional validity of a law, they may not hear all the factual evidence which may be relevant to decide the issue. It may then transpire that the constitutional issue has not been properly aired and ventilated, leaving the record insufficiently comprehensive for the appeal court to do justice to the constitutional issue. A defendant unwillingly trapped into litigation in courts other than a provincial court, may feel aggrieved at the limited scope available to him to have his constitutional grievances adjudicated. Had such litigation been instituted in the provincial courts, he may *not* have been

66 See the discussion *supra* 430 – 431 on the possible content of the words "in the interest of justice" as used in s 102(1).

subject to these limitations. Where litigation is commenced in such other courts he will be able to ventilate his constitutional complaint fully only if:

(i) the presiding officer exercises a discretion in his favour and postpones the matter pending an application to a provincial court; *and*

(ii) his application to the provincial court to hear the matter or to refer it to the constitutional court, as the case may be, is successful.

To succeed in his application, the aggrieved litigant bears a heavy onus, heavier than an organ of state wishing to litigate constitutionally under section 102(14) or a litigant in a provincial court under section 102(1). There is no justification for this disparity and it may very well lead to courts other than supreme courts falling into disfavour with the public *vis-à-vis* constitutional litigation, especially when they experience difficulty in satisfying all the peremptory prerequisites for having a constitutional dispute referred to the provincial or constitutional courts.[67]

It should also be noted that the compulsory referral contemplated under these subsections permits the provincial court to give a definitive decision on the matter where the issue is within its jurisdiction. In such an instance, the court is not a mere conduit as is the case under section 102(1) or (14). However, where the law in question is an act of parliament, the provincial court, once it has decided that all the prerequisites have been complied with, is obliged to refer the matter to the constitutional court and may not decide the issue itself.[68] In such an instance, it would merely be a conduit for onward transmission of the dispute to the constitutional court.

It should be noted further that there is no express provision for direct access to the constitutional court from courts other than the provincial courts. The procedure contemplated in section 103 envisages a route via the provincial courts to the constitutional court. Once litigants are involved in litigation in such other courts, can they submit their constitutional dispute to the constitutional court under the direct access jurisdiction, by-passing the procedure laid down in section 103 and the provincial courts? The answer to this question is unclear, but *prima facie* it would seem that parties, once locked in battle in other courts, will be obliged to take the section 103 route in cases where the constitutional validity of legislation arises as an issue in such proceedings.

Mero motu *referrals*

Section 102(8) and (9) provides for the possibility that a provincial court may refer a constitutional issue to the constitutional court *mero motu*. It will do so where it is of the opinion that the constitutional issue which has been raised before it, is of such importance that a ruling should be given on it. This is an

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67 Option 1 and 2, clause 11, of the Technical Committee on Fundamental Rights during the Transition suggested only one prerequisite for a referral to the constitutional court, ie the provincial court must be satisfied that the issue is decisive for the matter's determination; see the alternative options dated 1993-08-16. The first draft prepared by the Technical Committee on Constitutional Issues suggested two prerequisites: (i) such decisions should be material to the adjudication of the matter; and (ii) there must be a reasonable prospect that the law will be held invalid (see its Twelfth Report Addendum s 91(4)).

68 Unless, of course, the parties agree in terms of s 101(6) to accord the provincial court jurisdiction to hear the matter.

extraordinary procedure.[69] It contemplates an appeal to the constitutional court by way of a judge's referral on an issue with or without the litigants' co-operation or approval, but at the behest of the judge. This power, it is submitted, should be sparingly used. Practical guidelines for the circumstances under which judges are to use this power of referral, will have to be established. For the sake of clarity it should be considered to include such guidelines in the rules of court to be drafted for the provincial courts and the constitutional court. Where the parties are unwilling to appeal and the judge refers the matter to the constitutional court *mero motu* under this subsection, provision must be made for the appointment of counsel to deal with the matter. As a result of this, section 102(9) provides that the Minister of Justice may appoint counsel[70] to argue such constitutional issue at the request of the president of the constitutional court.

The nature of the dispute will have to be of such importance as to convince the judge that public policy demands a verdict by the constitutional court on the matter. Examples of issues which may fall into this category of public importance would be decisions on violations of contentious fundamental rights such as freedom of religion, education, racial or gender discrimination and the right to life (for example, whether or not to legalise abortion). The rules will, of course, have to make special provision for the administration of this kind of appeal where no litigants are actively involved in its further prosecution.

Refusal to refer a matter to the constitutional court

Where not all the prerequisites for a compulsory referral to the constitutional court are present, the provincial court may refuse to order such a referral. A particularly troublesome provision in this regard is section 102(3). This section contemplates a matter where both constitutional and non-constitutional issues arise. If, in such a case, the provincial court does not refer the constitutional issue to the constitutional court, it must hear evidence and make findings of fact relevant to the constitutional issues which are within the exclusive jurisdiction of the constitutional court and decide such constitutional issues as are within its own jurisdiction. What does this mean? It postulates litigation containing the following elements:

(a) constitutional issues beyond the jurisdiction of the provincial court and thus within the exclusive jurisdiction of the constitutional court; and

(b) constitutional issues within the jurisdiction of the provincial court; and

(c) other issues of law and fact, also within the jurisdiction of the provincial court; and

(d) issues of fact relevant to the constitutional issue within the exclusive jurisdiction of the constitutional court.

In such circumstances, the provincial court may resolve *not* to refer the constitutional issues which are within the constitutional court's exclusive jurisdiction,

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69 It is, however, similar to the powers of the Minister of Justice which entitle him to refer a legal issue to the Appellate Division for a definitive decision: s 333 of the Criminal Procedure Act 51 of 1977.

70 The Afrikaans version of this subsection uses the word "raadgewers" in the plural form. Thus the intention may very well be to allow the appointment of more than one counsel which may include instructing attorneys.

to the latter court for resolution, only if it is not in the interest of justice to do so or if such issues are not decisive for the case.[71] In doing so, it has to find, expressly or by implication, that the matter can be decided and disposed of without deciding those issues exclusively within the constitutional court's jurisdiction. It will then decide the other constitutional issues within its jurisdiction as well as all other remaining issues and it will also make the necessary findings on issues related to the constitutional issues within the exclusive jurisdiction of the constitutional court. The losing party now has a right of appeal. To which court does he note such an appeal? In terms of section 102(4), an appeal against a decision of a provincial court in terms of subsection (3) lies to the Appellate Division. But, as indicated earlier, a decision under subsection (3) contemplates a decision on multiple issues which include issues of fact and law as well as constitutional issues. The latter cannot be decided by the Appellate Division. And in any event, section 102(12) expressly stipulates that any appeals in constitutional matters contemplated in section 101(3) shall lie to the constitutional court. What must the party do? Divide the appeal into constitutional issues and other issues, and note the former to the constitutional court and the latter to the Appellate Division? The answer to this problem depends on the relationship between subsections (4) and (12). If the latter is peremptory, then appeals on constitutional issues have to be noted with the constitutional court. However, the procedural scheme contemplated in subsections (4), (5) and (6) seems to suggest that the entire appeal is to be noted to the Appellate Division, and if the latter court can dispose of the entire matter without deciding any constitutional issues, it will do so. This seems to suggest that the intention is for an appellant to note the entire appeal from a multiple decision under subsection (3) to the Appellate Division, and not to divide up the appeal into constitutional issues on the one hand and other issues on the other. If the Appellate Division cannot dispose of the matter without dealing with the constitutional matters, it will refer such issues to the constitutional court for its decision.[72] If this is the correct interpretation of these provisions, it would mean in practice that all appeals against decisions dealing with multiple issues will first be directed to the Appellate Division and via the latter, the constitutional issues will be referred to the constitutional court for its decision. If this is so, what then is the purpose of subsection (12)? It may be intended to deal with situations where a party wishes only to appeal the constitutional issues forming part of the multiple decision of a provincial court's judgment. In such a case, the party will note the appeal directly to the constitutional court. However, these provisions are not clear and it is perhaps for this reason that subsection (7) specifically requires the rules of court to deal with the appeal procedure for decisions of provincial courts on multiple issues. In terms of this subsection, the rules may provide for constitutional issues to be referred to the constitutional court "before or after" any appeal to the Appellate Division. It is therefore presumed that these rules will clarify the procedure to be adopted by any appellant wishing to note an appeal against a decision of a provincial court on multiple issues, including constitutional issues.

The practical effect of these provisions as they presently stand, is that:

(a) the Appellate Division has no jurisdiction to sit as a court of appeal on constitutional issues; and

71 See s 102(1).
72 Subs (6).

(b) the constitutional court has no jurisdiction to sit as a court of appeal on factual and legal issues of a non-constitutional nature.

Because of this separation of appeal jurisdiction, the rules of court will have to be drafted very carefully to prevent any possible stalemate situation: the Appellate Division, on the one hand, not being able to decide legal and factual issues until the constitutional issues are decided by the constitutional court, and the constitutional court on the other hand not being able to decide such constitutional issues until the legal and factual background against which such constitutional issues are to be decided, has been finally settled.

As stated above, a constitutional issue may be decided by the constitutional court either before or after the Appellate Division disposes of an appeal on fact and/or law. This therefore envisages that in certain circumstances the Appellate Division may wish to refer the constitutional issues to the constitutional court before finalising the appeal on other issues. In other circumstances the Appellate Division may wish to finalise the factual and legal issues and thereafter refer the constitutional issues to be settled by the constitutional court. An example of the latter situation may arise where the constitutional issue depends upon the validity of a substantial amount of statistical and other social scientific evidence as the motivation for particular legislation, the validity of which is under attack. It may therefore be sensible to decide the cogency of such evidence once and for all by the Appellate Division, after which the matter may then be referred to the constitutional court for a decision on the validity of such legislation, based on the statistical and social scientific evidence as finally settled by the Appellate Division.

OTHER COURTS

Section 103 deals with the establishment, jurisdiction, composition and functioning of all other courts. The question is: what other courts are contemplated in this section? It will, of course, refer to all inferior courts such as the magistrate's court, children's court, maintenance court, courts of chiefs and headmen.[73] It will also refer to statutory courts such as the water court, the court of the Commissioner of Patents, the special court for the maintenance and promotion of competition, the special income tax court, the compensation court under the Workmen's Compensation Act, the maritime court under the Admiralty Jurisdiction Regulation Act and the industrial court and the labour appeal court established under the Labour Relations Act.[74] All of the above courts except the industrial court[75] are regarded as courts of law.

The further question arises whether quasi-judicial tribunals will fall within the meaning of "courts" as used in section 103. Although such tribunals have all of the trappings of a court of law, it has been held that they do not constitute courts of law because of certain negative propositions applicable to them, namely:

> "1 A tribunal is not necessarily a court in this strict sense because it gives a final decision.
> 2 Nor because it hears witnesses on oath.

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73 These are regarded as inferior or lower courts.

74 See *Pollak on jurisdiction* 14 15. These courts are not necessarily "inferior courts" (see *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 1 SA 589 (A) with regard to the Patents Court.

75 *South African Technical Officials' Association v President of the Industrial Court* 1985 1 SA 597 (A).

3 Nor because two or more contending parties appear before it between whom it has to decide.
4 Nor because it gives decisions which affect the rights of subjects.
5 Nor because there is an appeal to a court.
6 Nor because it is body to which a matter is referred by another body."[76]

Once a country has moved to constitutionalism and away from the principle of parliamentary sovereignty and a positivistic attitude to interpretation of statutes, and bearing in mind that this is a constitution to be interpreted, one may expect a more liberal and broad interpretation of a provision such as this. A broad[77] interpretation may well include administrative tribunals exercising a quasi-judicial function as falling within the definition of the word "court" as used in section 103. Situations may very well arise where the validity of parliamentary acts may be contested before administrative tribunals such as the Transportation Board or licensing boards. If such a tribunal is not a court as contemplated in section 103, a litigant would not be able to ask the tribunal to exercise the discretionary powers contained in section 103(3) of the Constitution. The litigant will then have to rely on common-law rights entitling it to a postponement for purposes of approaching the courts for necessary relief. It is submitted that the rights under section 103 are more beneficial than the common-law rights and these should, on a proper interpretation of "other courts", also be accorded to litigants in quasi-judicial proceedings.

Section 103 provides that these other courts have no jurisdiction to decide the validity or invalidity of any law. Unless the proceedings are postponed, these courts are obliged to decide the matter on the assumption that the law is valid. The definition of the word "law" will also be wide enough to include all common, customary, statutory, and international law applicable to South Africa.[78] The presiding officer of such a court does, however, have a discretion to postpone the matter and not to decide a constitutional issue pending an application to a provincial court for a decision on the particular constitutional issue. If, in exercising such discretion, the presiding officer of the lower court decides not to postpone the matter but to continue with the hearing, the particular litigant who feels aggrieved by the refusal to postpone the matter may, of course, apply to the supreme court for the necessary relief once the hearing has ended. Even if there is no appeal from any particular tribunal, the inherent jurisdiction of the supreme court would entitle a litigant to review the decision either under the common law or in terms of the additional jurisdiction accorded provincial courts in terms of section 101(3) of the Constitution or in terms of section 19 of the Supreme Court Act 59 of 1959.

The mechanics of a referral to the constitutional court in terms of section 103(4) have been dealt with above.[79]

Will courts other than the supreme court have the power to "interpret, protect and enforce" the Constitution? Certain constitutional disputes, such as those

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76 Per the Lord Chancellor in *Shell Company of Australia Limited v Federal Commissioner of Taxation* 1931 AC 275 296, as approved by Schreiner JA in *Minister of Interior v Harris* 1952 4 SA 769 (A) 787 – 788.
77 For a broad and liberal interpretation of constitutions, see the discussion by Friedman J in *Nyamakazi v President of Bophuthatswana* 1992 4 SA 540 (BGD) 566 – 567; Du Plessis in Kruger and Currin (eds) 17 – 23.
78 See the discussion *supra* 427 – 428.
79 See *supra* 432 – 433.

involving the invalidation of a law on the ground of its inconsistency with a provision of the Constitution, are expressly stated to be beyond the jurisdiction of such other courts.[80] There is, however, constitutional litigation which does not necessarily require the court to decide the constitutional validity of any law, such as disputes about the constitutionality of executive or administrative conduct or constitutional disputes between state organs where no question arises about the constitutional validity of any law. A magistrate's court, as an example of a lower or other court, is vested with jurisdiction over local governments and state organs.[81] It is therefore possible to commence litigation in the magistrate's court, for example, to interdict an executive, local government or state organ from violating a plaintiff's fundamental rights. In such litigation it may not be at all necessary to decide whether a law is inconsistent with the Constitution: for example, in litigation where the plaintiff seeks an interdict restraining a state organ from issuing a licence to an unqualified person; or an interdict to restrain a policeman from violating a person's freedom of movement in breach of section 18 of the Constitution. In such instances, the magistrate's court would simply be required to enforce the provisions of an act of parliament or the Constitution without having to decide any perceived or alleged conflict between a law and the Constitution. In this type of litigation such "other" courts ought to have been granted jurisdiction to "interpret, protect and enforce" the Constitution. The provisions of the Constitution will just be another law to be applied by such other courts as they would do under any other circumstance and as they have done in the past.[82]

RULES OF COURT

The judicial authorities established in terms of chapter 7 will have to break new ground in making rules of court to accommodate all the various interrelationships between the respective courts, and to make these courts as accessible as possible to the public as soon as possible. Some of the new procedures arising out of the structures of the courts which will have to be accommodated in these rules of court, are in summary:

(a) The original jurisdiction of the constitutional court arising out of the "exclusive" and "direct access" jurisdiction will have to be defined and regulated. Rules for initiating proceedings, whether by summons, petition, motion proceedings or other informal methods (such as the writing of letters in "constitutional complaints" cases), will have to be spelled out clearly. Direct access by state organs under the Constitution and in regard to inter-statal disputes, will also have to be regulated specifically.

Such rules should also provide for a right to decline "direct access" jurisdiction, either at the instance of one of the parties or *mero motu* by the constitutional court.

(b) Rules should also be devised to allow the provincial courts (when they sit as courts of appeal from other courts in constitutional disputes) and the

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80 S 103(2).

81 See s 28(1) of the Magistrates' Courts Act 32 of 1944; Jones and Buckle *The civil practice of the magistrates' courts in South Africa* 8ed 39; *Minister of Law and Order v Patterson* 1984 2 SA 739 (A) 752 – 756.

82 Draft legislation has in fact been tabled which confers on magistrates' courts some jurisdiction in constitutional matters (editor).

constitutional court the power to call for additional evidence, if the appeal record reveals that the dispute was insufficiently ventilated in the court *a quo*.

(c) Rules for the procedure to be adopted in appeals dealing with decisions on multiple issues including both constitutional and non-constitutional matters must be provided for. A scheme should be devised by which appellants are to deal with the question to which court such multiple decisions are to be referred to prevent any possible stalemate.

(d) Where the provincial courts or Appellate Division refer constitutional issues of public importance for decision to the constitutional court *mero motu*, special rules will have to be devised for the further prosecution of such appeals and the appointment of counsel at the request of the president of the constitutional court, which will have to include scales of remuneration sufficient to make it attractive to counsel to participate in such hearings. The rules may enlist the financial support of the Human Rights Commission in the appointment of counsel.[83] It may also have to include guidelines to judges indicating the circumstances under which these powers of referral are to be utilised.

(e) Rules should be devised to govern the intervention of state organs in constitutional disputes either at provincial court or constitutional court level.[84]

(f) Rules will have to be framed for the manner in which parties may, by agreement, submit to the jurisdiction of the provincial courts in constitutional disputes falling outside their jurisdiction.

(g) Rules will have to be made in regard to the administrative implementation of the orders contemplated in section 98(5)-(9).

CONCLUSION

An exciting new day has dawned for legal practitioners in the courts of law in South Africa. The courts have an indispensable function in the creation of a new human rights culture in this country. As such, it is of great importance that they should function smoothly and effectively. There is good reason to express confidence that the structure of the courts as set out in chapter 7 of the Constitution will work effectively. No doubt, a certain amount of teething trouble is bound to arise, but all in all, with the necessary co-operation and enthusiasm of departments, judges and practitioners, all or most of the obstacles identified in this comment are surmountable.

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83 S 116(3).
84 S 102(10).

In a case where there is no evidence upon which a mathematical or actuarially based assessment can be made, the Court will nevertheless, once it is clear that pecuniary damage has been suffered, make an award of an arbitrary, globular amount of what seems to it to be fair and reasonable, even though the result may be no more than an informed guess (*per* Vivier JA in *Griffiths v Mutual and Federal Insurance Co Ltd* 1994 1 SA 535 (A) 546).

How compatible is African customary law with human rights? Some preliminary observations

JC Bekker
BA LLD
Professor of Private Law, Vista University

OPSOMMING

Hoe versoenbaar is Afrika-gewoontereg met menseregte? Enkele voorlopige opmerkings

Die Grondwet van die Republiek van Suid-Afrika 200 van 1993 verleen op verskillende maniere erkenning aan gewoontereg. Erkenning is egter deurgaans onderworpe aan die bepalings oor menseregte in die Grondwet. Dit beteken dat reëls van die gewoontereg getoets sal kan word aan menseregte soos gelykheid en nie-diskriminasie. Vanweë die aard van die gewoontereg sal dit egter nie so 'n toets kan deurstaan nie. Daar word aangevoer dat dit nie die bedoeling kon gewees het om gewoontereg te erken maar dit dan deur toetsing in die howe ongedaan te maak nie.

Die grondslag van menseregte is erkenning van die regte van individue. Daarenteen is die grondslag van die gewoontereg kommunalisme. Alhoewel die twee grondslae wyduiteenlopend is, behoort dit moontlik te wees om 'n middeweg te vind. Die uitdaging vir regshervormers is juis om so 'n versoening te bewerkstellig eerder as om gewoontereg eenvoudig ongeldig te verklaar.

The Constitution of the Republic of South Africa 200 of 1993 recognises customary law. In terms of section 229, all existing laws remain in force until repealed by a competent authority. These laws would include section 1 of the Law of Evidence Amendment Act 45 of 1986 in terms of which all courts may take judicial notice of indigenous (customary) law in so far as it is not repugnant to the principles of public policy and natural justice. The laws remaining in force would, moreover, include all laws relating to the recognition of customary law in specific instances, for example, section 27 of the Child Care Act 74 of 1983, which provides that a customary marriage is deemed to be a marriage for the purpose of adoption under the act.[1]

And the Constitution goes one step further in recognising customary law. In terms of paragraph 1 of constitutional principle XIII[2] "[i]ndigenous law,

1 Other examples are: s 22 of the Black Administration Act 38 of 1927; the KwaZulu and Natal Codes of Zulu Law (the KwaZulu Act on the Code of Zulu Law 16 of 1985 and Proc R151 of 1987 resp); s 5(6) of the Maintenance Act 23 of 1963; s 31 of the General Law Amendmend Act 76 of 1963; s 4(3) of the Workmen's Compensation Act 30 of 1941; and the definition of "married" in s 1 of the Income Tax Act 58 of 1962.

2 Schedule 4 of the Constitution.

like common law, shall be recognised and applied by the courts . . .''[3] Customary law is thus ostensibly completely recognised as a system of law as applicable in terms of existing law. However, the human rights entrenched in the Constitution also apply to customary law. This may be inferred from the provision that the Chapter on Fundamental Rights applies to ''all law in force''.[4] Secondly, section 33(2) provides that ''no law, whether a rule of the common law, customary law or legislation, shall limit any right entrenched in this Chapter''. Thirdly, section 33(3) of chapter 3 recognises customary rights ''to the extent that they are not inconsistent with this Chapter''. Lastly:

> ''In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and object of this Chapter'',[5]

that is, the chapter on fundamental rights. In terms of section 181(2) of the Constitution, indigenous law is subject to regulation by law. In terms of section 126(1) of the Constitution, read with Schedule 6, provincial legislatures have concurrent competence with Parliament to make laws with regard to indigenous law and customary law.

The implications of making the provisions of chapter 3 of the Constitution applicable to customary law are not yet clear. But, generally speaking, it could have the effect of marginalising customary law because some of its rules are incompatible with the fundamental rights listed in the Constitution.

The incompatibility stems from the fact that, ideologically, African customary law and the general law are poles apart. Customary law is communal or socialist, whereas the general law is more of an individualistic or capitalist nature.[6] Human rights are based on the premise that a person has rights because he is an individual human being; the underlying principle of customary law, on the other hand, is social solidarity. In this context groups play a prominent role.

Thus a customary marriage is an alliance between two groups, whereas in terms of general law a marriage is a union between two persons. A matter such as the guardianship of a child can therefore be misunderstood if viewed from an individualistic perspective. The customary-law father of a child, for instance, does not have personal guardianship of the child; the child rather ''belongs'' to its father's family group – the father being the family representative. At the same time a young child is unlikely to be taken away from (the custody of) its mother.[7]

Any individual exists as a member of a group. Consequently an individual's rights are subject to the interests of the group, which does not mean that individuals do not have rights. The family and community form a framework within which individuals exercise their political, economic and social rights.[8]

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3 The use of the term ''indigenous law'' here as against ''customary law'' in s 33(3) and 35(3) of the Constitution is of no material significance. It would naturally be preferable for the legislature to choose one term and to keep to it.

4 S 7(2) of the Constitution.

5 35(3).

6 Sanders ''The characteristic features of Southern African law'' 1981 *CILSA* 333–334.

7 See generally Maqutu *Contemporary family law in Lesotho* (1992) 145 *et seq*.

8 See Whelpton ''Inheemse reg en menseregte in Suider-Afrika'' Unpublished inaugural address, Unisa (1994) 6.

The manner in which customary law is recognised in the present Constitution does not bridge this ideological gap between communalism and individualism. To the extent that customary-law norms are seen as manifestations of inequality or discrimination, they will not survive. However, I shall try to show that there is more to customary law than one ordinarily perceives and that it would be wrong to say that the rules constitute just another form of inequality and discrimination.

At the outset it is necessary to say that customary law needs a particular, say a traditional, community in which to function. It is based on groups of extended families, clans and tribes which serve as a social support system for the family and within which the members not only have rights, but also duties. There can be no denying that this support system has to a large extent disappeared. This is aptly described by Donnelly:[9]

> "Westernization, modernization, development, and underdevelopment – the dominant contemporary social and economic forces – have in fact severed the individual from the small, supportive community. Economic, social and cultural intrusions into, and disruptions of, the traditional community have removed the support and protection which would 'justify' or 'compensate for' the absence of individual rights."

Donnelly continues by pointing out that in these circumstances the individual is largely alone, isolated and confronted by the modern state, the modern economy and the modern city. "In such circumstances," he continues "human rights appear as the natural response to changing conditions, a logical and necessary evolution of the means for realizing human dignity".[10]

Christianity, albeit Africanised, has also made vast inroads upon African support and value systems. Christians not only regarded paganism as abominable,[11]

> "but missionaries also taught new ideas about the individual and human rights, and these were critically important in attracting slaves, women, and others to the alternative legal program that the missions represented".[12]

In addition, Africans have all along been entitled to opt out of the customary-law system in one way or another, for example by marrying by civil rites or by making a declaration that they wanted to be married *in* community of property, in which case the proprietary and personal consequences of their marriages would have been governed by common law.[13] Most civil marriages were in community of property, probably on advice of the African clerks who filled in the marriage documents. They could furthermore marry by antenuptial contract and they could make wills. Admittedly the choices were not as free as it might appear at first blush. It was pointed out that the choice to enter into a polygamous marriage was in some instances a Hobson's choice, since, as a result of social and economic circumstances, women often had no alternatives and furthermore they were not fully informed of the consequences of customary marriages.[14] They nevertheless had a choice, although it was not always an informed choice.

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9 "Human rights and human dignity: an analytic critique of non-Western conceptions of human rights" 1982 *The American Political Science R* 312.

10 *Ibid.*

11 See Elias *The nature of African customary law* (1956) 25.

12 Mann and Roberts (eds) *Law in colonial Africa* (1991) 15.

13 S 22(c) of the Black Administration Act 38 of 1927 (repealed by s 1(e) of Act 3 of 1988); see also Bekker *Seymour's customary law in Southern Africa* (1989) 251.

14 Armstrong *et al Uncovering reality: excavating women's rights in African family law – women and law in Southern Africa: Working Paper No 7* (Undated) 26 – 27.

Customary law has so far been recognised subject to the provision that it should not be repugnant to public policy and natural justice. The repugnancy clause has not often been used, but where it has been applied, the values of Western culture served as a yardstick. During the last forty years it has hardly been invoked at all.[15] One may therefore assume that any remaining conflicts were not regarded as important enough to be challenged in court. The courts have therefore always had an instrument that gave expression to fundamental human rights[16] and declared only a few principles of customary law as repugnant to such rights.[17] Human rights advocates may therefore rest assured that they are not first in the field.

Furthermore, modernisation and Christianity (also Islam further north) have already radically changed the social support and value systems without which customary law cannot flourish. So why be concerned about customary law *vis-à-vis* human rights at all? There are several reasons: At present, customary law enjoys only limited recognition. The general law of the country allows all courts to take judicial notice of it.[18] It is also indirectly recognised by the preservation of traditional authorities. The latter are admittedly no longer purely traditional, but have to some extent become creatures of colonial politics and administration, perpetuated and "refined" by the National Party government to make apartheid work. The traditional leaders have lately become a strong lobbying force for their own recognition and for recognition of customary law. Add to this the political claims by the Zulu king, which rest partly on traditionalism and partly on the colonial National Party framework within which he has operated for a long time. His position is now safeguarded by the proviso to section 160 of the Constitution in terms of which the provincial Constitution of KwaZulu/Natal *shall* make provision for the institution, role, authority and status of the Zulu monarch.

Similar provision *may* be made for other monarchs. Any provisions in this regard "shall be recognised and protected in the Constitution".[19] The present Constitution, as shown above, continues to recognise customary law as before (which is limited) and goes further by recognising a traditional authority which observes a system of indigenous law and allows such an authority to "continue to exercise and perform the powers and functions vested in it in accordance with the applicable laws and customs".[20]

Recognition in this form is no more than toleration within the matrix of the general law. Although the recognition is subject to the catalogue of fundamental rights in chapter 3, customary law surely cannot be rendered nugatory on that score. Here my submission is that recognition should be granted in a way that renders statutory interpretation of the Constitution functional.

African leaders in independent Africa have shown a renewed interest in the revival of African culture and traditions, and by implication customary law, albeit this time in a universal democratic context. Their views are reflected in

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15 Bennett *A sourcebook of African customary law for Southern Africa* (1991) 133.
16 Bennett "The equality clause and customary law" 1994 *SAJHR* 130.
17 Bennett (1991) 133.
18 S 1 of the Law of Evidence Amendment Act 45 of 1986.
19 Par 2 of Constitutional Principle XIII of the Constitution.
20 S 181(1) of the Constitution.

the Preamble to the African Charter of Human and Peoples' Rights (1981) which declares that the African states are

> "taking into consideration the virtues of their historical traditions and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights".

Article 17(3) provides that "the promotion and protection of morals and traditional values recognized by the community shall be the duty of the State". Article 18(2) adds further: "The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community." South Africa will no doubt also subscribe to the ideals expressed in the Charter. The "new" South Africa has already gained membership of the Organisation of African Unity. It is therefore unlikely to "outlaw" customary law without more ado. To a greater or lesser extent South Africans have become modernised by social interaction, schooling, Christianity and economic necessity. But customary law is by no means a rural phenomenon only.

Many urban Africans still foster traditional values and there is an interaction between rural and urban communities. Sanders[21] highlights this aspect as follows:

> "A more common form of interaction is that between rural and urban normative spheres: to what extent are rural communities "feeder" communities for urban communities, and vice versa? Of no less importance is the question of how suburban communities interact with the greater metropolis, or the state for that matter. All these questions pose problems which a law reformer with a communitarian mission in mind cannot afford to ignore."

However, a large number still have their roots in traditional societies. It is difficult to quantify such a statement, but the magnitude of the traditional ambit may be gauged by noting that there are more than 800 officially recognised traditional leaders in the country.[22] Each one of them has a number of followers and wields authority over an area of land. It would appear that many people still adhere to customary laws and practices. Books and articles on women's rights in Africa, for example, are based on the assumption that customary law practices are still widespread throughout Africa.

In addition to tribal areas, there is a vast grey area where customary law overlaps with the formal legal structure: for instance, in cases of succession to property held under common-law tenure, the question is whether a customary-law widow is entitled to the same claims and benefits as a common-law widow. Customary law as integrated into the law of the land has come to be known as "official" customary law. A body of precedents (case law), reports and textbooks also constitute part of the official customary law.[23] Although official customary law is sometimes contemptuously referred to as a distortion of customary law, it is law all the same. This law, as Sanders[24] points out,

> "can of course not be undone in its entirety, neither will a restoration and simultaneous adaptation of the indigenous African law suffice to meet modern demands".

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21 "Legal anthropology in a changing South Africa" 1994 *CILSA* 3.

22 Bennett (1991) 63 states that there are approximately one and a half thousand chiefs' and headmen's courts operating in all parts of the country.

23 Sanders "How customary is African customary law?" 1987 *CILSA* 406–407; Bekker and Maithufi "The dichotomy between 'official customary law' and 'non-official customary law'" 1992 *TRW* 47–60.

24 "The characteristic features of Southern African law" 1981 *CILSA* 335.

Furthermore, the problem with unwritten indigenous customary law is that there is not yet a clearly demarcated boundary between law and custom: "The difficulty lies in the tremendous variation in normative orders and the diversity of particular situations."[25] Being unofficial, the indigenous customary law does not often figure in the law courts. Hence it is not likely to attract the attention of constitutional lawyers as much as the official customary law. Unofficial customary law applied in a chief's court may nevertheless now and again be impugned as being in conflict with human rights norms. But the point is that if the official version of customary law should be declared unconstitutional, the unofficial (people's) law will step into the breach and constitute the sole normative order. The constitution-makers will have to decide whether that is what they want. Most of the authors referred to in this article point out directly or indirectly that abolishing customary law or declaring aspects of it unconstitutional will not necessarily stop popular practice. For instance, in Mozambique customary law does not form part of the formal legal system, but courts still draw extensively on certain aspects of traditional law, and "many key aspects of the processes of traditional law have been taken over, transformed and integrated into the new system of Popular Justice".[26]

Howard[27] draws attention to another aspect, namely that "people value customs even when they seem to be 'irrational' to an outsider. The symbolic value is a real personal value". Reyntjens,[28] too, found:

> "Today, informal settlement of disputes continues in diverse forms and my own research indicates that it is quantitively by far the most important judicial forum. The survival of creation of folk modes of dispute-processing is not just obvious, but in fact inevitable . . . People will simply take their disputes to another, non-state forum which will apply folk law."

Lately customary law has also been viewed from another angle, namely the rights of ethnic minorities and indigenous peoples to preserve their customs and legal traditions. It is a *fait accompli* that in Africa and Asia, particularly in those countries in which customary law is an integral part of the general legal system, ethnic groups are still governed in matters of personal status and other fields of private law by their own rules.[29] In some countries customary law is applied with certain reservations; in some, certain instances of legal tradition are not regarded as valid, while a third group does not recognise a plurilegal system in matters of private law at all.[30] Capotorti[31] reaches the following conclusion:

> "With respect to the preservation of the legal traditions of minority groups, the general tendency is to apply a uniform set of rules throughout the country. However, in countries in which political autonomy has been granted to areas where a minority group is concentrated, matters of private law are often within the competence of the local

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25 Merry "Legal pluralism" 1988 *Law and Society R* 879.
26 Welsh, Dagnino and Sachs "Transforming family law: new directions in Mozambique" in Armstrong (ed) *Women and law in Southern Africa* (1987) 119.
27 "Women's rights in English-speaking sub-Saharan Africa" in Welch and Meltzer (eds) *Human rights and development in Africa* (1984) 59.
28 "The future of customary law in Southern Africa" in Church (ed) *The future of indigenous law in Southern Africa* (1993) 15.
29 Capotorti *Study on the rights of persons belonging to ethnic, religious and linguistic minorities* (UN New York 1991) par 379–385.
30 *Ibid*.
31 *Op cit* par 596.

> legislature. In Africa and Asia, particularly in the countries in which customary law is an integral part of the general legal system, various ethnic groups are still governed in matters of personal status and other fields of private law by their own rules. There cannot be any doubt that an effective and full protection of the culture of minorities would require the preservation of their customs and legal traditions, which form an integral part of their way of life."

Admittedly, whole black populations of African countries cannot without more ado be classified as minorities or so-called indigenous peoples, although some tribes may constitute minorities, while most or all the people are indigenous. The concepts are not amenable to exact definition.[32] For purposes of this article a definition is not crucial. The point is that there is a world-wide concession that indigenous laws and customs need to be preserved. Although, therefore, the principle of equality before the law is universally respected in the sphere of human rights, the same principle of equality could also be applied in order to respect the laws and customs of indigenous peoples.[33] Some protagonists of human rights lose sight of the fact that indigenous laws constitute values and a way of life that cannot be thrown overboard. As stated by Heintze,[34] rules of customary law

> "could promote greater security, since they have been applied and accepted over many generations. The total negation of these would necessarily lead to an even greater loss of identity and to collapse of traditional organizational structures".

I nevertheless feel that human rights norms should not be regarded as having no relevance for African society.

On the other hand, customary law should not be abolished, because it is in some respects incompatible with human rights norms. There is a middle way, as suggested by Nhlapo:[35]

> "[W]e must resist the temptation to throw out the baby with the bath-water. The reasons for producing a document that would set up a human rights system with a distinctively African flavour still hold good. Africa does need a human rights approach that cannot be dismissed as foreign and irrelevant. We need a way of looking at the Charter's attempts at relevance in a positive light. In this approach traditional African values would be seen, not as a natural enemy of the contemporary rights guaranteed in the document, but as a standard for defining the content and scope of those rights. This may not be easy in all cases: some traditional practices are incompatible with the spirit of the Charter. The attempt must, however, be made to seek out the positive aspects of African culture and apply them."

I believe that there are positive aspects that can be applied. Many customs and usages are, moreover, a social given and the application of human rights norms will not make them disappear overnight. It will indeed be a pity if a constitutional court should declare a rule of customary law unconstitutional before a process of law reform and other policy interventions have been put into operation.

This does not necessarily mean that the state should adapt customary law. Reyntjens[36] warns that

> "if these adaptations go beyond these that emanate organically from a changing environment, the transplant is likely to be rejected by an important section of the society.

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32 See Capotorti *op cit* par 20–81; Heintze "International law and indigenous peoples" 1992 *Law and State* 40–43.

33 Heintze *op cit* 58.

34 *Ibid.*

35 "International protection of human rights and the family: African variations on a common theme" 1989 *International Journal of Law and the Family* 17.

36 *Op cit* 21.

People will evade that law and because forum shopping is relatively easy, they will turn to folk law and non-state dispute settling agencies".

I suggest that there should be a broader-based recognition of customary law or it should be excluded from the injunctions against discrimination and equality. For example, the Constitution of Lesotho provides that "no law shall make any provision that is discriminatory either in itself or in its effect", but that this provision "shall not apply to any law to the extent that that law make provision – for the application of the customary law of Lesotho with respect to any matter in the case of persons who, under that law, are subject to that law".[37] The Constitution of Botswana has a similar provision.[38]

In my view, law reformers should not try to force customary law into a preconceived human rights mould. Their challenge lies in understanding customary law against its own particular philosophical background which is "communitarian" and to reconcile that with the tenets of individual human rights.

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37 S 18(1) and 18(4)(c) of the Constitution of Lesotho as brought into operation by the Lesotho Constitution (Commencement) Order No 5 of 1993.

38 S 154 of the Constitution of Botswana.

[E]k meen dat die grootte van die fooi vir die opstel van betoogshoofde wat die junior advokaat in die saak gevra het, kommerwekkend is. Die fooi is natuurlik bereken op die grondslag dat hy 484 ure hieraan bestee het. Dit is, in al die omstandighede en die lengte van die oorkonde inaggenome, beswaarlik aanvaarbaar. Dit beteken dat die advokaat wat in die verhoor verskyn het, wat met alle aspekte van die saak vertroud was en wat by die opstel van 'n betoog aan die Verhoorregter betrokke moes gewees het, vir meer as 60 dae (agt uur per dag) moes gewerk het om dié taak te verrig. Ek vind dit uiters vergesog. In elk geval meen ek dat die wyse waarop die fooi bereken is, nl soveel per uur, onvanpas is by die vasstelling van advokaatsgelde vir dienste van hierdie aard. Dit stel 'n premie op stadige en ondoeltreffende werk; en dit het tot gevolg dat 'n fooi gevra word wat geheel en al buite verhouding is met die waarde van die dienste wat inderdaad gelewer word. Ek meld dit alles in die verbygaan want die applikant het nie aangevoer dat die Takseermeester 'n aparte fooi vir die opstel van betoogshoofde moes toegelaat het of dat hierdie fooi in sy geheel op taksasie verhaalbaar is nie; maar ek meen dat dit nodig is dat hierdie Hof sy afkeuring van sodanige buitensporige fooie uitspreek (*per* Corbett HR in *JD van Niekerk en Genote Ing v Administrateur Transvaal* 1994 1 SA 595 (A) 601 – 602).

The future of South African contract law[1]

Annél van Aswegen
BA LLD
Professor of Private Law, University of South Africa

OPSOMMING

Die toekoms van die Suid-Afrikaanse kontraktereg

Die moontlikhede rakende die toekomstige ontwikkeling van die Suid-Afrikaanse kontraktereg word in hierdie bydrae ondersoek. Teen die agtergrond van sekere aannames omtrent die toekomstige konstitusionele en ekonomiese bestel in Suid-Afrika, word die vernaamste faktore wat die toekomstige ontwikkeling van die kontraktereg sal beïnvloed, geïdentifiseer en die belangrikste daarvan in meer diepte bespreek. Die invloed van 'n handves van menseregte op die privaatreg in die algemeen en die kontraktereg in die besonder word aan die hand van die verskillende moontlike vorme van horisontale werking van fundamentele regte wat in 'n handves beskerming geniet, ontleed. Hiernaas word ook die voortbestaan van die Romeins-Hollandse reg en die verskillende moontlike metodes wat aangewend kan word om dit aan te pas by die eise en omstandighede van die hedendaagse en toekomstige samelewing, ondersoek. Die belangrikste van hierdie metodes van hervorming van die kontraktereg, naamlik hervorming deur die regbank, word behandel en klem word gelê op die noodsaaklikheid van gedissiplineerde regterlike aktivisme om die doel te bereik. Ten slotte word gewys op die integrering van die geldende reg met inheemse regsbeginsels en die belang van toeganklikheid en effektiewe afdwinging van die geldende reg as belangrike faktore wat die toekoms van die kontraktereg in Suid-Afrika medebepaal.

1 INTRODUCTION

The debate on the future of contract law in South Africa includes many complex issues. Moreover, at this stage of the process of fundamental transition taking place in our country, it is still uncertain what the precise nature of the political, social and economic dispensation that will eventually emerge as the new South African order, will be. One can therefore be excused for despairing of the possibility of presenting, in the space of a brief contribution such as this one, even an intelligible account of the major factors playing a role, let alone of making a meaningful contribution towards an integrated model of contract for the future. In the light of these difficulties, I shall merely discuss briefly, and in some instances only identify, those factors that I regard as the most important in a successful transformation of contract law to meet the demands of the future.

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1 Updated version of paper read at a seminar on the future of South African private law presented by the Department of Private Law, Unisa, on 1993-08-25. Since this paper was presented, the intervening election of a new government has brought more clarity on some of the issues speculated on at the time of writing. The paper was updated only to include references to the Constitution of the Republic of South Africa 200 of 1993, which had not been finalised at the time of writing.

2 BACKGROUND

It is inevitable that such an endeavour has to be based on certain assumptions about the future political, economic and social dispensation. For present purposes, these assumptions will simply be spelled out without any attempt to justify them. It goes without saying that the basic assumption is that the institution of contract has a place in the new South Africa.[2] Furthermore, I think that the declared policies of the majority of the participants in the South African political struggle, justify the assumption that the future political dispensation after the transitional period will take the form of a multi-party democracy incorporating a constitutional bill of rights, and that the economic dispensation will at least partly be based on free-market principles. Many complex and fundamental issues about which profound differences of opinion exist, still have to be resolved,[3] and cannot even begin to be addressed in the present context. However, two aspects are central to the theme of my article, and need some further elaboration.

The assumption that a market economy will continue to exist, is based not only on the declared commitments of several political groupings, such as the ANC, which has embraced the concept of a mixed economy, but also and especially on economic realities. They include the recent world-wide resurgence of faith in the market as an effective economic instrument after the failure of communist centrally planned economies in the USSR and eastern Europe, and the necessity of economic growth for the implementation of a just and equitable social dispensation. The importance for economic growth first of all of stimulation of the informal sector, especially in the light of growing unemployment, and secondly of attracting overseas investment and business, attest to

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2 Contract is *par excellence* an instrument enabling individual participation in legal and economic intercourse – the means of private allocation of resources in society. As such it is closely associated with the traditional nineteenth-century liberal democratic political dispensation, predicated on the freedom of the individual with minimal state intervention, and the accompanying free-market economic system. The perception therefore exists that contract has no, or a far less important, role in socialist or communist state interventionist political dispensations emphasising communitarian values and characterised by centrally planned economies. However, the fallacy of such a perception has been adequately illustrated by commentators describing the increasing prevalence and importance of contract in the latter type of political dispensation. This was dictated by the need for an instrument to carry out the objectives of a centrally planned economy and the inevitability of a measure of private ordering in the informal sector. In this regard, see in general Eörsi "Contract in the socialist economy: general survey" in *International encyclopedia of comparative law* vol VII ch 5 par 1 – 3; Von Mehren "A general view of contract" in *International encyclopedia of comparative law* vol VII ch 1 par 1 – 22; Harker "The role of contract and the object of remedies for breach of contract in contemporary western society" 1984 *SALJ* 127; Van der Walt "Kontrakte en beheer oor kontrakteervryheid in 'n nuwe Suid-Afrika" 1991 *THRHR* 382 – 383. Contract thus remains an indispensable social institution regardless of the form of political and economic ordering society embraces.

3 Constitutional issues include eg the question of the desired form of democracy, namely simple majoritarianism versus more nuanced versions, and the vexing question of adequate constitutional curbs on state power to avoid the excesses of totalitarianism and to guarantee all citizens basic rights and participation in the political process, while allowing sufficient scope for state intervention to eradicate the negative legacy of the past (see eg Van der Vyver "Constitutional options for post-apartheid South Africa" 1991 *Emory LJ* 761 – 770 and Davis "Social power and civil rights: towards a new jurisprudence for a future South Africa" 1991 *SALJ* 458 – 464 for discussions of these problems). Economic issues mainly concern ensuring the correct balance between free enterprise and state regulation to ensure economic growth. These are but the most obvious examples of issues still to be resolved during the transitional period.

the inevitability of a measure of free-market economic activity. The continued existence of a market economy in turn necessitates the retention of contractual mechanisms developed for such a system. As will appear from what follows, this point of view does not imply a simple retention of the *status quo*.

A bill of rights has been included in chapter 3 of the Constitution adopted for the transitional period[4] and the assumption that it will also be incorporated in a future constitutional dispensation is quite uncontroversial. In spite of the fact that the precise ambit, effect and correct interpretation of the provisions of chapter 3 are still a matter of debate, any serious discussion of the future legal dispensation has to take into account the potential influence of a bill of rights on existing and future legal rules and institutions, both public and private.

3 FACTORS INFLUENCING THE FUTURE OF CONTRACT LAW

3 1 A bill of rights

In the present context, the effect of the provisions of a bill of rights on the law of contract is the first important factor affecting the future of contract law. This issue has not received much attention in legal literature and needs to be discussed in some detail. A bill of rights is traditionally regarded as a constitutional instrument entrenching, and thus guaranteeing and protecting, the basic rights of citizens against unwarranted interference by the state and its institutions.[5] Its provisions are thus in principle directly applicable only to state action; in other words a bill of rights has vertical application to relations between the state and its citizens. It is, however, the question of the possible horizontal application of the provisions of a bill of rights to private-law relations between individuals which concerns us.[6]

Different approaches to this question are possible. One can be found in the German doctrine of *Drittwirkung*, or *indirect* horizontal application, which briefly entails that, unless specifically so provided, the provisions of the *Grundgesetz* have no *direct* application to private-law relations, which are regulated by the provisions of the German civil code (*BGB*) and other *ad hoc* legislation.[7] However, horizontal application takes place *indirectly* in the following manner: the so-called general clauses in the *BGB*, embodying the principles of good faith and good morals,[8] which play a major role in the continued development and adaptation of the provisions of the *BGB*, have to be interpreted and applied to reflect the standards set by the basic rights protected in the *Grundgesetz*.[9] Moreover, the interpretation by the courts of *all* legislation, including that which governs private-law relations, has to give maximum effect

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4 The Constitution of the Republic of South Africa 200 of 1993.

5 Van der Vyver 1991 *Emory LJ* 771 – 773 795; Foster *German law and legal system* (1993) 116; Nörr "From codification to constitution: on the changes of paradigm in German legal history of the twentieth century" 1993 (1) *Codicillus* 37.

6 On vertical and horizontal application of a bill of rights, see in general Van der Vyver 1991 *Emory LJ* 795 – 801.

7 As is the case with the German provision expressly invalidating any agreement limiting or excluding freedom of association in the context of labour relations (see s 9.3 of the *Grundgesetz*).

8 Good faith (par 242 *BGB*); good morals (par 138 826 *BGB*).

9 This was decided by the constitutional court in 1958 (see *BVerfGE* 7, 198; Nörr 1993 (1) *Codicillus* 37).

to an objective system of values extracted from the provisions of the *Grundgesetz*, in effect *indirectly* subjecting all private-law rules and principles to the basic values of the bill of rights.[10] Apart from this German doctrine, the subjection of the legislature as an organ of state, and thus of all new legislation affecting private-law relations, to the provisions of the bill of rights, raises a further possibility of indirect horizontal application. New legislation regulating private relations will not infringe or be in conflict with the fundamental rights protected in such a bill beyond the limitation of fundamental rights specifically permitted, usually in a general limitation clause contained in the bill of rights. Furthermore, a bill of rights can specifically provide for legislative or other state measures to promote or protect specific fundamental rights or to enable affirmative action programmes. Such measures can affect private-law relations and thus also constitute a form of *indirect* horizontal application.

A different approach to horizontal application can be illustrated with reference to the position in the United States. There the doctrine of state action applies, meaning that most provisions of the Freedom Charter prohibit only state action, and not the individual invasion of individual rights. Accordingly, the charter has only vertical application in principle. Horizontal application of human rights principles is usually effected in an indirect manner by means of separate Civil Rights Acts. However, the prohibition of slavery in the thirteenth amendment, interpreted widely to include racial discrimination, is expressly held to be *directly* applicable to private relations. Furthermore, an extensive interpretation of the concept of state action to include, for example, enforcement by the court of a private agreement, or state funding of a private institution, in fact resulted in *direct* horizontal application of other provisions of the charter to regulate individual relationships and curtail private-law "subjective" rights and competences.[11]

The practical implications of direct and indirect horizontal application of the provisions of a bill of rights to contract law differ. Indirect horizontal application in the German sense will mean that so-called open-ended standards or principles similar to the German general clauses, like the rule that contracts contrary to public policy are illegal, will be given content in the light of such an instrument. Thus the values underlying fundamental rights protected in a bill of rights will have to be considered as important policy factors determining public policy in the circumstances. It will furthermore entail that all the existing rules and principles of contract law will have to be interpreted as far as possible in accordance with the values underlying fundamental rights. For example, the present principle of *pacta sunt servanda* should be interpreted to conflict as little as possible with fundamental rights such as equality or freedom from servitude and forced labour. However, to my mind this does not necessarily imply that where the effect of the application of the rule or principle amounts to a limitation of fundamental rights as between private individuals, the protection of fundamental rights will necessarily take precedence over "subjective" rights

10 On *Drittwirkung* in German law, see eg Siehr "Grundrechte und Privatrecht" in Habscheid *et al* (eds) *Freiheit und Zwang. Rechtliche, wirtschaftliche und gesellschaftliche Aspekte. Festschrift zum 60. Geburtstag von Professor Dr. iur.Dr.phil. Hans Giger* (1989) 627 – 642; cf also Van der Vyver 1991 *Emory LJ* 795 – 796; Foster 116 – 117; Nörr 1993 (1) *Codicillus* 37 – 38.

11 On horizontal application in the United States and for references, see Van der Vyver 1991 *Emory LJ* 796 – 798.

of performance validly acquired. Chapter 3 of the Constitution of the Republic of South Africa 200 of 1993, containing the present constitutional provisions concerning the protection of fundamental rights and thus constituting a bill of rights for South Africa, explicitly provides that South African courts should interpret any law, and apply and develop common and customary law, with due regard to the "spirit, purport and objects" of the chapter.[12] This is in effect an express adoption of the German model of *Drittwirkung* in South African law.[13]

The other forms of indirect horizontal application are both concerned with new legislation. The fact that the provisions of chapter 3 of the Constitution bind the legislative organs of state[14] will effectively prohibit new legislation, in the private-law sphere as well, conflicting with fundamental rights. This also applies to the provisions of the 1993 version of the ANC draft bill of rights.[15] Moreover, chapter 3 of the present Constitution, as well as the 1993 version of the ANC draft bill of rights, prohibits (*inter alia*) legislation conflicting with or limiting fundamental rights, except in so far as generally applicable limitations are reasonably justifiable in an open and democratic society based on freedom and equality and do not negate the essential content of the fundamental right.[16] It is, however, probable that these provisions will not affect private-law relations, since the protection of fundamental rights in chapter 3 binds only legislative and executive organs of state, which includes any statutory body or functionary.[17] Furthermore, both these instruments specifically provide for measures by the state to effect affirmative action or to protect specific fundamental rights.[18] In this context "measures" obviously include legislation, also

12 S 35(3). It is interesting to note that the bill of rights originally proposed by the South African Law Commission provided for indirect application after the German model in respect of legislation only.

13 The general wording of s 35(3) seems to refute the argument that, since the provisions of chapter 3 bind only legislative and executive organs of state (fn 17 *infra*), this section applies only to laws affecting the relationship between such organs and private individuals. Moreover, if this argument were correct, s 35(3) would seem to be superfluous in the light of the provisions of s 33(1) and (2) and 35(2), which overrides laws (or the interpretation of laws) limiting the fundamental rights of citizens protected against such organs in chapter 3. These sections in themselves ensure that laws affecting the relationship between such state organs and citizens will have to be interpreted in accordance with the objects of the chapter.

14 In s 7(1).

15 The legislature as an organ of state is subjected to the bill of rights in a 17(1) of the ANC draft (and also in a 1 and 40 of the Law Commission draft).

16 S 17(5) of the ANC draft, like a 35(a) of the Law Commission draft, prohibits legislation limiting or violating fundamental rights, while the prohibition in s 33(2) of the Constitution refers to legislation as well as rules of common law or customary law. Limitation clauses are contained in s 33(1) of the Constitution, a 16(2) and (4) of the ANC draft and a 34(1)(a) and (b) of the Law Commission draft. The wording of these provisions differs in minor respects: the wording used in the text is that of the Constitution. The Law Commission draft in fact differs further in that the limitation clause does not refer to the norms acceptable in a just and open democratic society as guiding principle in deciding what is reasonable, but specifically to state security, public interest and order, good morals, public health, state or legal administration, the rights of others and the prevention of crime or public disorder.

17 S 7(1) and 233(1)(ix).

18 Measures to achieve the adequate protection and advancement of persons or groups unfairly discriminated against specifically to promote equality, are provided for in s 8(3)(a) of the Constitution (a similar provision was contained in a 3(b) of the Law Commission draft),

legislation regulating private-law relations. In fact, the Constitution specifically provides for measures prohibiting unfair discrimination by persons and bodies not bound by the provisions of chapter 3.[19] Legislation may therefore be passed, for example, to ensure that provisions in contracts amounting to racial or sexual discrimination are not enforced, or to incorporate a minimum wage in common-law employment contracts. In sum, indirect horizontal application of the provisions of a bill of rights indirectly influences the content of contract-law rules and principles of statutory-, common- and customary-law origin, but private individuals and institutions remain free to regulate their private relations and enjoy and exercise their contractual rights in accordance with such rules, even if this should in effect infringe on or limit a fundamental right as between private individuals. This is justified by the fact that the underlying principle regulating private-law relations, requiring an equitable balancing of individual interests in the light of the public interest, may in a specific instance demand the protection of a particular individual interest at the expense of a fundamental right in the interests of justice.[20]

Direct horizontal application, on the other hand, means that the regulation of private relations is automatically subjected to the provisions of the bill of rights and can never result in any infringement or limitation of any fundamental right. In effect, unqualified precedence is given to the fundamental rights over all private-law rights and competences without allowing any consideration of the merits of an individual instance. Obviously, contracts concluded by the legislative and executive organs of state will be directly subjected to the provisions of the bill of rights. That aside, none of the bills of rights referred to earlier specifically provides that any particular fundamental right applies directly to the relations between private individuals. As pointed out earlier, the wording of the Constitution in fact restricts the application of chapter 3 to the vertical relationship between state and individual by specifically enacting that its provisions bind only the legislative and executive organs of state, which include any statutory body or functionary.[21] The ANC draft, however, specifically recognises the possibility of direct horizontal application in that it declares the terms of the bill of rights to be applicable to all social institutions and persons where appropriate.[22] Moreover, the Constitution specifically provides that no rule of the common law or custom shall limit any fundamental right beyond the reasonable limitation allowed in the limitation clause.[23] This may conceivably be interpreted to mean that private-law rules having that effect will automatically be overridden.

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and s 33(4) expressly provides for measures designed to prohibit unfair discrimination by persons and bodies not bound by the provisions of chapter 3. A 14 and 15 of the ANC draft allow and encourage affirmative action programmes to redress past discrimination in general. In addition, the Constitution allows measures to promote economic activity in s 26(2), and the ANC draft allows or requires legislation to promote and protect workers' rights in a 6(10); reproductive rights in a 7(2); gender rights in a 8(2); disabled persons' rights in a 9(2); social, educational and welfare rights in a 11(2); rights to land and the environment in a 12(6), (7), (8) and (16); and property rights in a 13(7).

19 S 33(4).

20 Cf also Van der Vyver 1991 *Emory LJ* 800–801.

21 See fn 17 *supra*. The wording of the Law Commission draft has a similar effect.

22 In a 17(1).

23 In s 33(1) and (2). See also fn 16 and 17 *supra* and accompanying text.

The possible implications of the last two provisions are not immediately obvious. Will they be interpreted to mean that any right to performance in terms of a valid contract which limits a, or certain particular, fundamental rights cannot be enforced in a civil action? The rights to dignity, property, privacy, home life, creative freedom and freedom of movement, variously recognised in the instruments under discussion, can all potentially conflict with or be limited by contractual rights to performance. It is, however, the right to equality and to freedom of association in particular, as well as the various second-generation rights contained in some of these instruments, notably workers' rights, which may be adversely affected by contracts between individuals. Potentially, direct horizontal protection of fundamental rights could in effect erode individual freedom of contract. To my mind, the provisions under discussion will not have that effect. As I have indicated above, the Constitution specifically limits the application of the provisions of chapter 3 to the legislative and executive organs of state, apart, of course, from the indirect horizontal application discussed earlier. Therefore the provisions prohibiting the limitation of any fundamental right by legislation, common law or custom probably also apply only to the relationship between state and private individual.[24] It is, after all, only against state organs that fundamental rights are recognised, except where the bill of rights explicitly extends such recognition to the private sphere. Beyond the general wording of the provision under discussion, it contains no indication that it, in contrast to the other provisions of chapter 3, should be extended to govern private-law relations directly by the recognition of fundamental rights against private individuals as well as against the state. The provision in the ANC draft explicitly providing for the application of any provision of the bill of rights to private individuals where appropriate, could potentially have the effect described. Doubtless, this is not the intention of the said provision. It is probably meant to apply only in those instances where justice demands total subordination of private-law interests to fundamental rights, for example to eradicate racial discrimination. However, the vagueness of the term *appropriate* used as indication of when direct horizontal application should take place, creates uncertainty.

Direct horizontal application can be justified by the demands of justice, especially where the need for the elimination of existing inequalities may take precedence over individual interests, as is the case in South Africa. In general it seems preferable, however, to limit horizontal application to the indirect methods except where the bill of rights specifically provides otherwise in a specific instance. Such specific provisions can be utilised to provide for those instances where justice requires direct application. Moreover, provisions enabling measures, including legislation, in certain instances, such as to effect affirmative action, can provide adequate mechanisms to regulate private relations in accordance with the bill of rights where necessary. A general precedence of fundamental rights over any conceivable private interest smacks of totalitarianism and in its inflexibility contains the seed of the erosion of the very justice it seeks to promote.

3 2 The retention of Roman-Dutch law

A second important issue concerning the future of contract law is whether the Roman-Dutch system should be retained as basis or part of our law of contract.

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24 See also text at fn 17 *supra*.

The retention of Roman-Dutch law is of course not uncontroversial. Apart from misgivings about the undeniable interrelationship of Roman-Dutch contract law with a free-market economic dispensation, many other valid objections remain. The most important of these are based on the poor performance of Roman-Dutch law in the past as a corrective to the injustices of apartheid and the corresponding lack of general acceptance of and faith in the system by the majority of the populace. However, I do not think that it is feasible or desirable to create an entirely new contract law or to transplant the system of another country here. Apart from the enormous resources of manpower needed for such an endeavour, it would effectively neutralise the reservoir of expertise and training available in the existing legal profession. Moreover, by adapting and reforming the Roman-Dutch system in the ways discussed below, we can in my opinion create a better option and retain the advantages of continuity.

3 3 Methods of reform

The third factor influencing future development concerns the manner in which such reform and adaptation should take place. The possibilities are codification, piecemeal legislative intervention and judicial reform. Codification as an option for legal reform in South Africa will be dealt with in a separate paper and I do not propose to discuss it in any detail. Suffice it to state that most of the methods of reform I will be considering, remain relevant should codification result. Not only will there undoubtedly be a long interim period before codification, during which the need for reform remains acute, but a code will for the reasons stated above be based at least in part on existing law. The mechanisms and results of reform are therefore *per se* important for codification. Finally, codification will not eliminate the need for continued adaptation and development of the code to accommodate future changes in social, economic and technological circumstances. The methods of reform and adaptation discussed apply equally to codified systems.

Piecemeal legislative reform always has its place where the reform needed is too drastic or urgent to be accommodated by judicial adaptation of existing rules and principles. Nevertheless it can never, in my opinion, be the only means of law reform. It is a practical impossibility for the legislature to stay abreast of the mass of legislation required in modern times to keep up with the demand for adaptation of legal rules created by ever-changing society. This situation is intensified by the rapid changes in community circumstances and perceptions occasioned by the political reform process in our country. It is therefore inevitable that judicial reform of contract law must take its place as one of the main mechanisms in the creation of a just, equitable, acceptable and effective contract law for the future.

3 4 Judicial reform

Judicial reform of contract law is therefore the fourth important component of a future vision. There are numerous points of departure in both academic dogma and court decisions for the reform of the generally accepted deficiencies in the law of contract by means of adaptation or expansion of the general principles of Roman-Dutch contract law. The main deficiencies already acknowledged, concern the fact that current contract doctrine is based on the paradigm of a free market where voluntary participation by individuals on an equal footing

in a bargaining process without state intervention would result in the greatest public good.[25] In fact, social and economic realities have changed. Participants in the market are seldom economic equals, the ignorance and inexperience of individuals, standard form contracts and contracts of adhesion erode real freedom, and the concentration of economic power and production processes of consumer goods in the hands of corporations and conglomerates have changed the nature of the market. The effect of these factors is intensified in South Africa, where the abhorrent system of apartheid contributed greatly to the social and economic inequalities that lie at the root of the problem. These inequalities create problems of substantive justice between contracting parties, for which the cornerstone of current contract doctrine, namely party autonomy, reflected by the principle of consensualism, freedom of contract and *pacta sunt servanda*,[26] does not provide solutions, disposed as it is towards procedural justice.[27] Obviously, mechanisms to ensure substantive justice furnish the answer to these problems.

One of the great advantages of the Roman-Dutch system, which has often been alluded to in the debate on an appropriate legal system for the future, is the flexibility inherent in its nature, consisting as it does of generally applicable principles. Moreover, underlying these principles are the equitable notions of fairness, justice and good faith.[28] The possibility of adapting the existing common-law contract doctrine to deal with the problems referred to has been espoused by numerous commentators suggesting ways in which the underlying principles of Roman-Dutch contract law can be used to establish such mechanisms and by various court decisions striving to adapt existing contract doctrine to the demands of equity. Some commentators have illustrated that the principle of contractual justice formed just as integral a part of Roman-Dutch law

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25 Harker 1984 *SALJ* 122 – 125; Van der Walt 1991 *THRHR* 368 374 – 380; Lubbe and Murray *Farlam and Hathaway: Contract. Cases, materials and commentary* (1988) 20 – 22; Lotz "Die billikheid in die Suid-Afrikaanse kontraktereg" (Unpublished inaugural lecture Unisa 1979) 2; Eiselen "Die standaardbedingprobleem: ekonomiese magsmisbruik, verbruikersvraagstuk of probleem in eie reg?" 1988 *De Jure* 257 – 258.

26 Lubbe and Murray 20 – 21; Van der Walt 1991 *THRHR* 368; Lotz 1; Eiselen "Kontrakteervryheid, kontraktuele geregtigheid en die ekonomiese liberalisme" 1989 *THRHR* 518 – 519 532 – 533; Lubbe "*Bona fides*, billikheid en die openbare belang in die Suid-Afrikaanse kontraktereg" 1990 *Stell LR* 16; Lubbe "Estoppel, vertrouensbeskerming en die struktuur van die Suid-Afrikaanse privaatreg" 1991 *TSAR* 13 – 14.

27 On the question of procedural and substantive justice, see Von Mehren par 72; Zweigert and Kötz *An introduction to comparative law. vol II The institutions of private law* (translated by Weir) (1987) 6 – 10; Lubbe and Murray 21 – 22; Harker 1984 *SALJ* 123 125 129 – 131; Cockrell "Substance and form in the South African law of contract" 1992 *SALJ* 59 – 60. The basic supposition of classical contract doctrine is that the bargaining process between equal participants in a free market will ensure substantive justice as long as the requirements of procedural justice have been met, which ensure genuine consensus freely reached.

28 Lotz 4 *et seq*; Cockrell 1992 *SALJ* 40 *et seq* esp 55; Lubbe and Murray 390; Van der Merwe *et al Contract. General principles* (1993) 232; Van Huyssteen and Van der Merwe "Good faith in contract: proper behaviour amidst changing circumstances" 1990 *Stell LR* 248. For judicial confirmation of this statement, see eg *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 1 SA 645 (A) 651; *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A) 433; *Bank of Lisbon and SA Ltd v De Ornelas* 1988 3 SA 580 (A) 606; *LTA Construction Bpk v Administrateur Transvaal* 1992 1 SA 473 (A) 480.

as the principle of party autonomy, and underlies substantive justice.[29] Attempts to utilise the underlying equitable principles, especially that of *bona fides*, to expand or vary the existing rules of contract law to accommodate substantive justice are numerous. They include academic arguments to recognise abuse of circumstances as a factor influencing consent;[30] to implicate *naturalia* incorporating equitable terms for certain types of contract or to construe tacit terms that promote equity;[31] to interpret public policy as a ground for invalidity of a contract in accordance with the demands of *bona fides*, which requires honesty and prohibits unreasonable promotion of one's own interests;[32] to utilise the principle of *bona fides* in a normative fashion in the interpretation of contracts;[33] and numerous others. This approach also has some support in case law. The most important examples are the recognition in *Sasfin (Pty) Ltd v Beukes*[34] that inequitable terms in a contract can be contrary to public policy and therefore illegal if they do not meet the demands of simple justice between man and man; the implication of an *ex lege* duty in a contract on the basis of the *bona fides* in *Tuckers Land and Development Corporation (Pty) Ltd v Hovis*;[35] the decision in *Rand Rietfontein Estates Ltd v Cohn*[36] that in cases of ambiguity in the interpretation of contracts, the principle of *bona fides*

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29 Eiselen 1989 *THRHR* 533 – 539; Van der Walt 1991 *THRHR* 386 – 387; Lubbe and Murray 26; Van der Merwe *et al* 230 – 234; Lubbe 1990 *Stell LR* 17 – 24; Van Huyssteen and Van der Merwe 1990 *Stell LR* 248 – 251; Van der Walt "Aangepaste voorstelle vir 'n stelsel van voorkomende beheer oor die kontrakteervryheid in die Suid-Afrikaanse reg" 1993 *THRHR* 76-77. This principle is usually based on the *bona fides* and is variously expressed as "ruilgeregtigheid" and the reasonable expectations of the parties (Eiselen 1989 *THRHR* 537 – 538); a reasonable balance or equivalence between performances (Van der Merwe *et al* 231; Lubbe 1990 *Stell LR* 21 – 22); and a minimum standard of conduct between contracting parties (Lubbe 1990 *Stell LR* 20; Van Huyssteen and Van der Merwe 1990 *Stell LR* 248).

30 Van Huyssteen "Onbehoorlike beïnvloeding en misbruik van omstandighede in die Suid-Afrikaanse verbintenisreg" (1980); Lotz 9 – 10; Cockrell 1992 *SALJ* 56 – 57; cf also Van der Merwe *et al* 96 – 99.

31 Vorster *Implied terms in the law of contract in England and South Africa* (1987) 20 – 38 150 – 159; Joubert "Regsontwikkeling by nuwe verkeerstipiese kontrakte" 1992 *TSAR* 214 – 216; Lotz 15 – 17; Cockrell 1992 *SALJ* 53 – 55; Lubbe and Murray 425.

32 Lubbe 1990 *Stell LR* 17 – 25; Lubbe and Murray 390; Van der Merwe *et al* 233 – 234; Cockrell 1992 *SALJ* 56; Davis 1991 *SALJ* 467. Cf also Lotz 11 – 12 for a similar argument concerning the concept *contra bonos mores* when determining the legality of contracts.

33 Lubbe and Murray 390 – 391 463 – 464 467 – 469; Van der Merwe *et al* 218 – 219; cf also Cockrell 1992 *SALJ* 60 – 61. Accepting the linguistic, objective approach to the interpretation of contracts, they argue that this provides scope for a normative dimension to interpretation in order to promote fairness. This is especially evident in the secondary rules of interpretation, such as the restrictive interpretation of exemption clauses, and the application of the principle of good faith in cases of ambiguity. Lewis "The demise of the *exceptio doli*: is there another route to contractual equity?" 1990 *SALJ* 36 – 44 and "Towards an equitable theory of contract: the contribution of Mr Justice EL Jansen to the South African law of contract" 1991 *SALJ* 258 – 260 argues in favour of a more subjective approach emphasising the true intention of the parties in order to ensure equity.

34 1989 1 SA 1 (A) 9, confirmed in respect of the law of partnership in *Botha (now Griessel) v Finanscredit (Pty) Ltd* 1989 3 SA 773 (A) 783. Cf Forsyth and Pretorius *Caney's the law of suretyship* (1992) 193 – 195; Van der Merwe *et al* 144 – 145; Lubbe 1990 *Stell LJ* 7 – 10; Lewis 1990 *SALJ* 34 – 35.

35 1980 1 SA 645 (A) 652. Cf Van der Merwe *et al* 233; Cockrell 1992 *SALJ* 57; Lewis 1990 *SALJ* 32 fn 24; Cockrell 1991 *SALJ* 249 – 251; Carey-Miller "*Judiciae bonae fidei*: a new development in contract?" 1980 *SALJ* 531.

36 1937 AD 317 330; cf Lubbe and Murray 469; Van der Merwe *et al* 222.

prescribes an equitable interpretation; and the extension and adaptation of existing rules of contract law apparently on the basis of good faith in cases like *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk*[37] and *Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk*.[38] Until recently, certain decisions also led to the belief that the *exceptio doli* could in certain circumstances be used to incorporate a general equitable discretion into the law of contract to ensure substantive justice.[39] The much, and justifiably, criticised decision in *Bank of Lisbon and SA Ltd v De Ornelas*[40] put paid to these hopes, but does not exclude the possibility that the *bona fides* will yet furnish the basis of a solution to the problem of substantive injustice along the lines suggested above.

3 5 Legislative reform

The important point illustrated by these examples is that numerous possibilities exist to create effective mechanisms to ensure substantive justice within the existing Roman-Dutch contract law, which should be utilised to the fullest possible extent. Of course, legislative intervention remains an obvious alternative solution to problems of substantive justice and has been used in the past, for example, to regulate consumer credit, an aspect of consumer protection which is a component of the substantive justice issue.[41] A further recent and topical example is found in the report of the committee appointed by the South African Law Commission to investigate unfair contract terms. They recommend legislation to confer on the courts a general equitable discretion based on *bona fides* to ensure substantive justice in the creation, contents and enforcement of contracts.[42] Needless to say, legislative reform will continue to provide a necessary component of the reformation of contract law. However, it was pointed out earlier that legislation cannot be a complete solution. Ongoing adaptation and expansion of existing contract-law doctrine in the manner illustrated

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37 1979 1 SA 391 (A) 434 – 435, where equity was used as basis for a discretion to award a reduced counter-performance where the *exceptio non adimpleti contractus* is relied on (see Van der Merwe *et al* 282 – 285; Lubbe and Murray 570 – 572).

38 1986 1 SA 819 (A) 848, where rescission of a contract was allowed on the ground of improperly obtained *consensus* (see Van der Merwe *et al* 73 96 – 99).

39 *Zuurbekom Ltd v Union Corporation Ltd* 1947 1 SA 514 (A); *Paddock Motors (Pty) Ltd v Igesund* 1976 3 SA 16 (A); *Rand Bank Ltd v Rubenstein* 1981 2 SA 207 (W); *Arprint Ltd v Gerber Goldschmidt Group SA (Pty) Ltd* 1983 1 SA 254 (A); Lotz 14 – 15; Lubbe and Murray 389 – 390; Van der Merwe *et al* 231 – 232; Forsyth and Pretorius 190 – 193; Lewis 1990 *SALJ* 26 – 34; Van der Merwe, Lubbe and Van Huyssteen "The *exceptio doli generalis: requiescat in pace – vivat aequitas*" 1989 *SALJ* 235 – 236.

40 *Supra*. For criticism, see Van der Merwe, Lubbe and Van Huyssteen 1989 *SALJ* 235 *et seq*; Hawthorne and Thomas "Vonnisbespreking" 1989 *De Jure* 143; Lambiris "The *exceptio doli generalis*: an obituary" 1988 *SALJ* 644; Forsyth and Pretorius 191 – 192 fn 163.

41 Thus the Hire Purchase Act 36 of 1942 and its successors, the Credit Agreements Act 75 of 1980 and the Usury Act 73 of 1968, were enacted to deal with problems concerning consumer credit (see eg McQuoid-Mason "Consumer law: the need for reform" 1989 *THRHR* 41 – 44). The whole situation is currently again under investigation with a view to legislative reform. The South African Law Commission has appointed a committee which has published its recommendations for reform: see Otto and Grové "Hooftrekke van 'n nuwe Kredietwet" 1993 *THRHR* 196; cf also Otto "Regspolitieke en beleidsoorwegings by die daarstelling van nuwe verbruikerskredietwetgewing (deel 1)" 1992 *De Jure* 322.

42 See Report South African Law Commission Project 47; Van der Walt 1991 *THRHR* 367; Van der Walt 1993 *THRHR* 65.

with reference to the reform of Roman-Dutch contract law, needs to be an integral part of the legal system of every country to adapt the law to ever-changing social needs and plays an indispensable part in adapting our contract law to the demands of the future.

3 6 Judicial activism

These demands can be met only if our courts are willing to recognise the need for and inevitability of judicial activism in the private-law sphere, and this raises the fifth factor I regard as of crucial importance. The necessity for judicial activism is a recurring theme in literature on law in developing countries in general and in post-colonial Africa in particular,[43] and is indispensable for the transformation of contract law into an effective, equitable and legitimate system. Naturally, judicial activism has to be subject to certain restraints to guard against the dangers of uncertainty, retroactiveness and high costs, and especially against the possibility of partisanship of non-elected judges drawn from an elitist minority. However, I believe that the model I proposed elsewhere for judicial activism in the context of the use of policy considerations in the law of delict,[44] can be adapted to serve the needs of the law of contract.

3 7 Other factors

Further factors that I regard as of particular importance in the transformation of contract law for the future, can merely be identified here.

In the first place, the various constitutional models which have been proposed, all provide for the continued application of indigenous or customary law. In my opinion serious attention will have to be given to the integration with western civil law of those customary legal rules and institutions which a large part of the population in fact abide by and accept. An example which is relevant to contract law can be found in the contract of exchange, an important component of the indigenous law of contract. Such an instrument can play a vital part in the development and stimulation of the informal sector, and the customary model, which, like most institutions of the indigenous law of contract, is not a consensual but a real contract,[45] could be used to establish and develop a dynamic new contractual instrument.

Secondly, no matter how good the legal rules and principles regulating contract law are, the system will never be effective if the private individuals for whose sake it exists, do not know or understand these rules and cannot effectively enforce them. This truth, stressed by the so-called access to justice

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43 See eg Aguda "The judiciary in a developing country" in Marasinghe and Conklin (eds) *Essays on third world perspectives in jurisprudence* (1984) 137; Hiller "The law-creative role of appellate courts in the third world" in Marasinghe and Conklin (eds) *Essays* 167 and the authorities referred to at 167 fn 2.

44 Van Aswegen "Policy considerations in the law of delict" 1993 *THRHR* 171.

45 See on the contract of exchange in indigenous law and its nature, eg Myburgh *Papers on indigenous law in Southern Africa* (1985) 91 – 92; Whelpton *Die inheemse kontrakte-reg van die Bakwena ba Mogopa van Hebron in die Odi 1 distrik van Bophuthatswana* (LLD thesis Unisa 1991) 70 79 *et seq* 201 *et seq*; Prinsloo and Vorster "Elements of a contract" in Centre for Indigenous Law (ed) *Indigenous contract in Bophuthatswana* (1990) 6 – 20 esp 10 – 11; Prinsloo "Exchange" in Centre (ed) *Contract* 28 – 39.

movement,[46] has numerous implications for the future of contract law. The most important of these are:

(a) the legislature, academics and the courts should strive to simplify the language, content and theory of contract law;

(b) access to knowledge of contract law should be promoted as far as possible by street law and other information programmes and by affordable access to legal advice. The legal profession as a whole, and not only the state, has an obligation in this regard;

(c) the effective enforcement of contract law by private citizens is a vital factor. The biggest obstacle in this regard is the ridiculously high cost of litigation. The various mechanisms available to counteract this, should all be utilised to the fullest possible extent. These include the various models of legal aid, community and state alternative dispute resolution mechanisms, small claims courts and similar institutions, consumer and other bodies promoting self-regulation, class actions and numerous other possibilities.

This brief overview illustrates the endless possibilities that exist to transform our contract law into an effective, viable and acceptable component of the future legal dispensation. All contract lawyers have an obligation to search out, examine and evaluate these possibilities and to promote those that they believe will make a positive contribution to the continued growth and flourishing of contract law.

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46 See eg Cappeletti "Access to justice as a theoretical approach to law and a practical program for reform" 1992 *SALJ* 22 and the authorities referred to by him; cf McQuoid-Mason 1989 *THRHR* 238 – 242.

IN MEMORIAM: JL TAITZ

Die redaksiekomitee van die Tydskrif *het met leedwese verneem van die afsterwe van een van sy lede, professor Jérold Leonard Taitz (1932-10-25: 1994-05-10) van die Universiteit van Durban-Westville. Die* Tydskrif *huldig langs hierdie weg die nagedagtenis van JL Taitz en speek sy meegevoel met sy naasbestaandes en vriende uit.*

AANTEKENINGE

A PLEA FOR FEDERALISM IN THE FINAL CONSTITUTION

"Till the war-drum throbbed no longer,
and the battle flags were furled
In the Parliament of man,
the Federation of the world" – (Tennyson *Locksley Hall* 127).

The concept of federalism

What, in a nutshell, is federalism? So much has been written on the topic. In essence, a federal form of government involves limitations upon the power of the *central* government, and fairly large units of *subordinate* government. A federal state is distinguished from a confederation in that there exists a powerful, though limited, central government; and federal units are distinguished from local government units in that they are the controlling units of the central government organism.

The *subordinate* elements are not necessarily subordinate in the sense of being inferior to a superior but must rather be seen to be *non-central* governmental organs. The distinction between them is rather based on a division between equally important functions.

The non-central governments generally deal with issues of a localised character, while the central government deals with peace and war, with international affairs and foreign matters, with the basic administration of justice, with national communications.

The way in which these functions are to be divided will vary according to the peculiar circumstances and the history of the people concerned. Federal governments can thus be formed by unifying diverse units (Switzerland, the United States) or by the decentralisation of a single unit of government (Canada).

Madison (1987 *The Federalist* 122 (ed Kramnick)) sums up the core principle of federalism when he argues that federation made possible the governance by a common political authority of a large geographic area possessing multiple factions. The existence of such a pluralism of interests, he maintains, would guard against the accumulation of powers in a constant majority.

Federations have undergone great changes through the years. As social problems have begun to become more complex, the demand for action by central government has grown. Despite this there has also constantly been pressure on returning power to the subordinate states. As put by Senator Muskie: "How do we make sure that the powers of government continue to be diffused while at the same time the chores of government are effectively performed?"

(Cited in Leach "Inter-governmental cooperation and American federalism" in Dietze (ed) *Essays on the American Constitution* (1964) 133.)

Federalism is a tool, rather than a rigid set of principles, a tool whose function is to provide for the welfare of the people by the most efficient means possible. Federalism has emerged not as a static concept, but rather as a dynamic instrument for implementing the ends of government. As seen by Barron (*Constitutional law, principles and policy* (1992) 67), federalism is about efficiency versus the danger of accumulated power.

The concept of federalism in the transitional constitution

The Constitution of the Republic of South Africa 200 of 1993 is a transitional constitution. A National Assembly and a Senate jointly forming a Constitutional Assembly must adopt a final Constitution within two years. The final Constitution must be based on certain constitutional principles which are set out in Schedule 4. Several of these constitutional principles prescribe criteria according to which powers must be *divided* between the national government and the provinces. This division must be entrenched in a final constitution, the powers of the provinces *may not* be substantially reduced and the provinces *must have* enough powers to be able to function effectively. The boundaries of the provinces *may not* be changed. The national government *may not* interfere with the integrity of the provinces.

It is my submission that in these constitutional principles the basis has been laid for the final constitution to be a federal one – should such a general will be expressed.

Because of historical, political, physical, economic and cultural factors, South Africa has always been characterised by the existence of different types of government institutions at regional or provincial level. This is trite and need not be spelt out here. Section 161 of the transitional Constitution emphatically declares that the new provincial system (set out *infra*) forms part of the transitional Constitution and the Constitutional Assembly is instructed to give preference to the further development of this system. As is stated above, Schedule 4 of the transitional Constitution contains a series of constitutional principles on provincial government which may not be deviated from in the final Constitution.

There are nine *new* provinces set out in the transitional Constitution. All the existing regional authorities are included in these provinces and the previous four provinces, the independent states and the self-governing territories have ceased to exist. The geographical areas of these new provinces are comprehensively set out in Schedule 1 of the Constitution. The new provincial legislatures may adopt constitutions for their provinces (which may not be inconsistent with the provisions of the transitional Constitution) although they may provide for legislative and executive structures and procedures which differ from those provided for in the current Constitution (s 160 as amended). Each province has a provincial legislature in which the legislative authority of that province vests and which has powers to make laws for that province (*ibid*).

The executive authority of a province vests in a Premier who must exercise his powers in consultation with the other members of the provincial executive council (s 144 147(2)). The Premier must assent to bills of the provincial legislature (s 147(1)). The executive council of a province consists of a Premier and

a maximum of ten persons who are proportionally divided between all parties holding at least 10% of the seats in the provincial legislature (s 149). The Premier allocates portfolios to the parties in question after consultation with the respective leaders.

A provincial legislature has legislative authority and an executive council has executive authority over demarcated functional areas or topics such as agriculture, local government, police, cultural affairs, language policy, tourism, road traffic, the environment and other related topics (a list of the topics appears in Schedule 6). Laws of a provincial legislature take preference over parliamentary law on these topics. Acts of Parliament may prevail, however, but only in certain specifically circumscribed circumstances (s 126(3) as amended).

The provinces also have certain rights and powers with regard to finance and are entitled to an equitable share of revenue collected nationally to enable them to provide the service and to perform the functions for which they are responsible (s 155). Add to this that the second house of Parliament, the Senate, consists of 90 members which represents 10 representatives from each province.

As stated above, it is clear that a basis has been laid for the final Constitution to be of a strong federal character. (For a more comprehensive exposition of provincial government under the transitional Constitution, see Rautenbach and Malherbe *What does the Constitution say?* (1994).)

The concept of federalism in historical context in South Africa

Is the federal idea so strange to South Africa? The answer here is in the negative. As explained by Carpenter (*Introduction to South African constitutional law* (1987) 197), shortly after the conclusion of the Anglo-Boer War in 1902, the idea of federation between the four colonies was seriously debated and Canada and Australia invoked as examples. It would appear that the disadvantages of federation at that time were greatly exaggerated by the proponents of a union and these voices ultimately carried the day.

Despite the unitary character of the Union of South Africa (1910), certain federal characteristics were prominent and inimical to the Westminster system of government. The Senate, for example, gave equal representation to all four provinces. Then there was the system of provincial government: the powers of provincial councils could not be curtailed nor the provincial boundaries altered without a prior petition from the province concerned. Rautenbach and Malherbe (*Staatsreg* (1993) 194; see further May *The South African Constitution* (1949) 191; May and Mitchell "The development of provincial government since Union" 1960 *Acta Juridica* 29; Hahlo and Kahn *The Union of South Africa: the development of its laws and Constitution* (1960) 119) refer to the provincial system which came to being in South Africa in 1910 as a compromise between a unitary state and a federation. This provincial system remained unchanged with the 1961 Republic Constitution and in the 1983 Constitution the chapter in the 1961 Constitution regulating provincial affairs was similarly unrepealed.

The legislative powers of the provincial councils were seen to be *original* and *not* delegated. This meant that unlike municipal by-laws, provincial legislation did not constitute subordinate legislation and could be declared invalid only by the supreme court on the grounds of *ultra vires* (*Theunissen Town Council v Du Plessis* 1954 4 SA 419 (O)). Obviously, the legislative powers of the Provincial Councils could only deal with matters entrusted to the provincial authorities.

The year 1986 saw the Provincial Government Act 69 of 1986 which abolished the Provincial Councils but left the provincial system as such unchanged. Section 14 of this act set out the legislative and executive powers of the Administrator and a new Executive Committee.

Added to the above, it is necessary to mention the devolutionary principles manifested by the highly unpopular Promotion of Black Self-Government Act 46 of 1959, The National States Constitution Act of 1971 and the decision of Transkei, Bophuthatswana, Ciskei and Venda to take nominal independence from South Africa (Vorster and Van Vuuren *Constitutions of Transkei, Bophuthatswana, Venda and Ciskei* (1985)). These four states have been reincorporated into South Africa and as no state but South Africa gave them recognition, the experiment to have them universally recognised as states may be regarded as a failure (Dugard *International law: A South African perspective* (1994) 77).

The basic concept underlying the basis of federalism is clearly thus no alien constitutional idea to South African constitutional history. This is not strange. South Africa is a vast territorial area. Its population is spread over vastly diverse geographical areas. Dialects abound. Economic interests are totally diverse. It was not without serious debate and sophisticated reasoning that the 1993 Constitution could discern *nine* provinces, namely Eastern Cape, Eastern Transvaal, KwaZulu/Natal, Northern Cape, Northern Transvaal, North-West, Orange Free State, Pretoria-Witwatersrand-Vereeniging and Western Cape.

KwaZulu/Natal and Northern Cape are as different in all respects as Massachusetts and Arizona. Similar major diversities could easily be spelt out regarding all these provinces. The differences are so glaringly obvious that there is no point in belabouring the issue further. It is to the credit of the framers of the 1993 Constitution that the recognition of these differences has been entrenched by the recognition of regional governments for these nine provinces in their own right (s 135(1)).

Federalism in a free and democratic South Africa

The bill of rights in the 1993 Constitution makes much of freedom and democracy. A relevant question would be: what are the uses of federalism in a free and democratic society?

It cannot be denied that in this age many objectives of government require intervention at the level of central government. Foreign affairs and national defence are an obvious target area for unified policies. The promotion of economic prosperity also calls for the energies of central government.

Yet there is a nexus between self-government and freedom. Localised government, as Tocqueville (*Democracy in America* (1945) (ed Bradley) 61) said, inspires the spirit of liberty. Federalism and localised government encourage civic participation. The command of a distant capital is something different to citizens deliberating closer to the place where they live and shaping their more personal affairs of government.

Federalism distributes power among the various levels of government. If power tends to corrupt, then devices that distribute and diffuse power help guard against tyranny (Howard "The uses of federalism: the American experience" 1992/3 *Am UJ International Law and Policy* 413).

Federalism encourages and reflects pluralism as a counter to uniformity and homogeneity; it nurtures pluralism. And is South Africa not a plural society *par excellence*? Section 31 of the Constitution has found it necessary specifically to entrench the right of every person to use the language of his choice. Section 14(1) guarantees the establishment of educational institutions based on a common culture, language or religion, where practicable.

Federalism stands for the greater exploration by, and implementation of, units of self-government by pluralistic states. It stands for pluralistic doctrines and theories. It is opposed to the notion of one encompassing state sovereignty – which often ignores the aspirations of smaller groups and communities. The notion of the nation-state, a unitary entity in which one "nation" resides in one "state", is outdated and is not responsive to the pluralistic realities of countries such as South Africa, or the United States of America, for that matter. More blood has been spilled in intra-religious, intra-racial, and internecine conflicts and warfare than has been shed in wars between strangers.

Vigorously waving a newly sewn flag of democracy without balancing the rights of the multitudes of the diverse economic, cultural, and ethnic communities that make up South Africa – a modern pluralistic state – is not going to produce justice or tranquillity.

Federalism bolsters the essence of a constitutional democracy. It invites a continuing dialogue about the premises and limits of government power; about the creation of a sufficiently powerful central government and the preservation of local prerogatives. This dialogue is bolstered by sections 15 and 21 of the bill of rights of the Constitution which entrench the right to freedom of speech and the right to vote.

Federalism promotes constitutional *innovation* and experimentation. As stated by US Supreme Court Justice Louis Brandeis in *New State Ice Company v Liebmann* 285 US 262 311 (1932),

> "it is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without a risk to the rest of the country".

Federalism raises the value of *choices*. Different states, by their localised governance, can have a significant impact on the quality of life from state to state. People can choose to live in one state or another with reference to quality of life concerns that are affected by the way a particular state exercises its sovereignty.

Federalism enhances the idea of national *consensus* which, in practical terms, means that if there is consensus between the central government and the various states on important questions of public policy, central government can take a stand in the knowledge that it has virtual national support.

The possibility of the federal government acting in response to a national consensus is in a sense a "safety valve" (Sedler "The uses of federalism" 1992/3 *Am UJ International Law and Policy* 413), enabling the people of the federation to decide collectively that a given matter involves a sufficient national concern to require a comprehensive national solution.

This can be illustrated by referring to the United States Federal Civil Rights Act of 1964. This act prohibited racial and other forms of group discrimination in employment, education, public accommodations and housing. When this act

was enacted by Congress, some states had already enacted anti-discriminatory laws, but a number of states, especially in the South, which had a long history of racial discrimination, had not. The result of the Civil Rights Act was a national commitment to principles of equality for racial minorities and other traditionally victimised groups in American society.

South African society is highly pluralistic with all types of traditions. Subdivisions are based upon ethnic origin, religion and territory. South African society is fragmented, it is a land of minorities. Despite these divisive aspects, there are unifying forces which give South African society a coherence and self-consciousness – forces which make South Africa a *nation* and will enable its government to function stably and effectively.

The effect of the vastness of South Africa has been to promote regional cleavages. One only has to look at the nine provinces more closely to realise this fully: each province has its own atmosphere, own economic interests, peculiar problems and own peculiar outlook deriving from their sparse populations on the one hand, to their dependence on industries on the other. It cannot be denied that the vast distances have given rise to a certain parochialism. The quality newspapers, for example, do not have much of a circulation beyond the cities in which they are produced.

Regionalism should therefore be of overriding importance and government should not be reaching outwards from the centre to the periphery and downwards from top to base. Rather, the institutions of government should be looked at from precisely the other way round – as leading upwards from the base. The system of government should rather start at the bottom and work its way to the top.

The role of the judiciary

The role of the judiciary is fundamental to a successful federal system. It is the judiciary which has to keep itself concerned with the business of regulating the constitutional separation of powers between the central government and the regional governments. Judicial monitoring by the courts is the only way to ensure fidelity to the federal constitutional structure. If one accepts that federation is the desirable structure, then one must look to the courts to achieve and maintain that structure. The role of the courts will therefore be a challenging one. The courts acquire the role of a national conscience and play the role of a national political engineer as they monitor the separation of powers. Mimicry of the United States Constitution and the role played by the United States Supreme Court in structuring the separation of powers in a federation is not likely to give South Africa all the answers, but much may be learned from an understanding of that country's experience (Kurland "The rise and fall of the 'doctrine' of separation of powers" 1986 *Mich LR* 592).

South Africa is in the advantageous position of having a constitutional court (s 98(1)) predicated by the transitional Constitution. Thus the body to adjudicate between the separation of powers in a possible South African federation will already be in place. It will also, in a few years' time, have had the experience of adjudicating in purely constitutional matters. Under the transitional Constitution, the constitutional court is the court of final instance in all matters relating to the interpretation, protection and enforcement of the Constitution. This includes decisions on whether acts and bills of Parliament and provincial

legislatures are in conformity with the provisions of the Constitution. It also includes decisions on constitutional disputes at any level of government between organs of state.

Conclusion

The 1993 Constitution has seven main features (Rautenbach and Malherbe 3). First of all, the *entrenched Constitution is supreme*, which puts an end to the sovereignty of Parliament. Secondly, *equal franchise* will be enjoyed by all. Thirdly, there is a *bill of rights* to control the relationship between state and individual. Fourthly, the government is one of *national unity*. Fifthly, *nine new provinces* have been created, leading to a new regional system. The existence of the provinces, as well as the recognition of local government as a level of government in its own right, is entrenched. Sixthly, the *diversity of interests* in South African society is accommodated. Lastly, the constitution is a *transitional* one.

Features five (nine provinces and the recognition of local government) and six (accommodation of diversity of interests) form the basis of a federal constitutional structure for the future South Africa. The last feature (the transitional nature of the Constitution) is indicative of the fact that all parties to the present Constitution are still prepared to negotiate. It is to be hoped that these future negotiations which will take place in the Constitutional Assembly (s 68(1) 73(2)) which must adopt a final Constitution, will move South Africa closer to genuine federalism. Constitutional pragmatism predicates this.

GEORGE BARRIE
Rand Afrikaans University

ADMINISTRATIEWE GEREGTIGHEID – MEER VRAE AS ANTWOORDE?

Soos die Grondwet van Namibië, maak die Grondwet van die Republiek van Suid-Afrika 200 van 1993 (a 24) voorsiening vir die reg op administratiewe geregtigheid as 'n beregbare fundamentele reg. Die twee bepalings sien daar egter ietwat verskillend uit. Die Namibiese artikel (a 18) lui:

> "Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal."

Dit is nie die bedoeling om dié bepaling hier te ontleed nie. Daar kan net opgemerk word dat dit min of meer die posisie weerspieël soos dit in die Suid-Afrikaanse reg voor 27 April 1994 gegeld het.

Artikel 24 van die Suid-Afrikaanse Grondwet lui soos volg:

"Elke persoon het die reg –

(a) op regsgeldige administratiewe optrede waar enige van sy of haar regte of belange geraak of bedreig word;

(b) op prosedureel billike administratiewe optrede waar enige van sy of haar regte of regmatige verwagtings geraak of bedreig word;

(c) om skriftelik van redes te voorsien word vir administratiewe optrede wat enige van sy of haar regte of belange raak, tensy die redes vir sodanige optrede openbaar gemaak is; en

(d) op administratiewe optrede wat regverdigbaar is met betrekking tot die redes wat daarvoor gegee is, waar enige van sy of haar regte geraak of bedreig word."

Die eerste ding wat opval, is dat (a) verwys na regte of belange wat geraak of bedreig word; (b) na regte of regmatige verwagtings wat geraak of bedreig word; (c) na regte of belange wat geraak word; en (d) na regte wat geraak of bedreig word. Dit is duidelik dat "belange" wyer as "regte" is en dat "regmatige verwagtinge" of "geregverdigde verwagtinge" soos dit meer algemeen bekend staan, iewers tussen die twee lê. (Kyk bv wat die omvang van die begrip "belange" betref, *Aquatur (Pty) Ltd v Sacks* 1989 1 SA 56 (A) waar die hof onderskei tussen 'n regsbelang aan die een kant en 'n finansiële of kommersiële belang aan die ander kant. Vgl ook die bydrae deur Bray (*infra* 481 ev) oor die *locus standi*-bepaling in die Grondwet.) Dit is ook duidelik dat daar 'n verskil tussen "raak" en "bedreig" is.

Die eerste vraag is of artikel 24 iets nuuts aan die regte van die individu toevoeg of bloot die gemeenregtelike posisie weergee.

Met die eerste oogopslag kom (a) ietwat eienaardig voor. Is 'n individu tog nie altyd op regsgeldige administratiewe optrede geregtig nie? Letterlik vertolk, beteken (a) dat die administrasie onregmatig kan optree waar daar nie regte of belange ter sprake is nie. Dit is wel waar dat "belange" baie wyd is en dat daar altyd by administratiewe optrede die een of ander belang betrokke sal wees, maar miskien is die vraag of hierdie bepaling nie eerder ietwat anders benader moes gewees het nie, dit wil sê uit die hoek van die verpligting van die staat en sy organe om regsgeldig op te tree (vgl die Namibiese bepaling *supra*). Dit behels dat die administrasie te alle tye in die openbare belang moet optree én aan alle statutêre bepalings gehoor gee én alle gemeenregtelike vereistes nakom. Dit is ook onnodig om hier na "regte" of "belange" te verwys aangesien die vereistes vir *locus standi* in artikel 7 vervat word. Aangesien daar geargumenteer kan word dat artikel 7(4) die Romeinsregtelike *actio popularis* in ere herstel het, is dit moontlik dat selfs iemand wat nie 'n direkte reg of belang by 'n saak het nie, op regsgeldige administratiewe optrede in hierdie eng sin kan aandring.

Die uitleg van (a) hang eintlik daarvan af of 'n mens die wye of die enge benadering van *ultra vires* aanhang. Volgens die wye benadering omvat "regsgeldige administratiewe optrede" *alle* vereistes vir die geldigheid van 'n administratiewe handeling; indien dié benadering gevolg word, word die res van die artikel minstens gedeeltelik oorbodig. Volgens die eng benadering van *ultra vires* word die geldigheid van administratiewe optrede gemeet aan die bepalings van die magtigende wet en niks verder nie (kyk Wiechers *Administratiefreg* (1984) 198 – 200; Baxter *Administrative law* (1984) 307 – 312, hoewel Baxter mi Wiechers enigsins verkeerd verstaan).

Om subartikels (b), (c) en (d) sinvol te maak, moet daar dus aanvaar word dat (a) beteken dat 'n administratiewe orgaan in enge sin *intra vires* moet optree. Wat die bepaling eintlik moes gesê het, is dat administratiewe optrede binne die perke van die verleende bevoegdheid uitgeoefen moet word. Dit sou geldigheidsvereistes ten opsigte van die outeur van die handeling (delegasie ingesluit), die spesifieke doel van die handeling en sekere vormvereistes behels.

Hoewel die uitoefening van administratiewe bevoegdhede in die oorgrote meerderheid gevalle die bestaan van 'n magtigende wet behels wat die bevoegdhede van die gemagtigde orgaan afbaken en omskryf, was daar voorheen ook enkele gemeenregtelike prerogatiewe bevoegdhede (soos dié om 'n paspoort uit te reik) wat nie 'n statutêre basis gehad het nie. Dit is nog onseker of hierdie bevoegdhede nou verdwyn het en of hulle voortbestaan vir sover hulle met die Grondwet versoenbaar is. Logies is die bevredigendste oplossing miskien dat die prerogatiewe bly bestaan, maar dat die tradisionele verskil tussen hulle en statutêre bevoegdhede eens en vir altyd verdwyn, soos lank al bepleit word. Dit wil egter wel voorkom of die moontlikheid om 'n prerogatief wat nooit voorheen uitgeoefen is nie, soos in *Dilokong* gedoen is, gaan wegval – al is die bevoegdheid wat uitgeoefen word van 'n begunstigende en nie 'n verswarende aard nie (kyk Carpenter "Kan 'n nuwe prerogatief steeds 'ontdek' word?" 1993 *SA Publiekreg* 159; Wiechers "The public/private divide: administrative law and the benefactor state" in *Administrative law reform* (1993) 248).

Die formulering van subartikel (b) herinner baie sterk aan Baxter se terminologie: waar Wiechers in hierdie verband na die nakoming van die reëls van natuurlike geregtigheid verwys (235 ev), behandel Baxter die reëls onder die opskrif van "Proceeding unfairly" (535 ev). Hy poog ook om die probleme ten opsigte van die toepassing van die reëls van natuurlike geregtigheid deur ons howe aan te spreek deur die aanwending van 'n algemene "duty to act fairly". Soos hy self opmerk (595): "The duty to act fairly is nothing other than the duty to observe the principles of natural justice expressed in more fundamental terms." (Sien ook Baxter "Fairness and natural justice in English and South African administrative law" 1979 *SALJ* 607.)

Volgens Wiechers behels die reëls van natuurlike geregtigheid dat die geaffekteerde party die reg het om sy of haar saak *behoorlik* te stel (die beginsel *audi et alteram partem*); om ingelig te wees oor moontlik benadelende feite en oorwegings; om van redes vir 'n administratiewe besluit voorsien te word; en op 'n besluit op 'n onpartydige wyse. Die vereiste dat die administratiewe orgaan vry van vooroordeel moet wees (*nemo iudex in sua causa*) kan, soos Wiechers (241) aantoon, ewegoed as 'n vereiste *ratione personae* getipeer word, maar dit word tradisioneel as een van die reëls van natuurlike geregtigheid behandel. Die reël dat redes vir administratiewe optrede verstrek moet word, het in die verlede dikwels nie in die praktyk toepassing gevind nie – hieroor meer in verband met subartikel (c).

Baxter se uiteensetting van die reëls is min of meer gelykluidend met dié van Wiechers: hy wys daarop dat hoewel die reëls in twee beginsels uitgekristalliseer het, hulle inderdaad maar net toepassings van die breër begrip van natuurlike geregtigheid of prosessuele billikheid is (541). Hy wys daarop dat 'n billike verhoor of behoorlike aanhoring nie noodwendig beteken dat al die formaliteite van 'n hofgeding aanwesig moet wees nie. Dit is wel noodsaaklik dat die betrokke party kennis ontvang dat optrede beoog word en dat 'n behoorlike geleentheid

om aangehoor te word, verleen word. Laasgenoemde veronderstel bekendmaking van die inligting waarop die besluit gebaseer sal word – in sommige gevalle formele blootlegging van die teengetuienis – 'n redelike tyd om voor te berei, die geleentheid om persoonlik of deur middel van skriftelike voorleggings 'n saak te stel, die reg om teengetuienis te betwis, aanhoring in die openbaar, en soms ook die reg op kruisondervraging en regsverteenwoordiging. Baxter se tweede reël is vervat in die stelreël *nemo iudex in sua (propria) causa*. Ook hy betreur die howe se traagheid om op die verskaffing van redes aan te dring.

Op die oog af wil dit voorkom of die "prosedurele billikheid" wat in subartikel (b) vermeld word, niks voeg by dit wat voor die inwerkingtreding van die Grondwet gegeld het nie. Artikel 24 moet darem ook met van die ander bepalings van die Grondwet saamgelees word: byvoorbeeld artikel 22 wat die reg waarborg om 'n beregbare geskil deur 'n geregshof of *'n ander onafhanklike en onpartydige forum* te laat besleg; ook artikel 23 wat die reg op inligting wat in die staat se besit en noodsaaklik vir die afdwinging van 'n reg is, erken. Voorts kan ook geargumenteer word dat die erkenning van 'n algemene vereiste dat administratiewe prosedure billik moet wees, implisiet erkenning verleen aan al die billikheidsvereistes wat Baxter stel, en wat in die verlede nie altyd in die howe tot hul reg gekom het nie.

Wat die frase "regmatige verwagtings" betref, is die regsposisie dieselfde as voorheen. Die leerstuk van geregverdigde verwagting as grondslag vir die reg om aangehoor te word, is deur die appèlhof goedgekeur in *Administrator Transvaal v Traub* 1989 4 SA 731 (A). Die omvang van die leerstuk en die presiese omskrywing van 'n geregverdigde verwagting is egter nóg in *Traub* nóg in enige daaropvolgende saak uitgeklaar.

Soos voorheen vermeld is, was sowel Wiechers as Baxter baie ongelukkig oor die onwilligheid van die howe om aan te dring op die verskaffing van redes vir administratiewe besluite. Dit was net in enkele gevalle dat die standpunt ingeneem is dat 'n weiering om redes voorsien, op *mala fides* of dan minstens die afwesigheid van grondige redes dui (kyk Wiechers 240 – 241; Baxter 568 – 569 746 – 748; Viljoen "Reasons of necessity or the necessity for reasons" 1988 *SA Publiekreg* 277). Die uitdruklike erkenning van die reg om van redes voorsien te word, is dus te verwelkom, en strook ook met die uitgesproke verbondenheid tot oop en toeganklike regering (in sowel a 23 as grondwetlike beginsels VI en IX in bylae 4 van die Grondwet).

Subartikel (d) bevat 'n begrip wat vir die Suid-Afrikaanse administratiefreg geheel en al nuut is, naamlik "regverdigbaarheid". Presies wat is administratiewe optrede wat "regverdigbaar is met betrekking tot die redes wat daarvoor gegee is"? Een van die bekende reëls van ons administratiefreg is dat die administratiewe orgaan wat 'n besluit neem, al die jurisdiksionele feite in ag moet neem; met ander woorde, hy moet vasstel dat die feite op grond waarvan hy bevoeg is om te handel, inderdaad bestaan; hy moet alle relevante oorwegings in ag neem en alle irrelevante oorwegings buite rekening laat. Dit word soms uitgedruk as die verpligting om behoorlik aan die saak aandag te bestee. 'n Voorbeeld van 'n saak waarin subartikel (d) se vereiste nagekom is, is *Hurley v Minister of Law and Order* 1985 4 SA 709 (D), waar die hof beslis het dat "having reason to believe" (die maatstaf wat in die betrokke wetgewende maatreël gestel is) nie dieselfde is as "thinks he has reason to believe" nie. In hierdie sin sou administratiewe optrede regverdigbaar wees indien hierdie aandagbesteding behoorlik plaasgevind het.

Maar "regverdigbaar" kan ook wyer opgeneem word: dit beteken duidelik meer as net "verdedigbaar op rasionele gronde"; laasgenoemde sou 'n mens terugneem na die ou maatstaf van redelike administratiewe optrede, wat ingehou het dat 'n administratiewe handeling net noodlottig onredelik is indien die onredelikheid so grof was dat geen redelike persoon of liggaam so sou opgetree het nie – 'n uiters subjektiewe siening wat herhaaldelik deur skrywers fel gekritiseer is. Semanties gesproke, veronderstel regverdigbare optrede 'n objektief meetbare standaard, maar of ons howe so ver sal gaan as om Wiechers se vereiste van objektiewe redelikheid (kyk *Administratiefreg* 275 ev) te aanvaar, is 'n ander vraag; dit kan kennelik moeilik wees om te onderskei tussen 'n objektief (en materieel) redelike besluit en die "regte" besluit. Laasgenoemde kom naby die verbode gebied van die meriete, wat nie binne die omvang van die howe se hersieningsbevoegdheid val nie.

Aangesien die terminologie wat Baxter gebruik so sterk in hierdie bepaling figureer, is dit waarskynlik dat Baxter se idees eerder die deurslag sal gee. Eerstens kategoriseer hy besluite wat ongegrond is ("insupportable decisions" (497 ev)) as onredelik. Dit ly geen twyfel dat 'n administratiewe handeling wat op die beskikbare getuienis "insupportable" is, nie regverdigbaar (en beslis ook nie redelik) is nie. Hy gaan egter verder en onderskei tussen substantiewe en dialektiese redelikheid. Laasgenoemde word soos volg verduidelik (485 486)

> "A proposition may be regarded as 'reasonable' in the dialectical sense if, in support of it, an appeal was made to factors, values and standards which the other party would recognize as legitimate given the context of the argument . . . As far as the procedural or *dialectical* fact of decision-making is concerned, it is possible to adjudge someone to be reasonable or unreasonable without necessarily identifying or disagreeing with their views."

Die probleem met dialektiese redelikheid is dat dit, naas die redelikheid van die besluitnemingsproses, steeds op die redelikheid van die *orgaan* konsentreer en nie op die redelikheid (uiteindelik regverdigbaarheid?) van die *handeling* nie.

Aan die ander kant is die gebruik van die regverdigbaarheid-kriterium moontlik te regverdig omdat dit in verskeie verbande in die Grondwet gebruik word. Die howe sal dus vroeër of later moet besluit wat dié term in grondwetlike verband beteken. Op die oomblik is daar egter nog geen sekerheid nie. (Hierby sal teruggekom word by die bespreking van die beperkingsbepaling in a 33.)

'n Verdere probleem wat hier kan ontstaan, is dat 'n party wie se regte óf belange geraak word, geregtig is op skriftelike redes vir die optrede – indien die regte egter net bedreig word, kan nie op redes aangedring word nie (subart (c)); nadat sodanige redes verstrek is, kan slegs 'n party wie se *regte* ter sprake kom, eis dat die optrede regverdigbaar moet wees (subart (d)). Sodra dit vasstaan dat 'n reg ter sprake is, tree die regverdigbaarheidsvereiste in werking selfs al word die betrokke reg net bedreig. Met ander woorde, dit kan gebeur dat iemand op redes vir 'n besluit kan aandring, maar die optrede waarvoor die redes verskaf is nie kan aanveg op grond daarvan dat die gegewe redes nie 'n regverdigbare (rasionele? redelike? "supportable?") grondslag vir die besluit uitmaak nie.

Een van die groot probleme met die "ou" Suid-Afrikaanse administratiefreg was die wyse waarop die parlement die hersieningsbevoegdheid van die howe (en ook die toepaslikheid van die reëls van natuurlike geregtigheid) kon uitsluit. Die vraag is of dit steeds moontlik is. Seer sekerlik kan dit nie met dieselfde gemak gedoen word nie; daar moet minstens aan die vereistes van artikels 33 en 34 voldoen word.

Kragtens artikel 33(1) kan enige van die regte wat in die akte van menseregte (hoofstuk 3 van die Grondwet) verskans word, beperk word. Die beperking moet egter deur *algemeen geldende reg* (dit sluit dus sowel gemenereg as wetgewing in) geskied; dit moet verder redelik wees, regverdigbaar (al weer) wees in 'n oop en demokratiese samelewing gebaseer op vryheid en gelykheid; en mag nie die wesenlike inhoud van die betrokke reg ontken nie. Waar dit in verband met vrye en regverdige politieke aktiwiteit staan, kan onder meer die reg op inligting (a 23) en administratiewe geregtigheid (a 24) verder slegs beperk word indien die beperking inderdaad noodsaaklik is.

Die feit dat redelikheid en regverdigbaarheid naas mekaar genoem word, dui daarop dat hulle nie as sinoniem beskou moet word nie. Ek wil ook betoog dat dit bitter swaar sal gaan om 'n beperking te regverdig van die reg om 'n administratiewe handeling in die hof te laat bereg tensy die beperking van 'n redelik formele aard is (soos 'n tydsbeperking). Anders sal die wesenlike inhoud van daardie reg tog onvermydelik aangetas word. Dit hou ook verband met die moontlike uitleg van die woord "beregbaar" in artikel 22: indien beregbaarheid deur 'n uitsluitingsbepaling geraak sou kon word, sou dit beteken dat die ou-styl "ouster clauses" hierdeur by die agterdeur sou kon insluip – iets wat klaarblyklik belaglik is. "Beregbaar" moet redelik voor die hand liggend uitgelê word: as 'n skuld nog nie opeisbaar is nie, of as 'n eis verjaar het, ensovoorts, kan daar nie hof toe gegaan word nie.

Daar kom in verband met artikel 33 nog 'n vraag na vore: in watter mate sal die oorgrote meerderheid administratiewe handelinge nie uit die staanspoor met hierdie bepaling te doen hê nie? In die lig van die feit dat alles wat nie verbied word nie nou toegelaat word (eerder as andersom), sal administratiewe optrede meer opsigtelik bestaan uit beperkings op fundamentele regte en vryhede. Neem 'n mens artikel 26, wat die reg op ekonomiese aktiwiteit erken as voorbeeld, dan blyk dit dat enige regsreël wat byvoorbeeld 'n handelslisensie vereis, 'n beperking op die reg om vrylik aan die ekonomiese verkeer deel te neem, daarstel. Dit doen nie afbreuk aan die feit dat daar steeds baie begunstigende en statusverlenende administratiewe handelinge verrig sal word nie; maar 'n handeling wat een party begunstig, kan heel moontlik die regte van 'n ander raak of bedreig. Dit was nog altyd so – maar nou gaan almal soveel meer bewus wees van potensiële inbreukmaking op hul regte. En administratiewe optrede kan al die regte raak wat in hoofstuk 3 figureer: van ons belangrikste administratiewe regspraak gaan oor diskriminasie, persoonlike vryheid, die reg om te vergader, bewegingsvryheid, burgerskap, die regte van aangehoudenes, arbeidsverhoudinge, eiendomsake, gewetensbesware teen militêre diens, omgewingsaangeleenthede, onderwys en so meer. Die punt wat ek eintlik wil maak, is dat die debat oor redelikheid miskien tog (onwetend?) deur die grondwetskrywers ondervang is. 'n Mens kan selfs bepaal of dit wetend of onwetend was aangesien daar nou na die geskiedenis van wetgewing gekyk kan word by die uitleg van die Grondwet.

Artikel 34 maak voorsiening vir die tydelike opskorting van fundamentele regte ingevolge die uitroep van 'n noodtoestand. (Vir 'n bespreking van die verskillende wyses waarop fundamentele regte ingevolge die uitroep van 'n noodtoestand omskryf, beperk of opgeskort kan word, kyk Van der Vyver "Limitation provisions of the Bophuthatswanan Bill of Rights" 1994 *THRHR* 58 – 65.) Die bevoegdheid om 'n noodtoestand af te kondig en die omvang van die inperking van fundamentele regte wat ingevolge die noodtoestand gemagtig

word, word baie noukeuriger omskryf as ingevolge die Wet op Openbare Veiligheid 3 van 1953, wat aan die destydse staatspresident feitlik *carte blanche* verleen het om 'n noodtoestand uit te roep en noodregulasies uit te vaardig. Onder andere is die geldigheid (en, so kan geargumenteer word, ook die objektiewe noodsaaklikheid) van die afkondiging, enige verlenging daarvan en enige stappe wat kragtens die noodtoestand gedoen word, aan judisiële kontrole onderworpe; mag die staat of persone wat op die gesag van die staat handel nie gevrywaar word van aanspreeklikheid vir wederregtelike handelinge wat tydens die noodtoestand verrig word nie; en mag sekere bepalings van die akte van menseregte glad nie opgeskort word nie. Artikels 22, 23 en 24 word nie spesifiek hier genoem nie en kan dus in beginsel deur 'n noodtoestand geraak word.

Die kwessie van watter howe in watter sake jurisdiksie gaan hê, is ook nog lank nie uitgeklaar nie. Dit verg egter 'n bespreking van sy eie en word nie hier aangeraak nie.

Die toekoms van die Suid-Afrikaanse administratiefreg blyk nie heeltemal duidelik uit die grondwetlike bepaling nie. Daar is egter verblydende tekens dat sommige van die knelpunte aangespreek sal word. 'n Mens kan maar net die hoop uitspreek dat die "slegte" invloed van sommige van ons "ou" administratiefreg nie weer gaan terugsypel nie. 'n Bepaling soos dié in die Namibiese Grondwet lyk op die oog af na 'n beter opsie as die Suid-Afrikaanse model omdat dit eenvoudiger gestel is en nie die voor-die-hand-liggende probleme manifesteer wat hierbo uitgewys is nie. Aan die ander kant is dit wel moontlik dat so 'n bepaling inderdaad as 'n bevestiging van die bestaande vertolking van die beginsels van ons administratiefreg beskou sou kon word, wat die saak vir die hervorming van die administratiefreg nie juis sou bevorder nie.

GRETCHEN CARPENTER
Universiteit van Suid-Afrika

OBSERVATIONS ON AMNESTY OR INDEMNITY FOR ACTS ASSOCIATED WITH POLITICAL OBJECTIVES IN THE LIGHT OF SOUTH AFRICA'S TRANSITIONAL CONSTITUTION*

Introductory observations

South Africa's transitional Constitution (Republic of South Africa Constitution Act 200 of 1993) impacts on amnesty or indemnity for acts associated with political objectives in two ways:

- First, by referring to it in explicit terms (and with legal authority) in a rather extraordinary postscript.

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* An adapted version of a paper entitled *Amnesty and transition in South Africa* read at an IDASA conference on *Justice in transition: Dealing with the past* held at Somerset West on 1994-02-25 to 27.

● Secondly, through chapter 3, the Chapter on Fundamental Rights, which fixes standards for the review of both existing and future legislation on the issue. The existing legislation is the Indemnity Act 35 of 1990 and the Further Indemnity Act 151 of 1992.

The explicit reference

The transitional Constitution is innovative in a number of ways. Section 4(1), for instance, proclaims its supremacy and provides for the invalidity of any law or act inconsistent with it. This denotes a clear break with the past: a dispensation of constitutional supremacy is substituted for eighty three years of parliamentary sovereignty.

But the transitional Constitution itself also illustrates that (and why) the Multi-Party Negotiating Process in Kempton Park was not the appropriate forum to produce a final constitution. A negotiated transition requires substantial compromise and can hardly be a "clean break" with the past. This is clearly evidenced by the non-conclusive way in which the issue of amnesty/indemnity for acts associated with political objectives is dealt with.

The negotiating parties were engaged constructively in this crucial controversy only during the final stages of the negotiating process. It came up as an issue in bilateral talks between the SA Government/NP and the ANC alliance. All the parties were *ad idem* (albeit for different reasons) that the issue had to be addressed in the Constitution, but could initially not agree on the nature, content and status of possible provisions to this effect. When they eventually agreed on what had to be written into the Constitution, they were compelled by time constraints to bypass the technical committee responsible for drafting the text of the Constitution, and to include the formula they had agreed on as a postscript without couching it in technical language. The central theme of the postscript appears to be this: *For the sake of reconciliation there must be forgiveness, but for the sake of reconstruction forgetfulness must be avoided at all costs.* The full text reads as follows:

> "*National Unity and Reconciliation*
>
> This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.
>
> The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.
>
> The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.
>
> These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.
>
> In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms,

criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.

With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country.

Nkosi sikelel'iAfrika. God seën Suid-Afrika

Morena boloka sechaba sa heso. May God bless our country

Mudzimu fhatutshedza Afrika. Hosi katekisa Afrika."

The postscript, framed as a declaration of intent reminiscent of preambulatory statements, is equal in status to other provisions of the Constitution and "shall for all purposes be deemed to form part of the substance of this Constitution" (s 232(4)). It is therefore also supreme law (s 4(1)). But can it be invoked as a standard of review to test existing indemnity legislation (namely the Indemnity and the Further Indemnity Act – see *supra*) or does it solely fix standards for the future? In not dealing with the issue of amnesty in a comprehensive and conclusive way, the multi-party negotiators expressed in the postscript their intention to do so, by way of legislation after 27 April 1994. From this perspective the postscript was not intended as a standard for testing existing legislation. On the other hand, should a future legislature's inaction delay the enactment of the ("new") law envisaged in the postscript, it is hardly conceivable that the negotiators responsible for drafting the postscript contemplated the continuation of laws contradicting its very aims and objectives. Thus understood, the postscript, backed by section 4(1) of the Constitution, is an appropriate and purposeful standard against which existing legislation on indemnity can be tested.

The existing legislation in a nutshell

Section 2(1) of the Indemnity Act of 1990 vests the State President with apparently unrestricted powers to grant "indemnity to any person or category of persons . . . in respect of any event or category of events . . ." Section 2(2) precludes the institution of both criminal and civil proceedings against any person to whom indemnity has thus been granted. Section 1 provides for the granting of temporary immunity.

This act, promulgated in the wake of the Groote Schuur Minute, envisages (without explicitly saying so) indemnity or immunity mainly for "liberators" who committed offences in the course of the struggle against apartheid. Its extensive wording, however, makes it applicable to the indemnification of state officials as well. The South African Government and the ANC reached agreement on a broad definition of "political offences", and guidelines substantially similar to those formulated for Namibia by Professor Norgaard, President of the European Commission on Human Rights, were published (by GN R2625) in *Government Gazette* 12834 of 7 November 1990. The guidelines, which do not have the force of law (*Rapholo v State President* 1993 1 SA 680 (T) 693), take into account the intention and objectives of the perpetrator as well as the circumstances, nature and effects of the offence in determining whether an act constitutes a political offence. In other words, both *subjective* and *objective* factors are examined (see for a discussion of the difficulties involved in defining a "political offence", Keightley "Political offences and indemnity in South Africa" 1993 *SAJHR* 339 – 347). The procedures established under the Indemnity Act have worked reasonably well, but difficulties and differences of opinion between the main role players have also occurred from time to time.

Late in 1992 the government, expressing the view that the Indemnity Act does not make sufficient provision for the indemnification of all those who "advised, directed, commanded, ordered or performed acts with a political object which resulted in criminal charges" (see the *Memorandum on the objects of the Further Indemnity Bill, 1992* par 3), enacted the Further Indemnity Act. The contents of this act, as well as the manner and circumstances in which it was passed, demonstrate the government's keenness, at the time, to indemnify state officials who had perpetrated atrocities against adversaries of apartheid. The government acted unilaterally and did not consult any of its major negotiating partners. This was in marked contrast to the culture of negotiation and consultation which characterised the adoption and implementation of the 1990 Indemnity Act. When one of the houses of the tricameral Parliament refused to assent to the Further Indemnity Bill, Mr FW de Klerk, for the first and only time during his term of office as State President, used the powers conferred on him by section 32 of the Republic of South Africa Constitution Act 110 of 1983, to refer the bill to the President's Council in order to secure its adoption.

In terms of the Further Indemnity Act, the State President remained the one who could finally decide on indemnity for the perpetrators of acts "with a political object advised, directed, commanded, ordered or performed . . . before 12:00 on 8 October 1990" (s 3(1)). Indemnity has the effect of preventing or suspending both civil and criminal proceedings (s 3(2)). The State President could also release prisoners convicted of and sentenced for committing offences with a political object if he was of the opinion that "such release may promote reconciliation and peaceful solutions" (s 2(1)). The offence in question had to be committed before 8 October 1990.

Note that political motivation is the sole criterion for establishing someone's entitlement to indemnity or release. This purely subjective approach represents a break not only with the guidelines laid down to implement the 1990 Indemnity Act, but with the trend in other jurisdictions as well (see in this regard Keightley 1993 *SAJHR* 339–347 355). The promulgation of the 1992 act, for instance, resulted in the release of the ANC member, Robert McBride, and the "Wit Wolf", Barend Strydom, both of whom did not qualify for indemnity in terms of the 1990 guidelines.

The State President exercised most of his key functions provided for in the Further Indemnity Act *after consultation* with a National Council on Indemnity (established in terms of s 5), the composition of which was entirely at his discretion (s 6). The State President was, in other words, under no obligation to follow the advice of the council. The council heard and considered applications for indemnity and release and then advised the State President (s 7). Applications were heard in camera and those involved in the proceedings were sworn to secrecy (s 10) in order "to encourage prospective applicants to submit their applications with confidence" (see the *Memorandum on the objects of the Further Indemnity Bill, 1992* par 5.2). A court of law could also refer any criminal or civil case to the council for its consideration and finding (s 11(1)).

The Further Indemnity Act clearly facilitated self-amnesty. One of its side-effects has also been to benefit offenders who did not qualify for indemnity or release in terms of the 1990 guidelines.

Existing legislation, the chapter on fundamental rights and the postscript to the Constitution

With the commencement of South Africa's transitional Constitution on 27 April 1994, both the Indemnity Act and the Further Indemnity Act became susceptible to constitutional review and, in particular, to scrutiny in terms of the chapter on fundamental rights (chapter 3). The recent and as yet unreported judgment of the Supreme Court of Ciskei in *Buzelwa Eunice Matinkinca and Petrus Vantyu v The Council of State of the Government of the Republic of Ciskei and The Chairman of the Council of State* (case no 442/93) provides a good example of how sweeping indemnity provisions can be tested against standards laid down in a bill of rights. In this case the court had to consider the constitutionality of Ciskei's Special Indemnity Decree 7 of 1993 which granted "unconditional indemnity to all persons from criminal prosecution in respect of any offence committed or alleged to have been committed by any of them at or near Bisho on the 7th September 1992" (see the long title of the decree). The court's main findings on whether indemnity of this nature impinges on fundamental rights, were the following:

(a) Blanket indemnity violates the majority of citizens' right to equality before and equal protection of the law in that certain citizens are not called to account for criminal misdemeanour (see also s 8(1) of the current South African Constitution). Heath J suggested (39 – 43) that this is the case even if equality is understood not merely as equilibrium in a *formal* sense but also as *substantive* equality accounting for differences among people and the dissimilarity of their situations and circumstances. The judge also hinted at the possibility that blanket indemnity could infringe the victims' right to human dignity. It must, however, be borne in mind that the Ciskei bill of rights (unlike its South African counterpart) connect dignity and equality by stating that all human beings are born free and equal in dignity and rights (Ciskei Constitution Decree 45 of 1990 sch 6 s 1(1)).

(b) It was further held that unqualified indemnity interferes with the citizens' rights to life and to freedom and security of the person, including the right to be free from torture or cruel, inhuman or degrading treatment or punishment (45; see also s 9 and 11 of the South African Constitution). The rights themselves are violated, so the court argued, when a state indiscriminately exculpates the perpetrators of their violation.

(c) Indiscriminate indemnity invades victims' right to have their justiciable disputes settled by a court of law (44 – 46; see also s 22 of the South African Constitution). This is the case even if indemnity does not preclude victims' recourse to civil remedies: an aggrieved citizen can *as of right* insist that, where applicable, criminal proceedings be instituted against those who have wronged him or her. The Ciskei Special Indemnity Decree, unlike South Africa's indemnity legislation, did not preclude recourse to civil remedies.

The court pointed out that criminal prosecutions have real and potential practical advantages for aggrieved citizens (44 – 46). To engage the state apparatus in proceedings of an investigative nature, is to enhance the possibility of "discovering the truth" which, in turn, adds to the victim's prospects of success in subsequent civil proceedings. Criminal proceedings furthermore signal to both aggrieved persons and other citizens the state's determination to safeguard their rights and freedoms in an even-handed way.

Chapter 3 of the South African Constitution contains two provisions designed to help ensure transparent and accountable administration, namely section 23, which entrenches a right to access to information held by the state and section 24, which entrenches the citizen's right to administrative justice. Indemnity proceedings under the Further Indemnity Act are (as was pointed out) veiled in secrecy. This in itself constitutes an encroachment on the right to access to information of those who need such information in order to exercise or protect their rights (see the wording of s 23) and it is furthermore inconsistent with the right to written reasons for administrative action (entrenched in s 24(c)).

It has also been held by the Transvaal Provincial Division of the Supreme Court (*Rapholo v State President supra* 688 – 690) that someone whose application for indemnity is being considered in terms of the 1990 Indemnity Act, is not entitled to the advantages of *audi et alteram partem*. If this is so, then the act clearly interferes with the citizen's right to procedurally fair administrative action (entrenched in s 24(b)).

A finding that indemnity legislation *prima facie* infringes fundamental rights entrenched in the Constitution, does not conclude the process of constitutional review. A court is also called upon to consider whether the said infringements do not constitute permissible limitations to the rights in question. In the *Matinkinca* case *supra* Heath J concluded that the infringements resulting from Ciskei's Special Indemnity Decree are not permissible limitations: the bill of rights permits limitations *by a decree with general application* only (sch 6 s 22(5)), while the Indemnity Decree was promulgated to cater for but one particular event (50 – 53). The South African Constitution also provides for the limitation of rights "by law of general application" (s 33(1)) but both indemnity acts *prima facie* pass this test: they cater for a certain class of events with sufficient generality. However, both of them also vested the State President with such an unfettered discretion to grant indemnity, that if the exercise of this discretion had the effect of limiting entrenched rights, it could persuasively be argued that the limitation was actually effected not by law of general application but by the discretion of the State President, and that it is therefore not permissible.

Permissible limitations of the rights entrenched in chapter 3 are also required to be reasonable, "justifiable in an open and democratic society based on freedom and equality", and may not negate the essential content of the right in question. Should a court thus find that existing indemnity legislation constitutes law of sufficiently general application for the purpose of limiting rights, the limitation they effect will still have to pass these latter tests.

I previously expressed the view that the postscript to the Constitution is an appropriate and purposeful standard against which existing legislation on indemnity can be tested. A court could, for instance, have recourse to it in order to determine which values prevail in respect of indemnity for acts associated with political objectives, in an open and democratic, reconciled and reconstructed "new" South Africa based on the principles of freedom and equality. Should the postscript be allowed thus to permeate the values enshrined in section 33(1), the limitations effected by the existing indemnity acts will in all probability fail the permissibility test.

In sum then, it is highly unlikely that the existing indemnity acts will survive constitutional review.

Strategic considerations

If the constitutional court is going to strike down the existing indemnity acts, statutory provision for amnesty or indemnity will fall away. The order of the constitutional court will, as a rule, have effect only from the moment when it is made (s 98(6)(a)) and will therefore not undo indemnity already granted under the discredited legislation. The court, however, has a discretion to order otherwise should "the interests of justice and good government so require" (s 98(6)). The court could therefore conclude that, given the proven disadvantages of self-amnesty, the interests of justice and good government require it to undo indemnity granted under especially the 1992 act. To uphold the self-amnesty of an illegitimate regime, so it can be argued, will in any event undermine citizens' respect for the law and could perpetuate a culture of abuse and intolerance (see "No to general amnesty" 1993(2) *LHR Rights* 18), both of which are not conducive to justice and good government. It is, however, unlikely that the constitutional court will use its discretion under section 98(6) to undo indemnity already granted.

It would nevertheless be wiser for the government of national unity, and especially the legislature, to deal with the issue of amnesty or indemnity before the matter is taken to court and to do so in the spirit of the broadly phrased value statements embodied in the postscript to the Constitution. The objectives thus spelt out allow for legislation calling into existence a "commission of truth and reconciliation", like the one that was established in Chile. The commission will have to be placed in a position where it can facilitate striking a balance between, on the one hand, the revelation of the truth and, on the other, the shielding of the perpetrators of abuse from the uncontrolled vengeance of a society which, in a moral sense, rightly takes umbrage at their misdemeanours. The authority and terms of reference of such a commission will have to be defined with the following in mind (see also 1993(2) *LHR Rights* 18 – 19):

(a) The commission will have to be established, as a matter of urgency, by an act of the legislature elected on 27 April 1994. The commission will also have to have sufficient resources at its disposal and particularly an effective investigative arm.

(b) The commission will have to be seen as acting independently from the structures of authority in the state. A number of its key members will have to be people "from outside" and it should preferably be headed by someone who has not had a high profile in South African politics.

(c) The commission will have to have authority to investigate violations of human rights, primarily by the state and its agents, but also by liberation movements, especially with a view to identifying (and accounting for the whereabouts of) victims. The commission's authority will have to include dealing with matters which have previously been disposed of by way of court proceedings.

(d) The commission will have to have access to all applicable records as well as the authority to subpoena *any witness* (including the head of state, if necessary).

(e) The commission will, as a general rule, have to conduct its investigations in public, and proceedings *in camera* should be tolerated only as narrowly circumscribed exceptions to the general rule.

(f) The commission will have to submit to government a report which will eventually have to be made public. The report should, among other things, recommend steps to prevent possible future transgressions.

(g) The first aim of the commission should not be to prosecute and punish the perpetrators of abuse, but to make "the facts" known. Persons implicated by the findings of the commission will have to have the right to apply to a specialised tribunal for indemnity. Both the applicants and the victims (or their families) will have to be allowed to make submissions (also in the form of evidence) to the tribunal. In arriving at its decisions the tribunal will have to bear the following in mind:

(i) the nature, circumstances and seriousness of the transgression;

(ii) the interests of the victim and/or his or her next-of-kin;

(iii) the interests of reconciliation and reconstruction nationwide; and

(iv) the promotion of a culture of human rights in society.

Political offences will have to be defined and the definition will have to take into consideration subjective *as well as* objective factors. Indemnity should, as a rule, be granted for political offences. On the other hand, offences committed for personal gain or with any other "non-political" objective – albeit with reference to a political cause – should not so readily qualify for indemnity.

The tribunal envisaged above should have authority to make any of the following orders:

(i) that unconditional indemnity be granted;

(ii) that an application be refused and the matter be referred to an appropriate prosecuting authority;

(iii) that indemnity be granted but that the applicant be disqualified to hold any public position; and

(iv) that indemnity be granted and sustained on the condition that the applicant refrains from perpetrating further abuses of others' rights.

The state or any other organisation which ordered or planned acts in violation of the basic rights of citizens should, in principle at least, *not be absolved from civil liability* in order to ensure reparation for aggrieved persons. The prescription period of three years currently applicable to civil actions in South African law should also, in cases of this nature, start running from the date of *disclosure* of the act in question and *not* from the date on which it was *committed*.

It can be argued that it would be unfair to burden a succeeding government with the responsibility of repairing damage done by its predecessor. However, a substantially similar principle has – for convincing reasons – been subscribed to in respect of the restoration of land rights (in s 121 – 123 of the South African Constitution). An act of Parliament providing for and appropriately circumscribing the right to compensation of victims of the attrocities of a preceding regime, could therefore be a comparatively inexpensive way of dealing with a controversy which, if allowed to be swept under the carpet of history, will continue to plague this country at considerable material cost.

Perpetrators of atrocities on "both sides" will in spite of (*or even precisely as a result of*) the procedures suggested above, go unpunished. This could be seen as the outcome of the logic of history, on which Horkheimer (see Arato

and Gebhardt (eds) *The essential Frankfurt school reader* (1978) 117) once remarked as follows: "As long as world history follows its logical course, it fails to fulfil its human destiny."

But there is a less cynical way of looking at the matter. Both the experiences of confessing guilt and of forgiving those responsible for untold suffering, are liberating precisely because they are eminently humane. Lawyers therefore have to acknowledge that, whatever they can offer in terms of dealing with the past, will at best facilitate to but a modest extent the vital interaction between confession and forgiveness – an essentially inscrutable process which ultimately escapes explanation and regulation by way of legal formulas. Appropriate legislation can nevertheless still help prevent legalised amnesty from becoming institutionalised amnesia.

LOURENS M DU PLESSIS
University of Stellenbosch

THE LIBERATION OF *LOCUS STANDI* IN THE INTERIM CONSTITUTION: AN ENVIRONMENTAL ANGLE

Introduction

For many years the exact content of the *locus standi* phenomenon has been baffling academics and judges. As a result, many good cases have failed because the party approaching the court could not prove that he or she had a "legally enforceable right" or a so-called "sufficient interest" in the case. To complicate matters, the interest of the plaintiff or applicant had to be direct and personal, although it did not need to be a special interest, but rather a recognised personal interest even if it was not shared by members of the public (see eg Eckard *Die locus standi van aansoekers by die geregtelike hersiening van administratiewe handelinge* (LLD thesis Unisa 1975) 17 – 18; Baxter *Administrative law* (1984) 650 ff; Loots "*Locus standi* to claim relief in the public interest in matters involving the enforcement of legislation" 1989 *SALJ* 131 – 132; Bray "*Locus standi* in environmental law" 1989 *CILSA* 33 – 38).

In the public-law sphere an individual or group occupying a subservient position could not champion the "public interest" in a dispute against the state administration (or any other organisation) but had to prove a direct or personal (private-law) interest in the case. Since environmental law has developed a unique public-law character, governmental control of the environment has increased, leaving the individual in a much weaker position to vindicate the public (environmental) interest. This has led amongst other things to the denial of the individual's and group's interests in the broader general interest in which they shared (ie an interest in a healthy environment and the duty to prevent air or water pollution). As a result of this development, many "faceless" offenders were never brought to book (see Baxter 658 ff; Loots 1989 *SALJ* 132 ff 141 ff; Bray 1989 *CILSA* 34 ff).

The interim Constitution: the Constitution of the Republic of South Africa Act 200 of 1993

As was expected, the calls for the liberalisation of *locus standi* to promote the public interest (especially in environmental matters) intensified. Locally, the adoption of the Constitution of the Republic of South Africa Act 200 of 1993 (hereafter Constitution) – which incorporates a justiciable bill of rights – has opened many avenues for the widening of the *locus standi* requirement. Furthermore, the inclusion of a type of *actio popularis* means that the individual or group can now vindicate the public interest for the first time.

The broadening of the *locus standi* requirement promises interesting changes in the sphere of environmental law, since an individual or group can now act on behalf of the community or the general public to combat air or water pollution without having to prove personal damage. Nevertheless, the question is how this broadened concept of *locus standi* and the *actio popularis* will be interpreted and implemented in the light of section 29 of the Constitution.

An environmental right

Section 29 of chapter 3 (the bill of rights) reads:

> "Every person shall have the right to an environment that is not detrimental to his or her health or well-being."

One may argue that the incorporation of an environmental right in the bill of rights represents a milestone in creating an awareness of and a sensitivity towards the environment. However, upon closer scrutiny the following *criticisms* may be levelled at this environmental right:

- It is in actual fact a *people's* or *solidarity* right (a so-called third generation right) dressed up as a political or civil right (a so-called first generation right). As a collective right it can hardly be appropriated to a specific person (eg *his* environment or the *group's* environment) and has therefore quite rightly been labelled a "public-interest" right.

- The *content* of people's rights is of such a nature that they cannot be defined properly and are vague in terminology (eg what is the content of the words "environment", "health" and "well-being"?). Since these rights are vague, they cannot be concretised and the courts will have difficulty in implementing them (eg when is the environment "healthy" or detrimental to your "well-being"? Smoke (-ing) affects your environment, but also impinges on other basic rights such as personal integrity).

- What *legal standards* are being established against which to measure an infringement of the environment? For example, should a "healthy" environment comply with the standards of developing or of developed countries, and what will happen when conflict arises between environmental rights, the rights of private industry or developers? In these cases the court will have to balance these competing rights one against the other before it can give judgment. Naturally, our judges would be more at ease with well-known rights than environmental rights which often contain political elements that are difficult to mould into legal rights (see Burns "Green rights: theory and development" in *South Africa in transition: green rights and an environmental management system* (1993) 8ff; Viljoen "Green rights and the interim constitution" in *South Africa in transition: green rights and an environmental management system* 32 ff).

● The environmental right is phrased as an *anthropocentric* right and forms part of individual human rights in the bill of rights. It therefore centres around the human being (eg concern for his health and well-being) and does not protect the natural environment for its own sake. Such an environmental right does not cultivate an awareness of stewardship for the environment, but still clings to the ethics of utilitarianism.

● The *natural environment* will not receive the protection it merits under the Constitution, and will in any event not receive the same prominence as the entrenched homocentric environmental rights. Since the expanded *locus standi* requirement refers only to basic human rights embodied in chapter 3, not even the *actio popularis* will broaden the scope for the protection of the natural environment for its own sake (see below). Even if environmental legislation (eg the Environment Conservation Act 73 of 1989) provides for the protection of the natural environment as such, the environmental right incorporated in the bill of rights will still take precedence (eg only when degradation of the natural environment also constitutes an environment which is unhealthy and detrimental to the well-being of human beings, will it receive the protection it deserves). In this respect the inclusion of environmental rights as policy directives would have been more effective (eg placing a responsibility on the state to consider the environment in a positive way in policy decisions – see below).

On the other hand, there are certain *advantages* attached to the inclusion of an environmental right in the bill of rights:

● It could play an *educational role* in creating better public awareness of the importance of the environment to society itself.

● It could influence legislation generally and also promote the promulgation of legislation for the protection of the environment (see Sachs *Protecting human rights in a new South Africa* (1990) 144 – 146; Burns (1993) 11 ff; Viljoen (1993) 27 ff; Rabie *Criminal sanctions – environmental sanctions* (1991) 82 – 92).

Limitation of the right

Section 33 of the Constitution deals with the limitation of rights entrenched in chapter 3. Environmental rights are, like other basic rights, not *absolute* rights and may be limited by government institutions upon express authorisation. However, such authorisation is never unlimited. In brief, the environmental right may be limited provided it is reasonable, justifiable in an open and democratic society and does not negate the essential content of the right.

To what extent the government will limit environmental rights for national security purposes, or even for national development, is uncertain. For example, to what extent will mining and industrial activities which are necessary for development but detrimental to the health and well-being of human beings (and the natural environment), be allowed? Much will depend on the government's priorities regarding the protection of the human and natural environment *vis-à-vis* development and also on society's awareness of its role of stewardship towards the environment (see Rautenbach and Malherbe *What does the Constitution say*? (1994) 10 ff; Fuggle and Rabie *Environmental management in South Africa* (1992) 1 ff).

The locus standi *requirement*

A closer look at chapter 3 of the Constitution shows that section 7 confers *locus standi* on a wide spectrum of persons and groups. Generally, section 7 provides

that chapter 3 binds all legislative and executive organs of the state at all levels of government. Furthermore, juristic bodies are also entitled to the rights contained in chapter 3 to the extent that the nature of the rights permits it.

In analysing the first part of section 7, it is clear that –

- the whole of the state administration is subject to and bound by chapter 3. Although some controversy exists, it seems that "organ of state" in this context means bodies that perform state functions;

- juristic persons such as universities, welfare organisations, companies, societies and clubs are also entitled to the rights incorporated in chapter 3. Nevertheless, although these bodies are not bearers of individual human rights, they will still have *locus standi* to challenge the constitutionality of laws that may conflict with those rights (eg a company or society will have *locus standi* to challenge air pollution which is unhealthy or detrimental to the well-being of its employees or members and the general public) (see Cachalia, Cheadle *et al Fundamental rights in the new Constitution* (1994) 19 ff; Rautenbach and Malherbe (1994) 8 ff).

Section 7 further provides that when an infringement of or threat to any right entrenched in chapter 3 is alleged, any person or body (referred to below) will be entitled to –

- apply to a competent court for appropriate relief. The constitutional court will be the competent forum where the interpretation of a fundamental right (the environmental right: air pollution, for example) is in question. The ordinary judicial remedies as well as a declaration of rights will be available to the aggrieved party;

- judicial relief, which will be available only when a right entrenched in chapter 3 is encroached upon or where a threat of such an encroachment is evident or imminent. Since the court will have to determine whether such a right has been infringed or not, the discussion of the problems relating to the nature, content and implementation of the environmental right (see above), must be read together with the *locus standi* requirement.

Appropriate judicial relief may be sought by the following parties:

(a) *A person acting in his or her own interest.* For example, where air pollution has affected the person's health and well-being.

(b) *An association acting in the interest of its members.* A university may now – otherwise than at common law – institute a representative action on behalf of its academic and student members where water pollution in their residential areas has been detrimental to their health and well-being, for example. The university may approach the court even if it has no direct or substantial interest in the dispute.

(c) *A person acting on behalf of another person who is not in a position to seek such relief in his or her own name.* The classic cases of *Wood v Ondangwa Tribal Authority* 1975 2 SA 294 (A) and *Bozzoli v Station Commander John Vorster Square* 1972 3 SA 934 (W) are examples of the *negotiorum gestio* action in cases where the personal liberty of the person(s) in question was at stake. These actions may now include environmental disputes as well.

(d) *A person acting as a member of or in the interest of a group or class of persons.* This is an expansion of *Bamford v Minister of Community Development*

and State Auxilliary Services 1981 3 SA 1054 (C) where Bamford acted as a member of a group (the public) without having to prove any personal damage. A person may now act in the interest of a group or class of persons whose environmental right has been or is about to be infringed. This conduct reflects the institution of a class action.

(e) *A person acting in the public interest*. Such a person does not have to prove any personal harm or damage. This action is a re-institution of the *actio popularis* and calls for the widest interpretation and implementation of *locus standi*. It goes even further than the *negotiorum gestio* action dealing with individual liberty (see above). Therefore, any person may now champion the public interest where an infringement or threatening infringement of the environmental right is evident.

If one looks at the important task of the courts in determining the nature and content of the environmental right (discussed above) and its relevance for the *locus standi* requirement, one realises the powerful role that the constitutional court will play in environmental affairs.

Interpretation and implementation by the courts

The constitutional court established in terms of section 98 of the Constitution, is a court of final instance and will not only determine the content of the environmental right and whether an infringement of such a right has occurred, but also whether the matter falls within its jurisdiction, and then enforce the Constitution (eg determine whether the acts and conduct of any executive authority are in conformity with the provisions of the Constitution). The Appellate Division has no jurisdiction on matters within the jurisdiction of the constitutional court, but provincial and local divisions, although they are not courts of final instance in constitutional matters, have the same jurisdiction within their geographical areas of jurisdiction as the constitutional court, excluding matters of constitutionality of parliamentary legislation and constitutional disputes between central organs of state (see s 98(2) 63(5) 101(3) of the Constitution; Rautenbach and Malherbe (1994) 36 ff).

Rights incorporated in the bill of rights are entrenched and should be justiciable. However, the courts can only enforce rights which are clearly described and where a standard exists against which a breach of those rights can be measured. The danger therefore exists that the environmental right may become an ideological concept with no content at all. Although political and civil rights are negatively enforced, the nature of so-called second and third generation human rights usually requires some positive action by the executive (eg to provide public education, to protect natural resources and to combat air pollution) (see Viljoen (1993) 32 ff).

The questions surrounding *locus standi* have always been controversial and the widening of this concept will also give rise to substantial controversies. Consequently, the courts (especially the constitutional court) will have to develop guidelines and use devices or mechanisms to deal with certain problems. For example (s 7(4)(b)) –

- with regard to the "interests" required to obtain *locus standi* in the above instances – what type of interest is required: a direct, indirect or substantial interest?
- under what circumstances would a class action be appropriate?

- what mechanisms would (or should) the courts devise to prevent them from being swamped by undeserving cases, especially where class actions and the *actio popularis* are concerned? (See Cachalia and Cheadle (1994) 23 ff.)

Finally, one must bear in mind that if our aims of cultivating basic democratic values and an awareness of the environment are to succeed, a narrow, positivistic interpretation of the environmental right and *locus standi* should not be tolerated. Certainly the courts would rather concentrate on value judgments to fulfil the aspirations of a developing society than jeopardise the proper implementation of the environmental right and the proposed widening of the *locus standi* requirement. This last argument is supported by section 35 of the Constitution which provides that

- in interpreting the provisions of chapter 3, the court must promote the values which underlie an open and democratic society based on freedom and equality;
- the court must also in relevant cases have regard to public international law applicable to the protection of the rights entrenched in chapter 3 and may also have regard to comparable foreign law.

Directives of state policy

All the above problems regarding the content, concretisation and implementation of environmental rights, may detract from the overall value of the bill of rights as a justiciable legal document. Consequently the fear is that people may lose faith in the bill of rights as an effective legal instrument. As a result of these problems, many feel that environmental rights should not be incorporated in bills of rights, but rather in the Constitution as directives of state policy as was done in chapter II of the Namibian Constitution. However, to incorporate policy directives in a Constitution also poses other problems. Nevertheless, it must be mentioned that although policy directives are not enforceable by the courts, they do place a duty on the state to act positively in terms of the environment and to consider it in policy decisions. Policy directives may also serve as an interpretive guide for the courts and direct the exercise of official discretion.

Conclusion

Before one may draw any conclusions, a brief remark must be made about section 24 of the Constitution which deals with *administrative justice*. It is common knowledge that the *locus standi* requirement does not feature in administrative action because such action takes place outside the court structure. However, a sound state administration which adheres to the legality principle will certainly ensure that fewer administrative (environmental) disputes come to court. In this way the administrative justice provision sets the scene for the exercise of administrative power and defines the parameters within which the administration must function.

Adherence to administrative justice will restrict the improper exercise of discretionary powers by administrative officials and will hold the administration accountable for its actions and at the same time promote openness. Furthermore, the individual or group approaching the administrative body with an environmental action, will be ensured of a fair and just hearing and a decision that is reasonable. Many of the problems which may crop up in determining whether an environmental right has been violated and whether a party has *locus standi*, may also be avoided in this way.

The following concluding remarks may be made:

(a) The Constitution has opened the way for a liberalised *locus standi* which includes the application of an *actio popularis*.

(b) An environmental right is a typical collective right. The environmental right provided for in section 29 forms part of other individual basic rights, is phrased in an anthropocentric fashion, is without fixed content and therefore open to many interpretations. This approach does not promote stewardship of the environment and the impact of conservation of the natural environment is lost.

(c) A right should be infringed or a threat of such a violation should exist for the purpose of proving *locus standi*. The interpretation of the environmental right by the constitutional court is therefore a crucial issue and its decision may have far-reaching consequences for the recognition and implementation of the environmental right and the *locus standi* requirement.

(d) In following the spirit of the Constitution, the courts will follow a contextual (purposive) interpretation and devise guidelines and mechanisms to determine the parameters of the environmental right and the scope for the *locus standi* requirement.

(e) Acknowledging the current political and socio-economic situation, one realises that homocentric actions such as social upliftment and nationbuilding will receive priority on the constitutional agenda. We should, therefore, consider a type of national environmental reconstruction programme to create an awareness of the environment. The most obvious starting point for such an undertaking would be the institution by the state of policy directives to create a positive attitude towards and an awareness of the environment as well as cultivating an environmental ethic.

ELMENE BRAY
University of South Africa

INTERPRETATION OF THE RIGHT TO BAIL (SECTION 25(2)(D)) AND THE LIMITATION CLAUSE (SECTION 33) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA 200 OF 1993*

1 General principles and the right to bail

I am not certain exactly what is meant by "the response of legal academics". To some this phrase may create the impression that the view of an academic will of necessity be legalistic, theoretical and perhaps even impractical. To those I can just say that the majority of law teachers in the field of criminal procedure are persons with a background as prosecutors and state advocates, and

* Paper delivered on 1994-04-19 at a workshop on Reform of Bail in South Africa in the light of the right to bail and the limitation clause in the bill of rights of the Constitution of the Republic of South Africa 200 of 1993.

that some of us have even conducted *pro deo* defences on a large scale during our sabbaticals. Others have also sat as assessors in criminal trials when requested to do so by judges, so that we have some experience of all the practical branches of criminal law.

We also realise the supreme importance of a bill of rights: called "a formidable bastion for individual freedom" by the present Chief Justice in a speech to the Johannesburg bar in which he also declared his personal credo as believer in the importance of the liberty of the individual and, therefore, in the importance of human rights (October 1989 *Consultus* 75 78).

As sovereignty will be transferred from parliament to the Constitution in the new dispensation, the first and preliminary question in the construction of statutes will not be what parliament intended in adopting the statute, but whether the statute is constitutional (Mahomed "The impact of a bill of rights on law and practice in South Africa" 1993 *DR* 462; see also s 4 of the Constitution of the Republic of South Africa 200 of 1993).

The present Chief Justice of the Supreme Court of Namibia and also acting Judge of Appeal of the Appellate Division of the Supreme Court of South Africa, Mr Justice Mahomed (1993 *DR* 463) referred to the Constitution as a

> "mirror reflecting the national soul; the identification of the ideals and aspirations of a nation; the articulation of values bonding its people and disciplining its government" (see also *S v Acheson* 1991 2 SA 805 (Nm HC) 813A – B).

In order to interpret the provisions of the Constitution (including those of the bill of rights) and the requirements laid down for legitimate limitations of fundamental rights, regard will have to be had to certain guidelines, namely:

(a) Human rights and freedoms are to be interpreted generously rather than legalistically, "suitable to give to individuals the full measure of the fundamental rights and freedoms referred to" (*Minister of Home Affairs (Bermuda) v Fisher* 1980 AC 319 328, quoted in *ANC (Border Branch) v Chairman, Council of State of Ciskei* 1992 4 SA 434 (CkGD) 447D – F; the guidelines referred to in my text have been taken from the latter case 447D – 449D).

(b) In interpreting the provisions of the chapter on fundamental rights, a court of law must promote the values which underlie an open and democratic society based on freedom and equality and must, where applicable, have regard to public international law; it may also have regard to comparable foreign case law (s 35(1) of the Constitution; see also s 35(3)).

(c) Provisions allowing for restrictions are to be narrowly and strictly construed. This was confirmed by the European Court of Human Rights in the case of *Klass v Federal Republic of Germany* 5029/71 (referred to in the *ANC (Border Branch)* case *supra* 447G). A restriction in relation to a fundamental right that it qualifies, is to be seen as an exception to a general rule, and therefore to be *narrowly* construed (see also s 35(2) of the Constitution).

(d) It is generally accepted that where it is shown that a fundamental right has been infringed, the *onus* is on the violator to show that the infringement was authorised in all essential respects. (This whole topic was dealt with by Magnet *Constitutional law of Canada* vol 2 (1987) 185 – 186, quoted in the *ANC (Border Branch)* case *supra* 447J – 448D; see also *Qokose v Chairman, Ciskei Council of State* 1994 2 SA 198 (CkGD).) The arrestee need therefore only show a *prima facie* violation of the fundamental right, that is, that he or she has been arrested

and that he/she has the right in terms of section 25(2)(d) to be released from detention with or without bail. If the arrestee can prove a *prima facie* case, it is then for the state to prove – this is not an evidentiary burden ("weerleggingslas") but a full *onus* – on a balance of probability that the interests of justice require otherwise. What would be in "the interests of justice" would depend on the particular facts of each and every case. Guidance may be derived from three main principles which are presently taken into consideration in deciding an application for bail, namely:

(1) Is it more likely that the accused will stand his trial or is it more likely that he will abscond and forfeit his bail? The determination of that issue involves a consideration of other sub-issues such as the following:

(i) how deep are his emotional, occupational and family roots within the country where he is to stand trial;

(ii) what are his assets in that country;

(iii) what are the means that he has to flee from the country;

(iv) can he afford the forfeiture of the bail money;

(v) what travel documents does he have to enable him to leave the country;

(vi) what arrangements exist or may later exist to extradite him if he flees to another country;

(vii) how inherently serious is the offence in respect of which he is charged;

(viii) how strong is the case against him and how much inducement would there therefore be for him to avoid standing trial;

(ix) how severe is the punishment likely to be if he is found guilty; and

(x) how stringent are the conditions of his bail and how difficult would it be for him to evade effective policing of his movements?

(2) Whether there is a reasonable likelihood that, if the accused is released on bail, he will tamper with witnesses or interfere with the relevant evidence or cause such evidence to be suppressed or distorted. This issue again involves an examination of other factors such as the following:

(i) whether or not he is aware of the identity of such witnesses or the nature of such evidence;

(ii) whether or not the witnesses concerned have already made their statements and committed themselves to give evidence or whether it is still the subject of continuing investigations;

(iii) what the accused's relationship is with witnesses and whether or not it is likely that they may be influenced or intimidated by him; and

(iv) whether or not any condition preventing communication between such witnesses and the accused can effectively be policed.

(3) How prejudicial may it be for the accused in all the circumstances to be kept in custody by being denied bail? This would involve again an examination of other issues such as, for example:

(i) the duration of the period for which he has already been incarcerated, if any;

(ii) the duration of the period during which he will have to be in custody before his trial is completed;

(iii) the cause of any delay in the completion of his trial and whether or not the accused is partially or wholly to be blamed for such a delay;

(iv) the extent to which the accused needs to continue working in order to meet his financial obligations;

(v) the extent to which he may be prejudiced in engaging legal assistance for his defence and in effectively preparing for his defence if he remains in custody; and

(vi) the health of the accused.

Some of these considerations will weigh more than others, depending on the circumstances of a particular case, and they are the result of judicial interpretation, conveniently summarised in *S v Acheson* 1991 2 SA 805 (NmHC) 822 – 823.

The above is not a *numerus clausus* and it is my submission that such a list should not be incorporated in any statute such as the Criminal Procedure Act. This would not be feasible and it is suggested that the term "the interests of justice" in section 25(2)(d) of the Constitution should be left to judicial interpretation.

As the *onus* to prove that he should be granted bail is presently on the applicant accused on a balance of probability (*S v Hlongwa* 1979 4 SA 112 (D); *S v Mataboge* 1991 1 SACR 539 (B); see also *S v Mqubasi* 1993 1 SACR 198 (SEC) where it was decided that the presiding officer should inform an unrepresented accused of the nature of the *onus* resting upon him) this has been severely crticised by certain writers (Du Plessis *Aspekte van borgtog: 'n regsvergelykende studie* (LLD thesis Unisa 1991) 259; see also Fabricius "The government's proposals on a charter of fundamental rights: a critical appraisal" 1993 *Consultus* 37). The reason for this is that bail has always been seen as a privilege rather than a right. To place the full *onus* on the state would also be in accordance with the general principle that the *onus* of proof is always on the state and would also satisfy section 25(3)(c) of the Constitution that every accused person shall have the right to a fair trial, which shall include the right to be presumed innocent. In *S v Acheson* 1991 2 SA 805 (Nm) 822A – B Mahomed J said:

> "An accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in Court. The Court will therefore ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice."

This would also be in accordance with a guideline to interpreting the bill of rights mentioned by Kruger ("A constitutional court for South Africa" 1993 *Consultus* 16) that the courts should give meaning to the system of values and norms called into being by the bill of rights and that values not mentioned *eo nomine* in the bill of rights are nevertheless part of it, and are significant of its "spirit and objectives" which requires the court to apply value judgments. To place the *onus* on the state in an application for bail to prove on a balance of probability (proof beyond reasonable doubt will surely be out of place here) that it would not be in the interests of justice that the accused be released on bail, will certainly be in accordance with the values and norms of the bill of rights. It is, of course, also possible to say that to work with the concept of an *onus* here would be inappropriate.

This is also the Canadian position where an accused is entitled to be released on bail, except in certain circumstances where a reverse *onus* clause is operative and the *onus* rests on the accused to show why he should be granted bail (Du Toit *et al Commentary on the Criminal Procedure Act* 9 – 10E).

2 The limitation of fundamental rights

2 1 General introduction

All fundamental rights entrenched in the bill of rights (chapter 3 of the Constitution) may be limited by law of general application provided that such limitation shall be permissible only to the extent that it is (a) *reasonable*; (b) *justifiable in an open and democratic society based on freedom and equality*; and (c) *does not negate the essential content of the right in question.*

These rights are the right to equality, life, privacy, religion, residence, citizens' rights, access to court, economic activity, labour relations, property, environment, certain rights of children, language, culture and education.

The same principles apply to certain other rights although one further requirement is added, namely that any limitation in a law of general application should not only be reasonable but also necessary. These rights are the rights to human dignity; freedom and security of the person; not to be subject to servitude or forced labour; freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning; rights of detained, arrested and accused persons; the right of a child not to be subject to neglect, abuse, exploitative labour practices nor to be required or permitted to perform work which is hazardous or harmful to his or her education, health or well-being; and certain other rights, but only in so far as such rights relate to free and fair political activity, namely rights to freedom of expression; assembly, demonstration and petition; freedom of association and movement; access to information and administrative justice.

It is therefore clear that there are no fundamental rights which enjoy unrestricted protection. Fundamental rights may, however, not be limited simply at the discretion of the judicial authority construing the bill of rights. The bill of rights itself provides for the limitation of fundamental rights in the general limitation clause contained in section 33 (see Du Plessis and De Ville "Bill of rights interpretation in the South African context (3): comparative perspectives and future prospects" 1993 *Stell LR* 380–381).

2 2 The content of a fundamental right

The protection of any fundamental right is confined to a definite sphere. This means that the reach or inner content of the right first has to be established. This is done by ascertaining the meaning of key words and phrases taking cognisance of the language in which the provision entrenching the right is couched as well as the textual context of the provision. Any of the aids to statutory interpretation may be used to help establish the meaning of the provision. In Canada, the *onus* of proving a *prima facie* infringement of any provision of their Charter rests with the party claiming protection under the Charter. He or she has to prove that the measure sought to be impugned encroaches on the protected sphere of a fundamental right.

Once the meaning of the constitutional provision has been established, it has to be determined whether the measure sought to be impugned (substantially) infringes on the right entrenched in the provision. This can be done by reference either to the purpose of the measure or to its effect. If an infringement is proved, the measure complained of will not simply be struck down because

limitations to the fundamental right allegedly infringed may be allowed subject to certain prescribed conditions. Only if a limitation is not allowed, will the infringement be unjustifiable and a fundamental right violated. Where a measure which is challenged, is found to infringe a fundamental right, a court is therefore always under the obligation to try and ascertain whether the infringement was justified or not. In Canada the *onus* of proving a justified infringement rests with the government (see Du Plessis and De Ville 1993 *Stell LR* 381 – 382).

2 3 The justification of infringements

In terms of section 33 of the Constitution, the rights entrenched in the chapter on fundamental rights may be limited by law of general application, provided that such limitation shall be permissible only to the extent set forth above.

Limitations may therefore be placed on certain fundamental rights, provided that certain conditions are met. These conditions are contained in section 33 which provides *inter alia* that the entrenched fundamental rights may be limited by law of general application. In Germany this requirement is understood to mean that the legislature itself and not the executive is obliged to take all principal decisions affecting the exercise of fundamental rights (Du Plessis and De Ville 1993 *Stell LR* 383).

The provisos to such a limitation are that the latter will be permissible only to the extent that it is reasonable and justifiable in an open and democratic society based on freedom and equality and shall not negate the essential content of the right in question. Furthermore, in certain instances a limitation is also required to be necessary. (Some rights are, however, also limited specifically in the section in which they occur. The entrenchment of the rights to equality before and equal protection of the law – which include the right not to be discriminated against – does not preclude measures designed to achieve affirmative action. Property rights are made subject to the possibility of expropriation in the public interest against the expeditious payment of adequate compensation. Finally, the rights freely to engage in economic activity and to pursue a livelihood anywhere in South Africa can be limited by measures designed to promote a variety of socio-economic objectives (Du Plessis and De Ville 1993 *Stell LR* 391).)

It is submitted that these concepts will also have to be interpreted with section 35 of the Constitution in mind and that it is also not feasible to have statutory guidelines for this purpose. Regard must then be had to public international law and may be had to comparable foreign case law (see in general Du Plessis and De Ville 1993 *Stell LR* 382 – 386). In the light of this section it is not advisable to limit the interpretation of these concepts by way of statutory guidelines.

I therefore agree with the sentiments expressed by Corbett CJ that it is

> "inadvisable to lay down any rules for interpretation in the Bill of Rights. Interpretation is a question of common sense based on judicial experience. Well-known rules for interpretation of Constitutions and Bill (*sic*) of Rights have been developed worldwide. They have been applied in our courts and by South African judges sitting in other divisions, for example, in the Supreme Court of Namibia, and we have full confidence in the courts to apply just and equitable rules of interpretation" (*Memorandum submitted on behalf of the judiciary of South Africa on the draft interim bill of rights* (1993) 28).

In this respect, a special burden rests on the legal profession including the judicial branch of government, as

> "constitutional interpretation requires creativity, tact, imagination, sensitivity and a resolute willingness not only to be independent from and impartial towards vested and competing interests and value-systems but also to make hard political choices, which the legislature and executive are often loath to make" (see the quotations from the *Tenth progress report of the technical committee on fundamental rights during the transition at the multi-party negotiating process* and by Corder, quoted by Du Plessis and De Ville 1993 *Stell LR* 392).

PEET M BEKKER
University of South Africa

SOME CRITICAL COMMENTS ON SOUTH AFRICA'S BILL OF FUNDAMENTAL HUMAN RIGHTS

1 Need for fundamental human rights

Reasonable people will not dispute the need for a proper bill of fundamental rights in South Africa. In addition to the usual grounds, the following are among the reasons why such a bill is vital: (a) The relatively unsophisticated political views and attitudes of the majority of the electorate and many of their legislative representatives; (b) the lack of relevant experience of many in the executive branch of government; (c) the historical baggage of the crimes committed in the past either to preserve the *status quo* or to bring about political liberation; (d) the unfortunate fact that too many people currently in high office are tainted by criminal backgrounds; (e) the potentially harmful agendas of certain political parties in power.

It is, generally speaking, doubtful whether chapter 3 of the Constitution of the Republic of South Africa, Act 200 of 1993 will be effective in countering many of the serious and potentially serious problems posed by these (and other) factors in South Africa. Moreover, the application of certain aspects of the bill may create new problems in itself.

2 Myth of "Christian" human rights hopefully now dispelled

In the reports on group and human rights, Judge Olivier of the South African Law Commission was at pains to find "Christian" and church support and authority for the doctrine of human rights (see eg *Working Paper 25 Project 58* (1989) 7 – 8 185 – 198; the *Interim Report* (1991) 203 – 249; see also Du Plessis "Enkele opmerkings oor die Christelike fundering (en verwerping) van menseregte" 1990 *THRHR* 403; Kruger *Die wordingsproses van 'n Suid-Afrikaanse menseregtebedeling* (LLD thesis PU for CHE 1990) 49 – 59). Now of course almost anything can be described as "Christian" as long as one uses an incorrect and unbiblical definition of Christianity. However, it has also been demonstrated that the doctrine of human rights is not Christian (or Biblical) as far as its origin, foundation, nature and consequences are concerned (eg Potgieter

"Gedagtes oor die nie-Christelike aard van menseregte" 1989 *THRHR* 386; Potgieter "Menseregte – verwyder die skyn van Christelikheid" 1990 *THRHR* 413).

Any doubt in the minds of credulous observers that there could have been about the non-Christian nature of human rights must surely by now have been removed by certain vital provisions in the current bill as well as the likely results the bill will produce. The following examples will suffice:

(a) The express recognition, status and protection given to, amongst others, homosexuals, lesbians, bisexuals and transsexuals in terms of the non-discrimination provision (s 8(2));

(b) the effective elevation of idol-worship, satanism, occultism, witchcraft, atheism etcetera to the status of legitimate religious activities or as acceptable under the protection of freedom of conscience, religion, thought, belief and opinion (s 14(1));

(c) the possible recognition of polygamous marriages (s 14(3));

(d) the lawful distribution of pornography and blasphemous material as a legitimate exercise of the freedom of expression (s 15(1));

(e) the running of gambling facilities and sex-shops as a legitimate use of the freedom to engage in economic activity (s 26(1));

(f) the arguments in favour of abortion, suicide (euthanasia) and the abolition of capital punishment based on certain rights in the bill;

(g) the extensive rights conferred on suspects and convicts which will hinder reasonable police action in bringing suspected criminals to justice and make it more difficult for the state to punish convicts properly;

(h) the fact that there is no special right governing the protection of a normal marriage or family (see par 3 below).

It is to be hoped that these factors will finally remove the cloak of Christian respectability that some are so eager to draw over the doctrine of human rights in order to camouflage its patently non-Christian facets. It must be emphasised that Christian concepts of rights, justice, freedom, equality, peace and fairness differ fundamentally from their apparent counterparts in the field of human rights. And because of the basic incompatibility of Christian principles such as humility, self-sacrifice, restraint and chastity with the human rights ideology which promotes maximum individual freedom to pursue even un-Christian practices, any endeavour to formulate a so-called "Christian" bill of rights will fail and should not even be attempted. Consequently the bill of human rights must be seen for what it really is – a political and legal instrument mainly aimed at giving effect to the notions of *political* and *legal* justice of some and not as a means to achieve *Christian* justice.

3 The absence of provisions protecting the family

While the bill of rights may possibly be relied upon as support for the recognition of "marriages" between homosexuals and between lesbians (s 8(2); s 25(1)(d)), and it is probable that polygamous or potentially polygamous unions may be recognised as normal marriages (s 14(3)), the bill is silent on the protection of the normal family and marriage.

This lacuna is hard to understand in view of the fact that all major international human rights instruments provide for the protection of the family (see

Van Wyk "Safeguards of the family: A South African perspective" 1990 *Stell LR* 186–197). What is the reason behind this omission? Is, for example, the protection of a homosexual lifestyle of more importance than the protection of a legal marriage between a man and a woman? The question now arises how and when this absurd inconsistency is going to be addressed.

4 Criminals and their (unfortunate) victims

Detained, arrested and accused persons enjoy strong and comprehensive protection in the bill of rights. Section 25 shows the great concern for the welfare of these people and uses more than a half thousand words to define and entrench their rights. Now of course no reasonable person will quarrel with provisions requiring a fair trial and civilised treatment of suspects and convicted offenders. But it is, for example, strange to have to learn that even a sentenced prisoner's right to adequate reading material is elevated to the realm of constitutional protection (s 25(1)(b)). And then the special reference to a prisoner's "human dignity" is also puzzling (dignity is in any event protected in s 10) and even a little absurd seen against the *curricula vitae* of many prisoners. It is further difficult to believe in the "dignity" of murderers, rapists, child-molesters, drug-pushers and other evil and dangerous people.

All the concern with the rights of suspects and convicts makes the absence of any reference to special rights of the *victims of these criminals* even more glaring (see eg s 25 of the Constitution of the US State of Michigan on the rights of victims). Moreover, one would have expected the creation of third generation social rights to address the death, destruction, hardship and damage left behind by many of the inhabitants of our prisons (see generally Coetzer "Die slagoffers van misdaad: 'n verwaarloosde groep" 1994 *Consultus* 28–32). The law should not be seen to be "soft" on criminals, but rather seen to be "soft" on their victims. However, the myriad of rights accorded to suspects and accused persons and the possibility of leaner sentences and more comfortable prisons will obviously not assist the police in the lawful combating of the crime wave experienced in South Africa, nor deter potential offenders.

5 Non-recognition of certain other rights

Although many things abhorrent to decent and normal people are recognised and constitutionally protected by the bill (see par 2 above), other matters of importance to responsible citizens are not addressed. For example, although provision is made for legislation dealing with "social justice" (s 26(2): this may be abused to introduce an ill-conceived or unaffordable socialist agenda), *taxpaying citizens* have no fundamental right to reasonable taxes and levies. Apparently hardworking tax-payers are at the mercy of their rather inexperienced legislative representatives while others can look forward to constitutionally supported legislation describing what handouts they can claim.

Furthermore, law-abiding citizens have no fundamental *right to bear or possess arms for personal protection*, while those with criminal intent usually do not bother with such trivia as obtaining a licence. Certain naïve church leaders and politicians have already used this deficiency in the bill by starting to advocate the removal of all arms from society (which in effect means the disarmament of the responsible members of the community).

While the right to an environment which is not detrimental to one's health or well-being is regarded important enough to be expressly recognised (s 29), there is no mention of the basic *right to the maintenance of law and order in society*. A physically clean environment is of little value if it is polluted by the lawlessness and criminality of certain human beings. A right to law and order would give citizens the right to demand proper policing and also act as a natural balance to the wide range of rights and privileges enjoyed by criminals and suspects.

6 Unfair discrimination under the pretext of "affirmative action"

Section 8(3)(a) of the bill is used to accommodate the overworked and misleading concept of "affirmative action". While no reasonable person will quarrel with redressing actual damage-causing wrongs committed in the past, the damage allegedly caused by former unfair discrimination must be proved by a comparison of the actual position of the person concerned with his or her hypothetical position if the wrong were not committed. This would ensure that those who would in any event not have "made it" (even in the absence of discrimination), are not given preferential treatment, positions and opportunities under false pretences of "justice". Undeserved windfalls in the name of our apartheid history cannot be "affirmative action". At present it would seem that section 8(3)(a) is incorrectly perceived as justification for simply addressing racial imbalances and to reflect the composition of the population in certain situations. It must be obvious that the use of such a mechanical quota system has nothing to do with real justice.

Furthermore, the wielding of the sword of affirmative action merely for ideological or political reasons may keep talented people out of positions which they should legitimately occupy and opportunities which they should be able to exploit. One just hopes that in the long run the country can afford an unproductive and often expensive commodity such as political correctness which for some serves as the theoretical justification for "affirmative action".

7 Problems concerning the right to an own culture

Section 31 allows every person to participate in a chosen cultural life while section 32(c) provides the right to establish educational institutions based on a common culture. However, discrimination on the basis of race is totally prohibited (not even "fair" discrimination is allowed (as in s 8(2)). One problem "cultural" schools face in practice is that because of the obsessive suspicions in some circles regarding the alleged presence of racial discrimination in almost all spheres, lawful cultural differentiation is often mistaken for such racial discrimination (racism). Against this background the natural (though not inevitable) links between race and culture will in practice undermine the full enjoyment of one's constitutional rights regarding cultural identity. The only sensible solution appears to be somehow to strengthen the protection of cultural rights in certain situations at the expense of non-discrimination on the basis of race.

8 The interpretation of the bill

The courts are given extemely wide powers in interpreting the provisions of the bill of rights. Section 35(1) stipulates that the court must promote the values which underlie an open and democratic society based on freedom and equality.

This provision, which reminds one of the proverbial blank cheque, is supplemented by a stipulation requiring or permitting the use of public international law and comparable foreign case law. The implication of all this is that a court will be able to easily justify almost any interpretation it chooses to give to the bill of rights. One can also imagine the variety and subtlety of the arguments that will be raised in an attempt to justify a choice between the contradictory concepts of "freedom" and "equality" or in attempting to effect an equilibrium between them.

The legislative blessing to the use of comparable foreign case law has already made its effect felt in at least one of the textbooks available on the South African bill of rights (Cachalia *et al Fundamental rights in the new Constitution* (1994)). In this work one is frequently confronted with (sometimes strange) decisions by for example the Canadian judiciary which are supposed to assist South African lawyers in understanding their own laws.

One also gains the impression that certain human rights activists consider section 35 to provide a licence to attack eminently sound decisions of the Appellate Division which are in conflict with their distorted notions of legal justice. Lawyers for Human Rights ("Disappointing decision on press freedom" May 1994 *Rights* 45 – 47), for example, express their disappointment in three Appellate Division cases placing certain limitations on freedom of expression (*Financial Mail v Sage Holdings* 1993 2 SA 451 (A); *Argus Printing and Publishing Co (Pty) Ltd v Esselen's Estate* 1994 2 SA 1 (A); and *Neethling v Du Preez, The Weekly Mail* 1994 1 SA 708 (A)). In these cases the Appellate Division respectively prevented the publication of confidential information obtained by means of an unlawful intrusion of privacy, held that a judge of the supreme court is entitled to sue for defamation, and held that the media has no special privilege to publish untruths. Lawyers for Human Rights speculate (*ibid* 47) that all these decisions may be challenged under the bill of rights on the basis that the limitations placed on free speech in the decisions are not reasonable and "justifiable in an open democratic society based on freedom and equality". If these views of Lawyers for Human Rights represent the values held in an "open and democratic society" which should serve as an example for South African judicial decisions, what reasonable person with a good name would feel safe in such a democracy? (See also Neethling and Potgieter "Laster: bewyslas, media-privilegie en die nuwe Grondwet" *infra* 518 – 519.)

Our courts have always taken account of comparable foreign case law in a responsible manner and would have continued to do so even without section 35(1), which should not be interpreted to place on the courts an additional obligation to find and apply alien principles. In view of the fact that our common law must also be applied and developed with due regard to the spirit and objects of the bill of rights (s 35(3)), "comparable" foreign case law should not be allowed to interfere with the application of the eminent principles of Roman-Dutch and South African law which have withstood the test of time.

9 The constitutional court

This most powerful court in our legal history will play a pivotal role in the interpretation and application of the bill of rights. Seen against the background of its wide powers in interpreting the provisions in the bill of rights (see par 8 above), the composition of this court becomes critical.

Section 99(5)(d) requires the court not only to be "independent and competent" but also "representative in respect of race and gender". These requirements are defective in at least two respects. *First*, actual independence and competence are not enough since judges must also *be seen* to be independent and competent. For example, someone with a history of political activism, however "competent" he or she may be, will not be trusted by reasonable and informed people as activists do not make good or impartial judges.

Secondly, the requirement of representativeness sanctions political correctness (or even tokenism!) as a criterion for judicial office. Now unfortunately political correctness and judicial competence do not necessarily coincide. Moreover, although it may be flattering for some people to see members of their race or gender represented in the highest court, demonstrable and real judicial impartiality and detachment are much more important and reassuring to reasonable and informed people. One just hopes that the constitutional court will indeed be a proper court and not merely a fourth house of parliament, composed of political activists and compromise candidates who are expected to create an illusion of legal justice while glibly handing down politically "correct" decisions. Without denying the necessary and inevitable interplay between political ideology and the law, the divide between politics and the law should be respected; what is needed is actual rule of law and not merely the rule of politics disguised as law (see further Bork *The tempting of America: the political seduction of the law* (1990) 1; Potgieter "The role of law in a period of political transition: the need for objectivity" 1991 *THRHR* 800).

PJ VISSER
University of Pretoria

JM POTGIETER
University of South Africa

LABOUR LAW AND THE CONSTITUTION*

1 Introduction

The introduction of South Africa's interim Constitution (the Constitution of the Republic of South Africa, Act 200 of 1993) signifies the birth of a free and democratic South Africa. The role of the interim Constitution in bringing about a new political, social and legal order is succinctly summarised in the clause on *National Unity and Reconciliation*:

> "This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex."

* This note deals with the law as it stood at the date of the commencement of the interim Constitution, 1994-04-27.

In other words, the interim Constitution creates a constitutional state, also referred to as a *Rechtsstaat* in European legal jurisprudence. Underscoring such a constitutional democracy are the legal values of freedom, human dignity and equality of every individual citizen. These values which underlie the new political, social and legal order are central to the interpretation and understanding of the interim Constitution.

2 The Bill of Fundamental Human Rights

The requirement that the fundamental rights of the individual citizen must be properly protected against encroachment, particularly by the state authorities, is fundamental to the ideal of a constitutional state (see in general DA Basson *South Africa's interim Constitution: text and notes* (1994) 13 *et seq*).

In giving effect to this ideal, a justiciable bill of rights is introduced by the interim Constitution in terms of which three categories of human rights and freedoms are entrenched: First generation human rights (or "blue rights") which are associated with a liberal democracy, such as the right to life and political rights; second generation human rights, also referred to as socio-economic rights or "red rights", which are associated with the idea of a welfare state, such as the right to health and the right to education; and third generation human rights (or "green rights") which encompass the environmental rights.

Of primary importance to South African labour law are the socio-economic rights which are entrenched in terms of section 27 of the Constitution, which deals with rights relating to "Labour relations". Although not all socio-economic rights relating to labour relations such as the right to work are enshrined, the following workers' rights are entrenched: the right to fair labour practices; the right to form and join trade unions; the right to organise and bargain collectively; and the right to strike for the purposes of collective bargaining. The right to form and join employers' organisations and employers' recourse to the lock-out for the purposes of collective bargaining, are likewise protected in terms of section 27.

In addition to the aforementioned socio-economic rights which are inherent to the employment relationship, various first generation human rights which are entrenched in the interim Constitution also impact upon this relationship. For instance, the equal treatment clause (s 8(2)) will undoubtedly be interpreted to outlaw any unfair discrimination in the workplace. Likewise, the right to freedom of expression (s 15) and the right to assemble and demonstrate with others peacefully (s 16) may impact upon the right or competence of workers to picket and to wear political insignia, and may also have implications for the right of a union to organise meetings and demonstrations on company premises (for a more detailed discussion see par 3 2 2 and 3 2 3 below).

Generally, when dealing with labour relationships, a weighing up of competing values will be required. This is in keeping with the principle that no right can ever be absolute. In fact, in terms of the general limitation clause contained in section 33(1) of the Constitution, every fundamental right may be legitimately limited provided that such limitation is reasonable, justifiable in a democratic and open society, does not negate the essential content of the right, and (with regard to certain specific rights) is also necessary. The competing values involved in this weighing-up process are (amongst others) the fundamental right of an employer freely to engage in economic activity (entrenched in terms of s 26 of

the bill of rights and limited even beyond the general limitations clause by socio-economic goals such as measures which promote the protection of fair labour practices) and the right to protect its property interests against the various fundamental rights which accrue to the workers in the employment relationship, such as the right to bargain collectively, the right to strike and the other workers' rights identified above.

Various statutes and laws dealing with issues such as fair labour practices and labour relations in general also impact upon labour law. As a general rule, all these statutes would have to stand the test of constitutional scrutiny in terms of the constitutional jurisdiction conferred on the courts and, more specifically, the exclusive jurisdiction of the constitutional court to strike down parliamentary acts which are inconsistent with the Constitution, which includes the provisions of the bill of rights.

Notwithstanding this generally stated rule, the provisions of a law in force "promoting fair employment practices, orderly and equitable collective bargaining and the regulation of industrial action" remain of full force and effect until repealed or amended (s 33(5)(a)). Statutes such as the Labour Relations Act 28 of 1956 (the LRA); the Public Service Labour Relations Act 102 of 1993 (the PSLRA); the Agricultural Labour Act 147 of 1993 (the ALA); and the Education Labour Relations Act 146 of 1993 (the ELRA) are all affected by this immunity against constitutional scrutiny and will thus prevail, even if they conflict with the fundamental rights entrenched in the bill of rights. This immunity can be illustrated with reference to the provisions of the PSLRA. In terms of the definition of an unfair labour practice contained in the PSLRA, any action which amounts to unfair discrimination on the basis of, for instance, race or gender, will constitute an unfair labour practice. But this act does not allow for limitations to be placed upon such equal treatment by way of affirmative action (in the manner provided for by the Constitution in s 8(3)(a)). Accordingly, affirmative action is outlawed as an unfair labour practice in terms of the provisions of the PSLRA (until suitably amended) notwithstanding a clear conflict with the affirmative action clause in the bill of rights (note that the PSLRA affects incumbent employees only and not prospective employees).

It must be noted that although the above-mentioned acts are (temporarily) immunised against constitutional testing, even they will have to be interpreted in the context of the new human rights culture within which labour law now operates since the commencement of the interim Constitution (see the discussion of s 35(3) of the Constitution below).

All other acts or laws will still have to stand the test of constitutional scrutiny. It may therefore be stated that, apart from the laws which enjoy the aforementioned immunity, all legislative and executive actions at all levels of government which infringe any of the human rights which have implications for labour law (as indicated above), will have to stand the test of constitutional scrutiny (bearing in mind that no right is ever absolute and that the weighing-up process in terms of the general limitation provision will be required in order to place legitimate and lawful limitations upon the fundamental rights of both workers and employers). The state accordingly has a duty not to infringe these rights and freedoms. This will apply in particular to workers employed by the state at all levels of government, that is, public servants as well as municipal

workers. These workers will be able to approach the courts with constitutional jurisdiction to enforce their rights, but will have to bear in mind that some statutes promoting fair labour practices applicable to the public service, will remain in force notwithstanding a conflict with the bill of rights (as discussed above). Workers who fall within the ambit of one of the aforementioned acts which are affected by the insulation clause will therefore have to seek redress in terms of such act itself. It is clear from the aforegoing that workers who are employed by the state and whose fundamental rights are infringed by way of state action will (in principle) be able to approach the courts with constitutional jurisdiction and seek redress in terms of the justiciable bill of rights. Other workers (or employers) would likewise be able to approach these courts if their fundamental rights (identified above) are infringed by way of state action, for example, by an infringing act which does not enjoy immunity.

However, the crucial question which remains, is whether the bill of rights enjoys vertical operation between the state (government) and the individual subjects of the state only, or whether it also operates horizontally. In other words, it is still uncertain whether the bill of rights also applies to private-law relationships, that is, the legal relationship between third parties or individuals (referred to in German jurisprudence as *Drittwirkung*). The outcome of this debate will profoundly affect the employment relationship between a private employer and its workers: should their common-law employment relationship fall outside the protection of the bill of rights, the various entrenched fundamental human rights will effectively be placed beyond the reach of most workers and employers in the sense that infringements of these rights by any third party will not be justiciable.

Even though the debate regarding the operating of the bill of rights will ultimately have to be settled by the courts with constitutional jurisdiction, it is submitted that various provisions in the Constitution point to the conclusion that the bill of rights has, in addition to vertical operation, horizontal operation as well. First, a strong indication that the bill of rights has horizontal application is contained in section 7(2), which expressly states that chapter 3 (which contains the bill of rights) shall apply to "all law in force during the period of operation of the Constitution". By referring to "all law" as opposed to "all laws", the inference may be drawn that chapter 3 applies not only to statute law, but also to common law and customary law. Secondly and in similar vein, section 35(3) expressly states that "[i]n the interpretation of any law and the application and development of the *common law* and *customary law*, a court shall have *due regard to the spirit, purport and objects of this Chapter*" (emphasis added). Accordingly, when adjudicating upon matters between third parties, that is, especially in applying the common law which governs private-law relationships, the courts are called upon to have "due regard" to the bill of rights. Thirdly, the same conclusion follows from a reading of section 33(2) which states that "no law, whether a rule of the common law, customary law or legislation, shall limit any right entrenched in this Chapter". It therefore appears that both common and customary law are expressly subjected to the application of the bill of rights. Fourthly, in terms of section 33(3), the rights conferred by the common law and customary law are recognised only "to the extent that they are not inconsistent with this Chapter".

In view of the aforegoing, it is clear that, applying the common law which applies to matters between third parties, the courts will thus be obliged to have

due regard to the fundamental rights and freedoms contained in the bill of rights and will be able to ensure that no infringement of the entrenched fundamental human rights takes place.

The conclusion that the bill of rights has horizontal application in the sense described here, has fundamental significance for the common law of contract, also in so far as it governs the employment relationship between employer and worker. In future, the courts will have to apply the common law of contract with "due regard" to the fundamental rights contained in the bill of rights. Of particular importance here is section 27 which entrenches, *inter alia*, the right to fair labour practices. The application of the common-law principles of contract in this new context of a human rights culture will, in effect, mean that the *boni mores* or public policy considerations which have always played a major part in interpreting contracts, will now also be infused with a human rights culture. Put differently, a right such as the right to fair labour practices, must be given full recognition when applying the common law of contract. In fact, the effect of this would be to clothe the ordinary courts, when adjudicating upon issues arising from the common-law employment contract, with unfair labour practice jurisdiction (a jurisdiction which was formerly reserved only for the industrial court).

But where the relationship between the employer and the worker is governed by an act such as the LRA, these workers will be called upon to enforce their labour relations rights (especially those pertaining to fair labour practices) in terms of that act, which presently prevails over the provisions of the bill of rights as it is explained above. Workers who are not afforded any protection in terms of existing labour legislation promoting, *inter alia*, fair labour practices (such as domestic workers) will, however, no longer have to accept the restrictions of the common law. Their rights to fair labour practices (as well as their other entrenched fundamental rights) will have to be considered whenever the common law is being applied in the manner described here.

3 The role of the industrial court

It is not only the ordinary courts or the courts with constitutional jurisdiction which are called upon to fulfil a role in the protection of fundamental rights on the labour law terrain; the industrial court and, on appeal, the labour appeal court, will in the exercise of their unfair practice jurisdiction, be playing a crucial role in terms of the new human rights context within which South African labour law will operate in future.

It should be stressed from the outset that the Constitution does not confer any constitutional jurisdiction upon these specialised courts. The industrial court as an administrative tribunal does not adjudicate on alleged infringements or violations of any of the fundamental rights entrenched in the bill of rights (see in regard to the status of the industrial court *SA Technical Officials' Association v President of the Industrial Court* 1985 1 SA 597 (A)). Only the constitutional court and the supreme court are conferred with constitutional jurisdiction to interpret, protect and enforce the rights entrenched in the bill of rights (in terms of s 98 and 101 of the interim Constitution). Moreover, although the industrial court discharges functions of a judicial nature, it is a creature of statute and as such it has no inherent powers but derives all its powers from statutes such as the LRA (see *SA Technical Officials' Association*

v President of the Industrial Court supra 6121 and *Amalgamated Clothing & Textile Workers Union of SA v Veldspun (Pty) Ltd* 1993 *ILJ* 1431 (A) 1438G).

Most workers in South Africa are employed in industries which are governed by acts such as the LRA, the PSLRA, the ELRA and the ALA, which brings into play the decisive unfair labour practice jurisdiction of the industrial court. In the exercise of its unfair labour practice jurisdiction, the industrial court may be confronted with a "constitutional" argument in two areas in particular: First, the allegation may be put forward that a law (even an act such as the LRA) is unconstitutional and, secondly, the industrial court may be called upon to infuse the very wide definition of an unfair labour practice (such as the definition contained in s 1 of the LRA) with meaning, taking cognisance of the provisions of the bill of rights.

3 1 Constitutionality of a statute or provision thereof

When the industrial court, in exercising its unfair labour practice jurisdiction in terms of, for instance, the LRA, is confronted with an allegation that a particular act or provision is unconstitutional by virtue of its inconsistency with a provision of the Constitution, the provisions of section 103 come into play.

Section 103(3) of the Constitution provides guidance as to how the industrial court should approach such an argument. First, a perusal of the terminology employed in section 103(3) leads to the conclusion that its provisions are not restricted to courts of law. This section refers to "*other courts*" and *not* to "*courts of law*" only. It is clear that the reference to "other courts" includes administrative tribunals (such as the industrial court) which are established by law. This conclusion is underscored by the terminology employed in this provision, which specifically refers to the person adjudicating the dispute as a "*presiding officer*" as opposed to a "*judicial officer*" (the term which is used in s 104, which clearly deals with courts of law – see also s 35(3) where reference is made to "a court" as opposed to a "court of law", the terminology used in s 35(1)).

Having accepted that the industrial court is bound by the procedural directives contained in section 103, the court, when faced with an argument that any law or provision is invalid on the grounds of its inconsistency with a provision of the Constitution, must decide such a matter on the assumption that the law in question is valid (s 103(2)). Should any law therefore *prima facie* infringe upon a fundamental right of an individual, the validity of such a law must be accepted by the industrial court and the matter before the court must be decided on the basis of such assumption.

However, if a party questions the validity of a law or a provision and the presiding officer is of the opinion that a decision about the validity of the law or provision is in the *interest of justice*, he or she will postpone the proceedings in order to allow the party who questioned the validity of the law or provision to lodge an application to a provincial or local division of the supreme court for relief (s 103(3)).

In order to postpone the proceedings, two jurisdictional facts must therefore be present: First, there must be an allegation that a law or a provision is invalid, for instance, that it is inconsistent with the rights entrenched in the bill of rights; and, secondly, the presiding officer must be of the (subjective) opinion that it is in the interests of justice to postpone the matter in order to allow the party

challenging the constitutionality of such law or provision, to apply for relief. Should the presiding officer refuse to postpone the matter, his or her decision is not appealable. It may be cogently argued, however, that such a decision will be reviewable in terms of the inherent common-law powers of review of the supreme court.

Thus once the matter has been referred to either a provincial or a local division of the supreme court and that court is of the view, first, that a decision about the validity of the law or provision is material to the adjudication of the matter before the court below (in this instance, the industrial court); secondly, that there is a reasonable prospect that the law or provision will be declared to be invalid, that is to say, unconstitutional; and, thirdly, that it is in the interests of justice to do so, the supreme court must deal with the matter in one of the following ways: if the issue raised before the industrial court is within the supreme court's jurisdiction, the court may deal with such issue itself. But if the issue is one which falls within the exclusive jurisdiction of the constitutional court, the matter must be referred to the constitutional court for a ruling in that court (s 103(4)(a)). Should the supreme court decide to allow the application on the aforementioned grounds, it will suspend the matter before the industrial court pending a decision in the matter (s 103(4)(b)).

Where a party before the industrial court challenges the constitutionality of the LRA or any other law which is insulated from constitutional challenge (in the manner described above), the provisions of section 33(5)(a) come into play even before the provisions of section 103 may be considered. Take as an example the position where a party challenges the provisions of section 24(1)(x) of the LRA, which expressly authorises an industrial council agreement to provide for a (statutory) closed shop in terms of which an employer is prohibited from employing a worker who is not a member of the union concerned but is eligible for membership to that particular union (unless such a worker already is a member of that particular union or becomes one within a statutory prescribed period of 90 days). Should such a party allege that the constitutionally entrenched right to freedom of association of an employee to join a union of his or her choice (in terms of s 17 of the bill of rights) is *prima facie* infringed by such an agreement, the industrial court would be faced with the allegation that these provisions of the LRA are inconsistent with the provisions of the Constitution. It is submitted that the court will not be able to consider postponing the proceedings in order to allow the party making the allegation to follow the procedures provided for by section 103, because the LRA is immunised against any constitutional challenge by the insulation clause and the postponement would accordingly serve no purpose whatsoever.

As is explained above, all other laws which do not fall into the category of laws promoting fair employment practices, orderly and equitable collective bargaining and regulating industrial action, do not enjoy temporary immunity against constitutional challenge by virtue of the provisions of section 33(5)(a) and an allegation that such laws are unconstitutional is therefore open to scrutiny in principle. An example of such a challenge which may arise in the industrial court would be if it is alleged that the provisions of an act such as the Basic Conditions of Employment Act 3 of 1983 (the BCEA) are inconsistent with the provisions of the Constitution.

In terms of section 19(1)(e) of the BCEA, no employer may deduct from an employee's wages without his or her consent an amount "except – (ii) in accordance with an order of court or a provision of any law". A species of a closed shop agreement, the so-called agency shop agreement, does not require an employee to join a particular union, but does require an employer to deduct (in terms of the said agreement) a compulsory agency fee from the wages of non-union members and to pay it over to the union party to the agency shop agreement. Since such compulsory deductions normally occur without the consent of the individual employee, such a practice will result in the contravention of the aforementioned provisions of the BCEA.

A fact which is seldom recognised, is that the industrial court has always been competent in terms of the LRA to give an order regardless of whether such order is contrary with the provisions of a law, including an act of parliament: the industrial court, when exercising its unfair labour practice jurisdiction, may make an order in terms of section 43(4) of the LRA which "shall prevail over any contrary provision in any law or wage regulating measure" (s 43(6) of the LRA), clearly including an order which prevails over the provisions of an act such as the BCEA. It is submitted that the industrial court will be able to make an order with similar effect when making a final determination in terms of section 46(9) of the LRA, the reason being that the section 43(4) order remains operative only until a determination has been made in terms of section 46(9) of the LRA. The assumption may therefore safely be made that the court, in exercising its powers in terms of section 43, will only be able to make an order which is also competent under section 46(9). Accordingly, the industrial court was the only institution under the old system of parliamentary sovereignty which could, by giving such order, in effect invalidate even an act of Parliament.

Should the industrial court, for example, find that an agency shop agreement constitutes a *fair labour practice*, an order by this court entitling an employer unilaterally to deduct union dues in terms of an agency shop agreement (concluded between the employer and the representative union), will enjoy preference over section 19(1)(e) of the BCEA which expressly outlaws any unilateral deduction of amounts from the wages of workers. Even apart from the fact that an order of the industrial court takes preference over the provisions of an act, such an order is possible by virtue of the provisions of section 1(3) of the BCEA, which expressly states that the provisions of the LRA or any matter regulated thereunder in respect of an employee, shall not be affected by the provisions of the BCEA, but that the provisions of the BCEA shall apply in respect of such employee in so far as the provisions thereof provide for any matter which is not regulated by or under the provisions of the LRA. The power of the industrial court to grant an order overruling the provisions of the BCEA is also strengthened by the provisions of section 19(1)(e), in terms of which an amount may not be deducted from an employee's remuneration without his or her consent except "in accordance with an order of court or a provision of any law".

However, a party before the industrial court may (in keeping with the provisions of s 103(2)) allege that section 19(1)(e) of the BCEA is invalid because (in effectively outlawing an agency shop agreement) it is inconsistent with the provisions of the Constitution, which protects the right to organise and bargain collectively (s 27), on the ground that an agency shop, by protecting the position of the union as bargaining agent, underscores these fundamental rights.

Should such a situation present itself, the presiding officer may arguably have to postpone the proceedings if he or she considers it to be in the interests of justice to do so and follow the route provided by section 103 in terms of which the courts with constitutional jurisdiction will have to decide about the unconstitutionality of the provisions of the BCEA.

Having established that an order given by the industrial court in terms of its unfair labour practice jurisdiction may in actual fact invalidate the operation of an act such as the BCEA, the difficult question which remains to be answered is whether the industrial court can legitimately consider it to be "in the interest of justice" to follow the route of section 103 whilst it is, in fact, capable of dealing with the matter itself in terms of its unfair labour practice jurisdiction.

There is no easy answer to this since the presiding officer clearly has a wide discretion when deciding to implement the provisions of section 103. However, it must be remembered that the industrial court cannot venture outside the ambit of its statutory powers and usurp constitutional jurisdiction that belongs either exclusively or concurrently to the constitutional court and the supreme court. Accordingly, section 103 of the Constitution which also binds the industrial court as an organ of state will prevail and if the validity of a law is challenged as being inconsistent with the Constitution, the procedures provided for will have to be followed strictly.

3 2 The definition of an unfair labour practice

The discussion thusfar has dealt with the situation where the constitutionality of an act or a provision thereof is challenged in proceedings before the industrial court. Most cases before the industrial court, however, deal with unfair labour practice disputes, in terms of section 17(11)(a), 43 or 46(9) of the LRA. Although it must be remembered that the industrial court also has unfair labour practice jurisdiction in terms of the PSLRA, the ELRA and the ALA, this discussion will concentrate on the provisions of the LRA, in terms of which the industrial court has had unfair labour practice jurisdiction over the last 14 years or so.

What should be stressed at the outset, is that the context within which the industrial court will operate in future when exercising its unfair labour practice jurisdiction, has changed completely and radically with the introduction of the bill of rights contained in chapter 3 of the Constitution. This conclusion is based upon a careful examination of the terminology used in section 35 of the Constitution (the so-called interpretation clause). This clause provides for a framework of values against which the courts should interpret the fundamental human rights, whenever called upon to do so. Not only are the courts with constitutional jurisdiction (the supreme court and the constitutional court) called upon to "promote the values which underlie an open and democratic society based on freedom and equality", but the industrial court is called upon to interpret the unfair labour practice definition (contained in the LRA) having "due regard to the spirit, purport and objects" of chapter 3 of the Constitution. The following arguments may be advanced in support of this contention: Section 35(3) explicitly requires "*a court*", when interpreting "*any law*" (clearly including the LRA) to have due regard to the *spirit*, *purport* and *objects* of chapter 3 of the Constitution. It is important to note that section 35(3) refers to "a court" only and not to a "court of law" whereas the preceding section 35(1) specifically refers

to a "court of law" (see also s 241 which specifically refers to a "court of law" and "judicial officers"). It may thus be cogently argued that "other courts", and by implication also the industrial court, are therefore obliged when called upon to interpret laws, to do so with "due regard" to the bill of rights. Accordingly, the industrial court is called upon to interpret the wide definition of the labour practice (contained in the LRA) with due regard to the entrenched fundamental rights.

Previously, the industrial court was called upon to give content to the definition of an unfair labour practice taking into account, *inter alia*, the purport or objects of the LRA. "Fairness" was the overriding criterion. The concept of fairness was not bound to any external value system such as the value system of a human rights culture which underlies the interim Constitution. Put differently, with the introduction of the bill of fundamental rights contained in chapter 3, the industrial court will from now on operate in a radically different context, namely one infused with a human rights culture. Accordingly, "due regard" must be had to the applicable entrenched fundamental rights whenever the industrial court is called upon to give content to the definition of an unfair labour practice contained in the LRA. But this does not imply that these rights are absolute. The principle that no right can ever be absolute is contained in the general limitations clause. Since the limitations clause is part and parcel of chapter 3, "due regard" must accordingly also be had to the limitations on fundamental rights (s 33). In the light of what has been said so far, it is clear that some of the entrenched fundamental human rights may have a profound impact upon the industrial court's interpretation of the definition of an unfair labour practice. A few examples of such fundamental rights will suffice: the right to strike, the right to freedom of expression and the right to assemble and demonstrate.

3 2 1 The right to strike

The second generation human right to strike which is entrenched in terms of section 27(4) of the bill of rights is of particular significance to workers. This fundamental right now forms an essential and vital component of the context within which the industrial court will in future have to interpret the wide unfair labour practice definition contained in the LRA.

Although many controversial areas of labour law will be profoundly influenced by the fact that the unfair labour practice definition will in future have to be interpreted in the context of a human rights culture, the question of the fairness of the dismissal of strikers will undoubtedly be one of the areas which will be most affected by the recent constitutional changes.

Various factors have in the past been identified to assist the industrial court in reaching a decision on the question whether the dismissal of strikers will amount to an unfair labour practice in terms of the definition contained in the LRA. These factors include, *inter alia*, the legality of the strike, the conduct of the strikers, the nature of the strike, and whether notice of the intention to strike was given to the employer (see AC Basson "The dismissal of strikers in South Africa (Part I)" 1992 *SA Merc LJ* 292 and "The dismissal of strikers in South Africa (Part II)" 1993 *SA Merc LJ* 20). All these factors essentially have in common their relationship to the promotion of the ideal of collective bargaining. The most important factor which is taken into consideration in

favour of protecting strikers against dismissal, is whether the strike is functional to the collective bargaining process, that is, whether the strike was used as an integral or complementary mechanism in the collective bargaining process (see Basson 1993 *SA Merc LJ* 298 – 299). This approach is in accordance with the fundamental philosophy underlying the LRA, which is that "collective bargaining is the means preferred by the legislature for the maintenance of good labour relations and for the resolution of labour disputes" (*National Union of Mineworkers v East Rand Gold & Uranium Co Ltd* 1991 *ILJ* 1221 (A) 1236 – 1237). Moreover, this approach enabled the industrial court to find that the dismissal of strikers who were dismissed for participating in an illegal (or unprocedural) strike constituted an unfair labour practice especially in circumstances where the strike was used as an integral part of the collective bargaining process and served the aims of collective bargaining (see *Performing Arts Council Transvaal v Paper Printing Wood & Allied Workers Union* 1992 *ILJ* 1439 (LAC)).

But whenever the industrial court is confronted with a strike dismissal situation in future, the question whether the dismissal of the strikers amounts to an unfair labour practice will have to be evaluated not only by taking into account the fundamental philosophy underlying the LRA, but more specifically against the broader context of a human rights culture within which the definition of an unfair labour practice (contained in s 1 of the LRA) must now be interpreted. The industrial court will accordingly have to give full recognition to the fact that a right to strike for the purposes of collective bargaining is now recognised as a fundamental human right in the bill of rights.

There is no doubt that the constitutional entrenchment of the right to strike is an important innovation in South African labour law with far-reaching consequences. Previously, because such a right to strike has not been recognised in terms of South African labour legislation, the protection of strikers was left solely to the discretion of the industrial court in the exercise of its unfair labour practice jurisdiction (in the manner described above).

For some guidance as to how the industrial court should deal with a constitutionally recognised right to strike in future, the French experience, in particular, may serve as a useful comparative source because the right to strike is also recognised in terms of the French constitution. French courts have interpreted the right to strike to mean that the strike must in principle be legal, that is, procedural in the sense that the dispute which gave rise to the strike, must have been referred to certain prescribed conciliatory mechanisms. The effect of affording constitutional recognition to legal (or procedural) strikes only, is to exclude illegal strikes from the ambit of constitutional protection normally associated with the recognition of a right to strike.

The recognition of the right to strike by the French courts means that strikers who participate in legal strike action may not be subjected to any criminal or civil sanctions, nor may the employer discriminate against the strikers with regard to their wages or social benefits purely on the grounds of their participation in (legal) strike action. Any dismissal under these circumstances will be null and void. But where the legal strike is accompanied by unlawful behaviour, the employer will be entitled to take disciplinary action against the strikers (which may include dismissal) based upon the unlawful action ancillary to the strike. Participation in a legal strike therefore does not constitute a breach of the

employment contract except in instances of flagrant misconduct. The employment contract is merely suspended for the duration of the strike, which means that the striking employee, in effect, remains in the employment of the employer (see in general the discussion of Birk "The law of strikes and lock-outs" in Blanpain (ed) *Comparative labour law and industrial relations in industrialised market economies* 265 *et seq*).

Following the French example, it may be cogently argued that the industrial court, when assessing the fairness of the dismissal of strikers engaged in a legal strike, should accept that the dismissal of such strikers will constitute an unfair labour practice in terms of the unfair labour practice definition contained in the LRA. In the same vein, the principle will probably also be accepted that participation in a legal strike does not amount to a breach of contract but merely results in a suspension of the employment contract for the duration of the strike.

It is submitted that such an interpretation of the unfair labour practice definition not only accords full recognition to the fact that the right to strike is a constitutionally protected right in terms of South Africa's bill of rights (thus having "due regard" to this entrenched fundamental right), but is also in keeping with the principle that no right can be absolute – a principle which is endorsed by the general limitation clause in the bill of rights. Limiting the right to strike to procedural (legal) strikes ensures that the dispute which gave rise to the dispute is first referred to the conciliatory mechanisms provided for in section 65 of the LRA, in keeping with the principle that collective bargaining remains the preferred method of resolving labour disputes. Furthermore, such procedural limitation clearly does not negate the essential content of the right to strike and is therefore in keeping with one of the tests contained in the general limitation clause (s 33(1)).

In terms of this approach, strikers who embark upon a legal strike will enjoy immunity against dismissal. Illegal strikers will not be afforded such protection. It is submitted, however, that the past practice of protecting illegal strikers who are dismissed on the basis of their participation in (illegal) strike action will still be possible in certain circumstances. It would be unfair to dismiss illegal strikers where the strike is found to be functional to the collective bargaining process (in keeping with the objects of the LRA to promote collective bargaining as a way to ensure industrial peace): where, for instance, the employer provokes an illegal strike by refusing to negotiate with the workers and thereafter simply dismisses them, such a dismissal would be unfair in view of the clearly provocative stance of the employer who unfairly refuses to comply with its duty to negotiate (see *Kolatsoeu v Afro-Sun Investments (Pty) Ltd t/a Releke Zezame Supermarket* 1990 *ILJ* 754 (IC) 757E; *National Union of Metalworkers of South Africa v ELM Street Plastics t/a ADV Plastics* 1989 *ILJ* 328 (IC) 335F). Furthermore, where the employer does not afford strikers a proper opportunity to reconsider their actions, that is to say, fails to issue a proper ultimatum but merely proceeds summarily to dismiss them, this fact may brand the dismissal unfair despite the illegality of the industrial action (see *Performing Arts Council (Transvaal) v Paper Printing & Allied Workers Union* 1992 *ILJ* 1439 (LAC)).

Although the recognition of the right to strike in the manner described above is an innovation in South African strike law, it is, in reality, only the logical consequence of the developments in strike law over the past few years. Initially there was some reluctance on the part of the courts to protect even legal strikers

against dismissal. This is no longer the position. In the landmark judgment of *Black Allied Workers Union v Prestige Hotels CC t/a Blue Waters Hotel* 1993 *ILJ* 963 (LAC) the labour appeal court accepted that workers who take part in a legal strike may not be dismissed. The court based its reasoning on the notion that if workers contemplating strike action face the possibility of dismissal, this would render the strike action ineffective for the purpose of collective bargaining. The reasoning of the labour appeal court is clearly correct, especially when viewed in the new human rights context within which the industrial court will, from now on, have to evaluate the fairness of the dismissal of strikers, and which recognises the fundamental right to strike for the purposes of collective bargaining.

3 2 2 The right to freedom of expression and to picket

A more difficult situation presents itself when the industrial court, in interpreting the definition of an unfair labour practice, has to take cognisance of those fundamental human rights which traditionally fall outside the labour terrain.

A picket situation is a case in point where the industrial court will be required to have "due regard" to such wider spectrum of human rights. Picketing occurs where strikers station themselves near to their place of work in an attempt to persuade other parties such as customers and non-striking workers not to enter the premises of the employer, to work or to do business there. Picketing often constitutes a vital component of a union's strike strategy and, depending on where the picketing takes place and its nature, various legal consequences may flow from the picket, including the commission of criminal offences such as assault, trespassing on private property, intimidation and defamation (where, for example, the placards used by the strikers during the strike contain defamatory statements). Moreover, strikers who take part in the picket may also face the possibility of disciplinary action being taken against them, including dismissal.

Whenever the industrial court is called upon to decide whether the prohibition or limitation of picketing constitutes an unfair labour practice in terms of the LRA, the industrial court is obliged, in keeping with the wider constitutional interpretive context, to consider this matter in the light of the constitutionally entrenched rights. The right to freedom of expression contained in section 15 of the interim Constitution is applicable here. It may undoubtedly be argued that there is an element of freedom of expression present when workers picket, thus bringing it within the ambit of a recognised fundamental right. This argument was endorsed in the Canadian case of *RWDSU, Dolphin Delivery Ltd* (1986) 2 SCR 573 855 where the court pointed out that

> "[t]he union is making a statement to the general public that it is involved in a dispute, that it is seeking to impose its will on the object of the picketing, and that it solicits the assistance of the public in honouring the picket line. Action on the part of the picketers will, of course, always accompany the expression, but not every action on the part of the picketers will be such as to alter the nature of the whole transaction and remove it from Charter protection for freedom of expression".

It may be argued further that the right to assemble and demonstrate with others peacefully and unarmed (s 16) is implicit to freedom of expression, which has as its rationale the maintenance of the democratic process (see in general Norman "Freedom of peaceful assembly and freedom of association" in Beaudoin and Ratushny (eds) *The Canadian Charter on rights and freedoms* 227).

Notwithstanding years of constitutional litigation, the last word on picketing has not yet been spoken in the United States of America. In a series of cases defining the scope of freedom of speech entrenched in the Fourteenth Amendment, peaceful picketing was recognised as "the working man's means of communication" (*Milk Wagon Drivers' Union of Chicago v Meadowmoor Dairies, Inc* 312 US 237 (1941)). Although this link between picketing and the right to free speech was weakened by a long line of cases, later decisions again referred to it. One judgment even went so far as to limit an employer's right to private property in favour of upholding the worker's freedom of speech (*Amalgamated Food Employees Union Local v Logan Valley Plaza, Inc* 391 US 308 (1968) – see also Kahn-Freund "The impact of constitutions on labour law" 1976 *Camb LJ* 258 *et seq*).

Although, by and large, the interests of free speech are outweighed by the interests of the employer in Canadian law, the courts generally do not interfere with peaceful informational picketing at the employer's business, especially if small numbers of picketers are involved in support of a legal strike (see Arthurs, Carter, Fudge and Glasbeek *Labour law and industrial relations in Canada* (1988) 265). It does, however, appear that in most jurisdictions violent and intimidating picketing are regarded as unlawful (see Twomey *Labor & employment law, text & cases* (1989) 219). In France, for example, picketing is regarded as lawful only if conducted outside the premises of the enterprise and takes place in a manner which is peaceful and which does not obstruct free passage to and from the premises of the enterprise. Pickets inside the employer's premises are equated with sit-ins and are considered to be unlawful. Likewise, pickets which are accompanied by violence and those preventing free access to or from an enterprise constitute penal offences of violence and interference with the freedom to work and will also normally justify dismissal.

From a perusal of American and Canadian jurisprudence in particular, it appears that the problems associated with the weighing-up process in coming to a decision whether to allow workers to picket, should not be underestimated. The competing interests at stake are, on the one hand, the individual worker's right to freedom of speech and expression (and possibly also the right to freedom of assembly) and, on the other, the employer's right freely to engage in economic activity which may also include its right to pursue its lawful business interests and the right to preserve and protect its normal business operation. Other interests such as the preservation of industrial peace and property rights may also be involved in this weighing-up process.

In one of the few South African cases in which the issue of picketing arose, *Laursens Division of BTR Ltd v National Union of Metalworkers of SA* 1992 *ILJ* 1405 (T), the court seemingly adopted a very restrictive approach when evaluating a limitation on picketing. In this instance legal strikers were interdicted from picketing on the ground that their mere presence was intimidating and threatening. The court held that

> "[i]t is entirely unnecessary in our law to hold that they have 'the right to congregate' or 'a right to demonstrate'. Each subject has the right to do exactly as he pleases provided that what he does is lawful" (1408B).

It is submitted that, in future, the reasoning in similar cases will be quite different. The industrial court will have to recognise, as a point of departure, that workers are entitled to various fundamental human rights which are

constitutionally entrenched. Moreover, in interpreting the unfair labour practice definition, the industrial court will be faced with the manifestly difficult task of defining the ambit of the right to freedom of expression, as well as determining whether the element of freedom of expression also includes the right of workers to picket. This process will involve the difficult process of weighing up the interests of the workers against the interests of the employer.

3 2 3 Freedom of expression: political insignia

Another example of the difficulty involved in the process which takes cognisance of the general limitation clause in the bill of rights in balancing the competing interests of employer and employee, can be identified. If the freedom of expression of workers to wear political insignia at work is infringed upon by company rules which prohibit this, the freedom of expression of the workers, as well as the right to free political activity (both of which are fundamental rights which are entrenched in the bill of rights – see s 15 and s 21 respectively) would have to be weighed up against the legitimate interests of the employer to avoid political conflict in the workplace, which in turn may lead to industrial strife. Put differently, the question is whether such a prohibition constitutes a reasonable, justifiable and necessary limitation upon the fundamental rights of the worker, taking into account the tests enunciated in the limitations clause contained in the bill of rights.

This question was considered by the supreme court in the case of *Atlantis Diesel Engine (Pty) Ltd v Roux NO* 1988 (9) *ILJ* 45 (C) where a company rule was introduced prohibiting employees from wearing clothing bearing, *inter alia*, political badges. The supreme court reasoned that it was not an unfair labour practice to dismiss an employee who persisted in wearing clothing bearing political insignia contrary to a company rule prohibiting such clothing. Again, should a similar case be brought to the industrial court operating within the new context of a human rights culture, a different outcome can be expected. As has been pointed out above, the interpretation of the unfair labour practice definition will have to be undertaken with "due regard" to the fundamental rights, such as the freedom of expression and the right freely to make political choices. Furthermore, once it has been ascertained that these rights of the workers have indeed been infringed, such infringements will stand only if they constitute limitations which pass the tests contained in the general limitation clause (s 33(1)).

4 Conclusion

It is clear that the introduction of the interim Constitution will fundamentally influence South African labour law. It will have a profound effect on the principles of common law as they apply to the labour relationship as well as upon the unfair labour practice jurisdiction of the specialised courts. It will even bring into play the constitutional jurisdiction of the courts especially in the case of government workers. South African labour law now operates within a completely different context which is infused by the values which promote a human rights culture and which underlie the new social, political and legal order in South Africa. These developments must be welcomed in the interests of the free and democratic South Africa which the interim Constitution seeks to introduce.

ANNALI C BASSON
University of South Africa

VONNISSE

LASTER: DIE BEWYSLAS, MEDIA-PRIVILEGIE EN DIE INVLOED VAN DIE NUWE GRONDWET

Neethling v Du Preez, Neethling v The Weekly Mail 1994 1 SA 708 (A)

Hierdie appèl spruit voort uit die opspraakwekkende bewerings wat in die *Vrye Weekblad* en *The Weekly Mail* gemaak is dat die eiser, hoof van die forensiese afdeling van die Suid-Afrikaanse Polisie, gif aan sekere polisiebeamptes voorsien het om ANC-verdagtes mee te vergiftig. In die hof *a quo* wys regter Kriegler die lastereis van die hand. Die appèl slaag egter. Alhoewel dit vir die appèlhof nodig was om die feite van die saak breedvoerig uiteen te sit en te ontleed, beperk ons die bespreking tot die twee regsvrae wat duidelik in die beslissing na vore kom, naamlik die vraag of die verweerder 'n weerleggingslas dan wel 'n volle bewyslas het om 'n lasterlike publikasie te regverdig, en die vraag na die bestaan al dan nie van 'n sogenaamde media-privilegie (''newspaper privilege''). Hierbenewens word kortliks op die moontlike implikasies van die nuwe Grondwet van die Republiek van Suid-Afrika 200 van 1993 gewys.

1 Die bewyslas

Sedert *SAUK v O'Malley* 1977 3 SA 394 (A) 401 – 403 is met die uitsondering van die beslissing van appèlregter Kotzé in *Joubert v Venter* 1985 1 SA 654 (A) 696 – 697 (vgl ook *Zwiegelaar v Botha* 1989 3 SA 351 (K) 355 – 356) aanvaar dat daar in 'n lasteraksie 'n blote *weerleggingslas* (voortgangsverpligting) in teenstelling met 'n volle bewyslas op die verweerder rus om die vermoedens van onregmatigheid en opset, wat spruit uit die publikasie van 'n *prima facie*-onregmatige lasterlike bewering, te weerlê (bv *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; *Jasat v Paruk* 1983 4 SA 728 (N) 733; *Zillie v Johnson* 1984 2 SA 186 (W) 194 – 195; *Iyman v Natal Witness Printing and Publishing Co (Pty) Ltd* 1991 4 SA 677 (N) 681 – 684; Neethling *Persoonlikheidsreg* (1991) 139; Burchell *Principles of delict* (1993) 178; Burchell *The law of defamation in South Africa* (1985) 258 – 259). Appèlregter Hoexter stel dit só in die *Neethling*-saak (767I – J):

> "It would seem that since the *O'Malley* case the view has been widely held and expressed, both by the Courts and by academic writers, that the *dicta* in that judgment involved an assertion that a defendant in a defamation action who wishes to repel the presumption of unlawfulness, for example by raising a defence of qualified privilege, bears no more than a 'weerleggingslas' or evidentiary burden."

Na 'n ontleding van die *O'Malley*-saak en ander regspraak bring appèlregter Hoexter 'n ommekeer van hierdie aanvaarde posisie teweeg. Hy verklaar dat in die *O'Malley*-saak die verwysing na die weerleggingslas slegs in verband met die vermoede van opset om te belaster (*animus iniuriandi*) ter sprake gekom het en nie ook met betrekking tot die vermoede van onregmatigheid (verweer van bv privilegie) nie (767 – 768). Volgens die appèlregter is daar in elk geval 'n groot verskil tussen die vermoede van *animus iniuriandi* en die vermoede van onregmatigheid, al ontstaan beide vermoedens uit die plaasvind van dieselfde gebeurtenis (die publikasie van die lasterlike bewering aangaande die eiser: 768I – 769A):

> "The presumption of *animus injuriandi* relates to the defendant's subjective state of mind (a deliberate intention to inflict injury) whereas the presumption of unlawfulness relates to objective matters of fact and law" (769A).

Die regter kom dan ook tot die gevolgtrekking

> "that nothing stated in the *O'Malley* case represents authority for the proposition that in our law of defamation a defence raised in order to repel the presumption of unlawfulness attracts no more than an evidentiary burden or 'weerleggingslas'" (769B).

Met die struikelblok van die *O'Malley*-saak uit die weg geruim, kom die regter op grond van beslissings van die appèlhof ook voor die *O'Malley*-saak (mbt die regverdigingsgronde privilegie en waarheid en openbare belang: bv *Pillay v Krishna* 1946 AD 946 951 – 953; *Johnson v Rand Daily Mails* 1928 AD 190 196) tot die gevolgtrekking dat daar 'n volle bewyslas op die verweerder rus om hierdie regverdigingsgronde te weerlê. Afgesien van die beginsel dat al drie die tradisionele regverdigingsgronde by laster (dus ook billike kommentaar) wat die bewyslas betref volgens die regter oor dieselfde kam geskeer behoort te word (770C), is daar in die geval van die verweer waarheid en openbare belang boonop dwingende beleidsoorwegings ten gunste van 'n volle bewyslas (770C – J):

> "Since it is entirely of his own accord that the defendant elects to vilify the plaintiff, justice demands that he should do so at his peril; and that in an action for defamation he should have to establish what he should have troubled to verify before he maligned the plaintiff. I recoil from the suggestion that it is enough for a defendant who invokes the defence of truth in the public benefit to plead, and to prove, no more than: (1) that it is just as likely as not that his defamatory allegations concerning the plaintiff are true; and (2) that it is not improbable that they might be in the public benefit."

Die regter se slotsom, waarmee ons ons (ook in die lig van die nuwe Grondwet, soos ons later – in par 3 hieronder – breedvoeriger sal verduidelik) vereenselwig, verwoord hy soos volg (770H – J):

> "For all the aforegoing reasons I conclude that in our law a defendant in a defamation action is encumbered with a full *onus* in regard to the defences of truth in the public benefit and of qualified privilege. Such defences can be sustained by nothing less than proof on a balance of probabilities. In passing it may be mentioned that proof on a balance of probabilities is required also in England and in those Commonwealth countries in which the common law of defamation allocates to the defendant a burden of proof in regard to the defence of truth and the defence of qualified privilege. In my respectful view the Court *a quo* erred in holding that the respondents were burdened with no more than an evidentiary burden."

2 Media-privilegie

Die vraag hier is of ons reg erkenning behoort te verleen aan 'n nuwe regverdigingsgrond, sogenaamde media-privilegie. Die kern van hierdie verweer is of in besondere omstandighede die openbare belang op sigself – dit wil sê sonder dat die lasterlike bewerings ook waar is – 'n lasterlike publikasie kan regverdig.

In die hof *a quo* antwoord regter Kriegler in navolging van regter Coetzee se uitspraak in *Zillie v Johnson supra* bevestigend hierop (sien die *Neethling*-appèlhofsaak 771 – 775; vgl Burchell *Delict* 170 – 175; Neethling *Persoonlikheidsreg* 152 – 153; Neethling en Potgieter "Openbare belang as selfstandige verweer by laster" 1993 *THRHR* 323 – 324).

Appèlregter Hoexter is egter sterk gekant teen die erkenning van so 'n nuwe verweer. Volgens hom verteenwoordig regter Kriegler se uitspraak

> "not only a marked departure from precedent and principle, but also an unsound one. Into what juristic niche it is designed to fit is, I think, a matter of some difficulty" (775H).

Hierbenewens is die onderhawige verweer volgens regter Hoexter onaanvaarbaar omdat dit "accords to the press a licence" wat nóg in die Suid-Afrikaanse reg, nóg – met die uitsondering van die VSA – deur die regstelsels van die meeste ander Engelssprekende lande erken word (776G).

Voorts vind regter Hoexter die standpunt in *Zillie supra* 195 onhoudbaar dat die "general principle is where public policy justifies the publication and requires that it be found to be a lawful one" (777D):

> "It is trite that underlying the three traditional and specialised defences (privilege; truth in the public benefit; and fair comment) are the requirement of public policy. Since these three categories of justification do not represent a *numerus clausus* it may also be accepted that in the further development of our law of defamation, if and when the Courts decide to define and delimit any further categories of justification, the governing factor will likewise be the dictates of public policy. The fact that the traditional defences do not constitute a closed list of categories of justification, however, does not mean that in the present state of the law a court is free to consider the issue of liability for the publication of a defamatory statement by a newspaper independently of the substantive requirements of the traditional defences, and simply by abstract reference to a 'general principle . . . whether public policy justifies the publication and requires that it be found to be a lawful one'. In my opinion our law recognises no such defence to an action for defamation, whether the matter complained of be published by a newspaper or by anybody else" (777D – G).

Media-privilegie as 'n tipe verskyningsvorm van so 'n "public policy"-verweer word volgens appèlregter Hoexter nie alleen nie in ons reg erken nie, maar is inderdaad "entirely alien to it" (777H). Alhoewel appèlregter Hoexter 'n algemene media-privilegie gegrond op "public policy" afwys, ondersoek hy nietemin die vraag of die lasterlike publikasie nie deur die tradisionele *relatiewe privilegie* (sien in die algemeen Neethling *Persoonlikheidsreg* 141 ev) geregverdig word nie (778A ev). Volgens die regter is Engelse en ander Statebondsbeslissings in die algemeen gekant teen die erkenning van relatiewe privilegie in mediaverband. Onder meer die volgende stellings weerspieël die houding in daardie jurisdiksies (asook in Suid-Afrika) en word deur regter Hoexter in ag geneem by sy beslissing dat die verweersgrond *in casu* faal (780 – 784): gemeenregtelik bestaan daar nie so 'n verweer nie; die gemenereg erken nie 'n sterk genoeg plig-belang-verhouding tussen 'n koerant en sy lesers om 'n verweer van relatiewe privilegie te regverdig nie aangesien publikasie deur 'n koerant aan die gemeenskap as geheel gerig word sonder dat elke individuele leser 'n persoonlike belang by die betrokke onderwerp het; daar is 'n groot verskil tussen wat in die openbare belang ("in the public interest") is en wat die publiek bloot interesseer ("interesting to the public" is) (sien ook *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 2 SA 451 (A) 464); 'n koerantpublikasie is nie die onderwerp van relatiewe privilegie net omdat die betrokke aangeleentheid die publiek interesseer nie omdat relatiewe privilegie steeds vereis dat daar 'n regs-,

morele of sosiale plig moet wees om 'n lasterlike bewering te publiseer en dat die publiek 'n ooreenstemmende reg of belang moet hê om daarvan te verneem: hierdie wederkerigheid "connotes a common legitimate interest which is more than idle curiosity in the affairs of others"; die toets of sodanige plig op die media gerus het, word objektief beoordeel: die vraag is of "the great mass of right-minded persons in the position of the defamer [would] have considered, in all the circumstances, that it was their duty to make the communication"; funksies van die pers is onder andere om hulle lesers van billike en akkurate verslae te voorsien in verband met die verrigtinge van howe, die parlement en andersins, asook om die publiek in te lig oor heersende gebeure en skinderstories; ten einde sirkulasiesyfers te verhoog, bestaan die gevaar dat die media dit wat in die openbare belang is, kan verwar met die media se privaat ekonomiese belang; om te besluit of 'n lasterlike publikasie deur relatiewe privilegie geregverdig word, is die status van die onderwerp wat gekommunikeer word (dws die bron en intrinsieke waarde daarvan) van deurslaggewende belang (bv of die bron amptelik en geïdentifiseer, dan wel informeel en anoniem is).

Ons stem in beginsel saam met appèlregter Hoexter (en hoofregter Corbett: 802G) se afwysing van die openbare inligtingsbelang (algemene media-privilegie) as selfstandige regverdigingsgrond vir laster. Die uitspraak bevestig ons standpunt dat daar nie te geredelik aanvaar behoort 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 (sien Neethling en Potgieter 1993 *THRHR* 326). Die moontlikheid dat daar in die lig van die grondwetlike beskerming van vryheid van spraak wel 'n behoefte aan 'n nuwe regverdigingsgrond vir media-publikasies kan ontstaan, word hieronder (par 3) bespreek.

3 Invloed van die nuwe Grondwet

Daar bestaan geen twyfel dat die bepalings van die Grondwet, wat die hoogste reg in die land uitmaak (a 4(1)), 'n invloed op die lasterreg kan hê nie. Artikel 35(3) stel dit duidelik dat by die toepassing en ontwikkeling van onder meer die gemenereg (dus ook die lasterreg), 'n hof die gees, strekking en oogmerke van die hoofstuk oor fundamentele regte (hfst 3) behoorlik in ag moet neem (vgl ook a 7(2)). Voorts is artikel 35(1) van groot belang by die uitleg van hoofstuk 3. Hiervolgens moet 'n hof

> "die waardes wat 'n oop en demokratiese samelewing gebaseer op vryheid en gelykheid ten grondslag lê, bevorder en, waar van toepassing, die volkereg wat van toepassing is op die beskerming van die regte wat in hierdie Hoofstuk verskans is, in ag neem, en kan die hof vergelykbare buitelandse hofbeslissings in ag neem".

Veral die volgende fundamentele regte kom by die lasterreg ter sprake. Enersyds het elke persoon ingevolge artikel 15(1) "die reg op vryheid van spraak en uitdrukking, waarby inbegrepe is vryheid van die pers en ander media". Andersyds, alhoewel die persoonlikheidsreg op die goeie naam of *fama* (wat deur laster aangetas word – Neethling *Persoonlikheidsreg* 29 125 130) nie *eo nomine* as mensereg verskans word nie, vorm dit na ons mening vanselfsprekend deel van die reg op respek vir en beskerming van 'n persoon se waardigheid (menswaardigheid) wat ingevolge artikel 10 beskerm word. Steun vir die standpunt dat die

reg op die goeie naam onder die mensereg op waardigheid tuisgebring kan word, blyk uit die erkenning van 'n algemene persoonlikheidsreg, waaronder die reg op die goeie naam, deur die Duitse regspraak op grond van artikels 1(1) en 2(1) van die *Grundgesetz* waarin die menslike eiewaarde (''Würde des Menschen'') en vrye ontplooiing van die menslike persoonlikheid (''das Recht auf die freie Entfaltung seiner Persönlichkeit'') as fundamentele regte verskans word (sien hieroor Neethling *Die reg op privaatheid* (LLD-proefskrif Unisa 1976) 27 – 28; Pauw *Persoonlikheidskrenking en skuld in die Suid-Afrikaanse privaatreg* (LLD-proefskrif Leiden 1976) 103 ev).

Die vraag is nou wat die invloed van vermelde regte op 'n saak soos die onderhawige kan wees. In die algemeen is daar na ons mening twee benaderings moontlik.

(a) Aan die een kant kan betoog word dat vryheid van spraak voorrang bo die reg op die goeie naam behoort te geniet aangesien die goeie naam nie uitdruklik in die Grondwet genoem word nie. Die moontlike implikasie van hierdie benadering met betrekking tot die *bewyslas* (*supra* par 1) is dat die volle bewyslas weer op die eiser geplaas kan word om die hof te oortuig waarom sy reg op die goeie naam nie deur die verskanste reg op vryheid van spraak ingeperk moet word nie; anders gestel, dat daar hoogstens 'n weerleggingslas op die verweerder geplaas word om sy regverdigingsgrond te bewys. Wat die verweer van *media-privilegie* betref, kan hierdie benadering ruimte bied vir die argument dat ons reg wel, soos in die VSA, plek moet maak vir so 'n verweer. Appèlregter Hoexter stel die posisie in die VSA soos volg (780A – B):

> ''In the United States of America media liability for defamation appears to have been shaped by constitutional guarantees of free speech and a free press; and the law stands in rather sharp contrast to that of most other countries in the English-speaking world.''

Dit beteken egter nie dat die uiterste Amerikaanse voorbeeld noodwendig gevolg hoef te word nie. Die posisie in ander lande soos Duitsland en statebondslande (bv Kanada en Maleisië) waarin vryheid van spraak ook grondwetlik beskerm word, moet ook oorweeg word – waarmee nie gesê word dat ons eie *boni mores* nie nogtans die deurslag kan gee nie. Alhoewel ons howe in ieder geval nog altyd tereg van regsvergelyking gebruik gemaak het vir sover dit bevrugtend op ons eie stelsel kon inwerk, moet dit duidelik gestel word dat die uitlegartikel (35(1)) geen hof *verplig* om buitelandse hofbeslissings in ag te neem nie, om van navolg nie eens te praat nie. Hierbenewens moet ook in gedagte gehou word dat die Grondwet (a 33(1)) uitdruklik daarvoor voorsiening maak dat fundamentele regte (dus ook vryheid van spraak) deur die geldende reg (dus oa die lasterreg) *beperk* mag word in die mate waarin dit redelik is, regverdigbaar is in 'n oop en demokratiese gemeenskap gebaseer op vryheid en gelykheid, en die wesenlike inhoud van die betrokke reg nie ontken word nie. Die *status quo* met betrekking tot die Suid-Afrikaanse reg sou dus ewegoed gehandhaaf kon word. Indien egter bevind sou word dat daar wel behoefte aan 'n verweer van media-privilegie in Suid-Afrika bestaan (en dit kan in die lig van bostaande uiteensetting steeds bevraagteken word), is dit uiters noodsaaklik dat die toepassing van die verweer streng beperk en die grense daarvan gevolglik duidelik uitgespel word (vir riglyne wat ons in hierdie verband aan die hand doen, sien Neethling en Potgieter 1993 *THRHR* 324 – 326).

'n Verdere moontlike uitbreiding van die reg op vryheid van spraak (wat nie in die *Neethling*-saak ter sprake was nie), is dat strikte aanspreeklikheid van die media (*Pakendorf v De Flamingh* 1982 3 SA 146 (A)) deur aanspreeklikheid

gegrond op opset (*animus iniuriandi*) vervang kan word. In die VSA het die pendulum sedert 1964 juis meer ten gunste van vryheid van die pers geswaai en word 'n skuldverwyt van "actual malice", analoog aan ons *animus iniuriandi*, nou vereis vir aanspreeklikheid weens die belastering van openbare amptenare en openbare figure (*New York Times Co v Sullivan* 376 US 254 (1964); *Curtis Publishing Co v Butts; Associated Press v Walker* 388 US 130 (1967)). Miskien lê die kompromie-oplossing (indien daar wel 'n behoefte aan verandering is) in die *de lege ferenda*-aanvaarding van *nalatigheid* as basis vir aanspreeklikheid vir media-laster in ons reg (sien Burchell *Defamation* 193 – 194; Neethling *Persoonlikheidsreg* 166 – 167 vn 347).

(b) Aan die ander kant kan geargumenteer word – en dit is na ons mening die korrekte benadering – dat die reg op die goeie naam (as inbegrepe by die menslike waardigheid soos in die Duitse reg – sien hierbo) en die reg op vryheid van spraak op gelyke voet in die Grondwet staan. Dit bring logieserwys mee dat die een nie op onredelike wyse bo die ander gehandhaaf moet word nie. Vryheid van spraak behoort dus veel minder (moontlike) inperking van die reg op die goeie naam tot gevolg te hê as ingevolge die eerste benadering (sien (a) hierbo). So gesien, behoort 'n uitspraak soos die *Neethling*-beslissing onder die nuwe grondwetlike bedeling nie veel anders daaruit te sien nie. Dit word gestaaf deur die feit dat die hof wat sowel die bewyslas as die kwessie van media-privilegie betref, deeglik kennis van buitelandse hofbeslissings geneem het (770I 776G 780 – 784). Op grond hiervan kan betoog word dat die hof uiteraard "die waardes wat 'n oop en demokratiese samelewing gebaseer op vryheid en gelykheid ten grondslag lê" (a 35(1)), in ag geneem het. Die waarskuwing wat hierbo in verband met 'n blinde navolging van veral die Amerikaanse reg op die gebied van laster gerig is, geld ook hier. Nieteenstaande herhaling wil ons weer beklemtoon dat ons eie privaatreg nie in die proses van belange-afweging geringgeag moet word nie. Per slot van rekening is ons privaatreg gebou op die Romeins-Hollandse reg wat by geleentheid beskryf is

> "as one of the world's great legal systems, representing civilian tradition at its best, built upon principles of equity and equality and placing a high value on the rights and liberties of the individual" (Van Wyk "The task facing South African law in the 21st century, with particular emphasis on the resilience of our Roman law heritage" 1993 (2) *Codicillus* 50; sien ook Neethling "A vision of South African private law – independent coexistence or reconciliatory synthesis?" 1993 (2) *Codicillus* 62).

In die lig hiervan moet grootliks ongemotiveerde kritiek van sogenaamd ongeregverdigde beperkings op persvryheid deur drie onlangse beslissings van die appèlhof, waaronder die *Neethling*-saak, bevraagteken word. (Die ander twee sake is *Financial Mail v Sage Holdings supra* waarin die reg op privaatheid van regspersone erken is (vir 'n bespreking sien Neethling en Potgieter "Die reg op privaatheid: regspersone, onregmatigheid en die openbare inligtingsbelang" 1993 *THRHR* 704 – 708), en *Argus Printing and Publishing Co Ltd v Esselen's Estate* 1994 2 SA 1 (A) waarin bevestig is dat 'n regter van die hooggeregshof ook 'n reg op die goeie naam het en daarom weens laster *locus standi* het.) In "Disappointing decision on press freedom" 1994 *Rights* 47 verklaar Lawyers for Human Rights naamlik:

> "This [*Neethling*] is the second in a series of three cases in which the Appellate Division has, disappointingly, defined further limitations on freedom of expression and in particular, the freedom of the media . . . One wonders whether all these decisions may not be challenged under Article 15 of the Interim Constitution which protects freedom of expression and the media, on the basis that these are not reasonable limitations

> and 'justifiable in an open and democratic society based on freedom and equality'. These judgments will definitely have the effect of tempering the robust investigative approach which some newspapers have adopted in the past."

Veral die laaste sin wek die indruk dat vermelde organisasie ten gunste van feitlik onbeperkte vryheid van spraak in Suid-Afrika is – hulle gee geen aanduiding van wat hulle as redelike grense beskou nie. Sou hulle kritiek teen die beslissings impliseer dat die pers *carte blanche* gegee moet word om lasterlike onwaarhede te publiseer oor aangeleenthede wat hulle as van openbare belang beskou, om regters na willekeur te beswadder, en om onbeperk op 'n onregmatige wyse in die private sfeer van regspersone in te dring? Indien wel, negeer hulle feitlik geheel en al gelykwaardige regte (soos die reg op privaatheid en dié op die goeie naam) wat uitdruklik of by implikasie in die Grondwet verskans word.

Ongemotiveerde kritiek soos dié van Lawyers for Human Rights op uitsprake van 'n regter van die statuur en aansien van hoofregter Corbett (wat twee van die betrokke uitsprake geskryf en met appèlregter Hoexter in die *Neethling*-saak saamgestem het), dui op 'n onverantwoordelike siening van vryheid van spraak wat in ieder geval in talle beskaafde, oop en demokratiese lande nie gehandhaaf word nie.

Daar word vertrou dat die konstitusionele hof, ten einde die vertroue van die Suid-Afrikaanse gemeenskap te verseker, deeglik kennis sal neem van die deurvorste en deurdagte uitsprake van die appèlhof op die gebied van die lasterreg.

J NEETHLING
JM POTGIETER
Universiteit van Suid-Afrika

GEREGTELIKE HERSIENING VAN BESLUITE VAN NIE-STATUTÊRE LIGGAME

Government of the Self-Governing Territory of Kwa-Zulu v Mahlangu 1994 1 SA 626 (T)

1 Relevante feite

Hierdie saak is 'n direkte uitvloeisel van die onttrekking van die Inkatha Vryheidsparty (IVP) en die regering van Kwa-Zulu aan die Veelparty Grondwetlike Onderhandelingskonferensie wat tydens die grootste deel van 1993 en die begin van 1994 in Kempton Park plaasgevind het. Die doel van hierdie onderhandelinge was om 'n nuwe konstitusionele bedeling vir Suid-Afrika daar te stel. Die IVP en die regering van Kwa-Zulu het aan die onderhandelings onttrek weens ongelukkigheid met sekere besluite wat twee voorsitters tydens hierdie onderhandelinge geneem het. Hierdie besluite hou hoofsaaklik verband met die vraag

of voldoende konsensus ("sufficient consensus") volgens die Staande Prosedurereëls aanwesig was vir bepaalde besluite van die konferensie. Hierdie prosedurereëls was eenparig deur al die deelnemende partye aanvaar.

Reël 4 van die Staande Prosedurereëls vir die Veelparty Onderhandelingsproses bepaal dat ooreenkomste deur algemene konsensus bereik moet word. By gebrek daaraan, moet die voorsitter besluit of daar voldoende konsensus vir 'n besluit aanwesig is voordat die onderhandelingsproses kan aangaan. Alvorens die voorsitter so 'n besluit neem, moet hy tevrede wees dat die partye wat nie saamstem nie voldoende geleentheid gehad het om van verskeie meganismes gebruik te maak ten einde die grootste moontlike konsensus te bereik.

Die afgevaardigde van die Kwa-Zulu regering het hom vereenselwig met die IVP mosies en die Kwa-Zulu regering doen aansoek om 'n verklarende bevel dat die

> "phrase 'sufficient *consensus*' . . . is quantitively and qualitively vague and ambiguous to the extent that it cannot serve as a proper guideline for the exercise of a discretion as to whether *consensus* exists or does not exist" (632J – 633B).

Daarby saam word hersiening van sommige besluite van twee voorsitters gevra (633B – G). Die applikant voel gegrief omdat die meganismes om wyer konsensus te bereik, hom en die IVP ontsê is.

2 Beslissing

Die volbank, by monde van regter-president Eloff, wys die aansoek vir 'n verklaring van regte en vir hersiening van die hand op grond daarvan dat die aansoeker geen bestaande reg het nie (638G).

Die hof vereis die aanwesigheid van sodanige reg in beide die aansoek om 'n verklaring van regte en hersiening (633I – 635A). Artikel 19(1)(a) van die Wet op die Hooggeregshof 59 van 1959 bepaal dat 'n hof slegs 'n verklarende bevel kan verleen ten aansien van 'n bestaande, toekomstige of voorwaardelike reg of verpligting (633I – 634B). Voorts word vir die hersiening van besluite van nie-statutêre liggame vereis dat die besluite op 'n kontrak moet berus (634E). Die hof stel dit soos volg:

> "Our Courts have frequently exercised powers of review in regard to decisions of non-statutory bodies, but in all those cases that was done because the body, such as a club, political party, *universitas*, or such like association, was created by agreement, and the agreement expressly or by clear implication provided certain things, for example expulsion of members, would be done in a particular way" (634E – F).

Die applikant gee toe dat hy die bestaan van 'n kontrak moet bewys (635A).

Die hof grond sy bevinding dat die applikant geen bestaande reg het nie, daarop dat die Staande Prosedurereëls vir die Veelparty Onderhandelingsproses nie op kontrak berus nie en dat die applikant derhalwe nie 'n kontraktuele reg daarop het dat die reëls deur die deelnemende partye nagekom moet word nie. Die applikant se aansoek bevat ten eerste geen bewering dat die reëls op kontrak berus nie (635H – 638A). Daar is ook verskeie ander aanduidings dat die partye nie bedoel het om ooreenkomste met regsgevolge te skep nie, onder andere die feit dat die deelnemende partye vry was om aan die onderhandelinge te onttrek (638B – 638G). Die hof bevind dus tereg dat die partye nie bedoel het om by die aanvaarding van die reëls van prosedure 'n bindende kontrak te skep nie. Die bedoeling was om 'n politieke onderhandelingsproses aan die gang te sit en daarvoor het die partye reëls van prosedure nodig gehad (636B – C).

Die hof voeg by dat insoverre die remedies diskresionêr is, hy van mening is dat dit nie gepas is om in die politieke proses in te meng wat in daardie stadium nog nie afgehandel was nie, maar dat deelname en debat die enigste metode vir die applikant is om sy doel te bereik (638G – H).

3 Besluite van privaatregtelike liggame wat wel vatbaar vir geregtelike hersiening is

Die vraag ontstaan of die volbank en die applikant korrek is in hulle siening dat die bestaan van 'n kontrak die bron en oorsprong van die hof se hersieningsbevoegdheid van die besluite van 'n nie-statutêre liggaam is. 'n Oorsig van die huidige positiewe reg is dus gepas.

Waar die privaat liggaam 'n statutêre plig opgelê word wat in die algemene belang uitgeoefen moet word, is die bevoegdheid in beginsel vir geregtelike hersiening vatbaar (*Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange* 1983 3 SA 344 (W) 361 – 362 364 – 365). Statutêre gesagsbevoegdhede wat in die algemene belang uitgeoefen moet word, behoort insgelyks vir hersiening vatbaar te wees (Wiechers *Administratiefreg* (1984) 3 – 4).

Waar dit gaan oor die uitoefening van kontraktuele bevoegdhede, word hierdie bevoegdhede dikwels beperk deur bedinge wat van regsweë ingelees word. Die reëls van natuurlike geregtigheid word so ingelees. In *Theron v Ring van Wellington van die NG Sendingkerk in Suid-Afrika* 1976 2 SA 1 (A) 21 gee appèlregter Jansen te kenne dat die reëls van natuurlike geregtigheid voortspruit uit die toepassing van die grondbeginsels van kontrak, veral die goeie trou. Privaat liggame moet hierdie reëls in ag neem by die uitoefening van hulle tugbevoegdhede teenoor lede, asook die bevoegdheid om lede se lidmaatskap op te skort (*Marlin v Durban Turf Club* 1942 AD 112 127 – 128; *Turner v Jockey Club of South Africa* 1974 3 SA 633 (A) 645 – 646; *Engineering Industrial Workers Union of South Africa v Abrahams* 1982 2 SA 326 (SOK) 332 – 334). Dit is ook die posisie by tugverhore kragtens dienskontrakte (*Theron v Ring van Wellington van die NG Sendingkerk in Suid-Afrika supra* 35 – 37). Die appèlhof brei in *Administrator, Transvaal v Traub* 1989 4 SA 731 (A) 761 ook *obiter* die werking van die reëls van natuurlike geregtigheid uit na die geval waar die party 'n redelike verwagting het dat die reëls nagekom sal word of dat die ander party die kontraktuele bevoegdheid in sy guns sal uitoefen.

Die partye kan natuurlik die werking van hierdie *ex lege*-beding in die kontrak uitsluit (*Turner v Jockey Club of South Africa supra* 646; *Marlin v Durban Turf Club supra* 127 – 128; *Gründling v Beyers* 1967 2 SA 131 (W) 141 – 143; *Moyo v The Administrator of Transvaal* (1988) 9 *ILJ* 372 (W) 384). Hoewel die howe nog nie uitdruklik so beslis het nie, word die moontlikheid wel in die regspraak *obiter* voorsien dat die uitsluiting van die reëls van natuurlike geregtigheid teen die algemene belang kan wees (*Marlin v Durban Turf Club supra* 128).

Die onderliggende rede waarom die howe hierdie reëls in sommige verhoudings inlees, is omdat die bestaande regte van die kontraktant geraak word (*Administrator, Transvaal v Traub supra* 761). Dit blyk ook baie duidelik uit *Mankatshu v Old Apostolic Church of Africa* 1994 2 SA 458 (TkA). Die applikant was in hierdie saak as priester afgedank en van sy kerklidmaatskap

ontneem. Hy was egter aangestel as priester sonder enige vergoeding of dienskontrak. Die hof bevind (462) daarom dat

> "[t]he *audi alteram partem* rule does not apply where the party who claims that he was denied the opportunity to be heard fails to prove that he has civil rights and interests which was prejudicially affected".

Die ongeldige uitoefening van 'n kontraktuele bevoegdheid is kontrakbreuk. Huidig is die posisie dat die benadeelde geregtig is op 'n bevel waardeur die besluit, wat die ongeldige uitoefening voorafgaan, ongeldig verklaar word (*Rossouw v Suid-Afrikaanse Mediese Navorsingsraad* 1990 3 SA 297 (K) 308 – 309; *Sibiya v Administrateur, Natal* 1991 2 SA 591 (D)). Die howe beskik oor 'n diskresie om so 'n bevel te weier want die bevel is 'n vorm van spesifieke nakoming.

Geen ander gevalle van geregtelike hersiening van privaat liggame se bevoegdhede kom in die regspraak voor nie en die volbank is dus korrek in sy uiteensetting van die regsposisie. Daar is egter onlangse ontwikkelings in die Engelse reg wat daarop dui dat ons reg wel verder kan ontwikkel.

4 Die posisie in die Engelse reg

Die Engelse reg maak 'n duidelike onderskeid tussen privaatregtelike en administratiefregtelike remedies. Die administratiefregtelike remedies word in 1977 vereenvoudig en vanaf 1980 word alle geregtelike hersienings gekanaliseer na 'n groep regters van die Queen's Bench (regters op die sogenaamde *Crown Office list*) wat oor spesiale kennis van die administratiefreg beskik (Foulkes *Administrative law* (1990) 329 – 332; Order 54 van die Rules of the Supreme Court; a 31 van die Supreme Court Act 1981). Die *prerogative writs* word omskep in 'n remedie wat by wyse van 'n enkele prosedure, die aansoek vir regterlike hersiening, verkry kan word. Die onderskeid tussen privaatregtelike en administratiefregtelike remedies lê vir die howe in die vraag of die geskil oor 'n *private-law right* of 'n *public-law right* handel (Lubach en Van Erp *Misbruik van privaatrecht door de overheid* Preadvies voor die Nederlandse Vereniging voor Rechtsvergelijking No 41 (1989); Craig *Administrative law* (1989) 413 – 415).

4 1 Kontraktuele remedies

Die howe vereis dikwels dat die reëls van natuurlike geregtigheid (*fair hearing* en onbevooroordeeldheid) nagekom word by die uitoefening van die kontraktuele bevoegdheid om 'n lid van 'n vakbond, klub of vereniging sy lidmaatskap te ontneem (*Burn v National Amalgamated Labourer's Union of Great Britain and Ireland* 1920 2 Ch 364; *Herring v Templeman* 1973 3 All ER 569; *Glynn v Keele University* 1971 1 WLR 487; *Edwards v Society of Graphical and Allied Trades* 1971 Ch 354; *Breen v Amalgamated Engineering Union* 1971 2 QB 175). Die reëls van natuurlike geregtigheid moet verder nagekom word waar daar 'n statutêre of kontraktuele beperking van die redes vir die ontslag van 'n werknemer bestaan (*R v British Broadcasting Corporation, ex parte Lavelle* 1983 1 WLR 23). Die partye mag wel ooreenkom oor die prosedure wat gevolg moet word by die toepassing van die reëls van natuurlike geregtigheid mits dit tot 'n billike verhoor lei (*Calvin v Carr* 1980 AC 574 (PC)).

Hierdie reëls word ingelees as bedinge *implied in fact* en *implied in law* (Oliver 1987 *PL* 558; Arrowsmith 1990 *LQR* 281). In 'n aantal ou sake word dit egter

bloot gestel dat die *audi alteram partem*-reël van toepassing is op sekere privaat liggame ten aansien van sekere besluite (*Wood v Woad* 1874 LR 9 Ex 190; *Fisher v Keane* 1878 11 Ch 353).

Die reëls van natuurlike geregtigheid mag nie uitgesluit word nie en moet dus nagekom word by beëindiging van die lidmaatskap van 'n vakbond waar die lidmaatskap noodsaaklik is om te mag werk (*Lee v The Showman's Guild of Great Britain* 1952 2 QB 329 342; *Edwards v Society of Graphical and Allied Trades supra* 381 – 382; *Enderby Town Football Club v Football Association* 1971 Ch 591 606). Die verbreking van die reëls van natuurlike geregtigheid is kontrakbreuk en die benadeelde se regsremedies is die gewone kontraktuele remedies (*Law v National Greyhound Racing Club Ltd* 1983 1 WLR 1302).

Die nakoming van die reëls van natuurlike geregtigheid en die verbod op die inagneming van irrelevante faktore word vanaf die sestigerjare van regsweë vereis ter beperking van die vrye besluit oor toelating van voornemende lede tot privaat liggame (*Nagle v Feilden* 1966 2 QB 633; *McInnes v Onslow-Fane* 1978 1 WLR 1520; Daintith 1979 *CLP* 43). Lidmaatskap van die privaat liggame is in hierdie gevalle 'n voorvereiste om te mag werk. Die benadeelde kan by wyse van 'n privaatregtelike remedie, 'n verklarende bevel, die besluit van die privaat liggaam nietig laat verklaar. Die bestaan van 'n stilswyende kontrak word in hierdie gevalle op 'n twyfelagtige wyse gefingeer ten einde die verklarende bevel te regverdig (Alder 1993 *Legal Studies* 185 193 vn 69). In 'n onlangse saak *R v Jockey Club, ex parte RAM Racecourses Ltd* 1993 2 All ER 225 word *obiter* te kenne gegee dat die administratiefregtelike remedies meer geskik is vir hierdie soort ongeldige besluite (247 – 248), terwyl dit in *R v Disciplinary Committee of the Jockey Club, ex party Aga Khan* 1993 2 All ER 853 ontken word (875 – 876).

4 2 Administratiefregtelike remedies

Aanvanklik is slegs statutêre funksies, wat in wetgewing direk of by wyse van magtiging aan 'n privaat liggaam oorgedra en in die algemene belang uitgeoefen word, aan administratiefregtelike hersiening onderwerp (*Swain v Law Society* 1983 1 AC 598; *D v National Society for the Protection of Cruelty to Children* 1978 AC 171). In onlangse sake word die moontlikheid van geregtelike hersiening uitgebrei na nie-statutêre funksies van privaat liggame wat publiekregtelike funksies (*public duties, public-law functions* of *public-law tasks*) is (*R v Panel on take-overs and mergers, ex parte Datafin plc* 1987 2 WLR 699; *R v Panel on take-overs and mergers, ex parte Guinness plc* 1989 1 All ER 509; *R v Advertising Standards Authority Ltd, ex parte Vernon's Organisation Ltd* 1993 2 All ER 202; *R v Code of Practice Committee of the British Pharmaceutical Industry, ex parte Professional Councelling Aids Ltd* 1991 COD 228; Borrie 1989 *PL* 561 – 563; Foulkes *Administrative law* 320 – 321; Cane 1987 *Civil Justice Quarterly* 337 – 339; Pannick 1992 *PL* 1; Bamforth 1993 *PL* 239). Die toets om die publiekregtelike aard van die funksie te bepaal, is of die owerheid die funksie sou verrig indien die privaat persoon of instelling dit nie reeds verrig nie. In *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex parte Wachmann* 1993 2 All ER 249 254 word die toets soos volg gestel:

> "To say of decisions of a given body that they are public law decisions with public law consequences means something more than that they are decisions which may be of great interest or concern to the public or, indeed, which may have consequences

> for the public. To attract the court's supervisory jurisdiction there must be not merely a public but potentially a governmental interest in the decision-making power in question. And, indeed, generally speaking the exercise of the power in question involves not merely the voluntary regulation of some important area of public life but also what Mr Beloff calls a 'twin-track system of control'. In other words, where non-governmental bodies have hitherto been held reviewable, they have generally been operating as an integral part of a regulatory system which, although itself non-statutory, is nevertheless supported by statutory powers and penalties clearly indicative of government concern."

In hierdie sake gaan dit oor die uitoefening van statutêre gesag deur die privaat instansies (Cane 1987 *Civil Justice Quarterly* 335; Oliver 1987 *PL* 566 – 577) of oor die monopolistiese uitoefening van bevoegdhede (Pannick 1992 *PL* 6; Alder 1993 *Legal studies* 184 – 185).

In 'n hele aantal latere sake word die werking van geregtelike hersiening uitgesluit, maar daar is verskillende benaderings in die sake oor die motivering daarvoor. Die redes is volgens sommige regspolitieke oorwegings (die bevoegdhede toon nie 'n voldoende publiekregtelike element nie) en volgens ander die feit dat daar 'n vrywillige en selfs 'n kontraktuele onderwerping aan die gesag van die privaat instansie aanwesig is (*R v Disciplinary Committee of the Jockey Club, ex parte Massingberd-Mundy* 1993 2 All ER 207; *R v Jockey Club, ex parte RAM Racecourses Ltd supra*; *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan supra*; *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex parte Wachmann supra*; *R v Football Association Ltd, ex parte Football League Ltd Football Association Ltd v Football League Ltd* 1993 2 All ER 833). In hierdie sake gaan dit oor besluite van sport- en godsdiensliggame. Die beleidsoorweging word soos volg in *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan supra* 875 gestel:

> "The attitude of the English legislator to racing is much more akin to his attitude to religion . . .: it is something to be encouraged but not the business of government."

In teenstelling hiermee word geregtelike hersiening in 'n Nieu-Seelandse saak, *Finnigan v New Zeeland Rugby Football Union* 1985 2 NZLR 181, uitgebrei na besluite wat slegs die algemene belang raak. In hierdie saak bevind die Appeal Court dat die twee applikante wel oor die nodige *locus standi* beskik in 'n aansoek om die hersiening van die beheerliggaam van die New Zealand Rugby Football Union se besluit om in Suid-Afrika te toer (178 – 179). Die hof voer verskeie redes vir sy beslissing aan. Die applikante is wel lede van rugbyklubs, al staan hulle nie self in 'n kontraktuele verhouding met die New Zealand Rugby Football Union nie (178). Verder raak die besluit die gemeenskap as geheel, asook die verhouding tussen die gemeenskap en diegene, soos die applikante, wat direk by die sport betrokke is (179). Volgens die mening van 'n groot groep mense raak die besluit verder die internasionale verhoudinge of posisie van Nieu-Seeland (179).

'n Sterk argument kan uitgemaak word om die uitoefening van ekonomiese mag in privaat hande aan die reëls van die administratiefreg te onderwerp (Oliver 1987 *Pl* 566; Cockrell "'Can you paradigm' – another perspective on the public law/private law divide" in *Administrative law reform* (1993) 232). Aan die ander kant is dit egter duidelik dat die uitoefening van gesag in privaat hande nie volledig aan geregtelike kontrole onderwerp behoort te word nie, want daar bestaan oortuigende beleidsoorwegings wat die uitoefening van gesag deur privaat persone anders maak as die uitoefening daarvan deur die owerheid

(Oliver 1987 *PL* 565 – 566). Respek vir individuele vryheid, regsekerheid en die behoeftes van die mark is drie faktore wat 'n uitgebreide geregtelike kontrole onwenslik maak. Dit is derhalwe nog onseker in hoeverre gesag in privaat hande aan geregtelike hersiening onderwerp behoort te word.

5 Uitbreiding van administratiefregtelike hersiening in die Suid-Afrikaanse reg

Die vraag is nou of ons reg ook soos die Engelse reg kan ontwikkel.

Daar is geen beperking in die Suid-Afrikaanse reg op sodanige uitbreiding nie. Die grondslag vir administratiefregtelike hersiening is vandag nie meer te vinde in die *ultra vires*-leerstuk nie (sien die oorsig van Breitenbach 1992 *SAJHR* 512; Suid-Afrikaanse Regskommissie Projek 24 *Ondersoek na die howe se hersieningsbevoegdhede ten aansien van administratiewe handelinge* (1992) 109 – 116). Gevolglik is administratiefregtelike hersiening nie tot statutêre bevoegdhede beperk nie.

Die Grondwet van die Republiek van Suid-Afrika 200 van 1993 beperk die verskansing van die fundamentele reg op administratiewe geregtigheid tot owerheidsliggame (wetgewende en uitvoerende staatsorgane) (a 7(1) en 233(1)(xii)). Hierdie verskansing dien nie ter vervanging of kodifikasie van die bestaande reëls van die administratiefreg nie, maar wel ter uitbreiding daarvan. Daarom mag die howe wel administratiefregtelike hersiening ten aansien van privaat liggame uitbrei.

6 Gevolgtrekking

Die vraag is nou of ons howe administratiefregtelike hersiening behoort uit te brei na besluite wat tydens 'n politieke onderhandelingsproses geneem is.

Regspolities gesien, is die administratiefregtelike hersiening van sulke besluite onwenslik. Geen party behoort die onderhandelingsproses by wyse van die regsproses tot stilstand te kan dwing nie. 'n Ontevrede deelnemer behoort slegs van politieke metodes gebruik te kan maak om sy ontevredenheid met 'n besluit kenbaar te maak en om die ander deelnemers te verplig om sy standpunt in ag te neem. Politieke metodes sou in hierdie geval byvoorbeeld verdere onderhandelings, onttrekking aan die onderhandelingsproses en massa-aksie kan insluit.

TB FLOYD
Universiteit van Suid-Afrika

ONDERHOUDSVERPLIGTING TEN OPSIGTE VAN AANGENOME KIND

Kewana v Santam Insurance Company Limited saak nr 112/88 (TkA)

1 Inleiding

Hierdie saak is 'n appèl teen 'n uitspraak van die Transkeise Hooggeregshof dat 'n kind wat ingevolge die gewoontereg aangeneem is, nie op vergoeding vir

die verlies van onderhoud geregtig is waar die aannemende ouer se dood nalatig veroorsaak is nie. Appèlregter Goldin het die appèl behartig.

Tydens 'n voorverhoorkonferensie kragtens reël 37 van die hofreëls kom die partye op die volgende ooreen: die enigste geskilpunt is of die oorledene 'n regsplig gehad het om die minderjarige aangenome kind te onderhou; die verweerder (Santam) erken dat die oorledene die kind tot haar dood toe onderhou het.

Die appellant (eiser) se saak word soos volg in die hof *a quo* deur die hoofregter genotuleer:

> "(a) Customary law in Transkei allows a single woman to adopt a child.
> (b) Andile was adopted by the deceased according to customary law.
> (c) In consequence of such customary law adoption the deceased was under a legal duty to maintain and support Andile with the result that the defendant company is obliged to compensate Andile for the loss of that legal right to receive support."

Die verweerder ontken bogenoemde beweringe. Beide partye bied getuienis, waaronder deskundige getuienis, aan. Die hoofregter het doktor Russel Kaschula, 'n deskundige in gewoontereg in Transkei en verbonde aan die Transkeise Universiteit, gedagvaar om hom in adviserende hoedanigheid as assessor by te staan.

Die hof *a quo* bevind dat 'n enkellopende vrou wel volgens die Transkeise gewoontereg 'n kind mag aanneem en dat Andile inderdaad deur die oorledene ingevolge die gewoontereg aangeneem is. Die hof bevind verder dat hoewel die kind deur die oorledene ingevolge die gewoontereg aangeneem is, "no common law or statutory right is enjoyed by him to claim compensation for loss of support".

Die eiser se appèl word teen hierdie beslissing gerig. Die respondent se kruisappèl weer is gerig teen die bevinding dat die oorledene die kind ingevolge die gewoontereg aangeneem het.

2 Agtergrond

Andile se vader is oorlede toe Andile nog 'n suigeling was. Sy vader het vanaf 'n ander gebied na die Transkei gekom. Na sy dood het niemand geweet of hy nog familie het en indien wel, waar hulle hul bevind nie. Na sy vader se afsterwe het sy moeder Nodoli tekens van kranksinnigheid begin toon. Haar toestand het sodanig versleg dat 'n hospitaal haar nie meer kon akkommodeer nie. Haar suster Mkatsomo het haar daarna versorg. Mkatsomo wat self 'n weduwee was, kon egter nie vir beide haar suster en dié se kind sorg nie. Die appellant, ook 'n weduwee, is die suster van Mkatsomo en die moeder van Nolungephi, die oorledene. Nolungephi het 'n diensbetrekking beklee en 'n vaste inkomste verdien. Die familie het besluit dat Andile by die appellant moet bly. Nolungephi sou gereeld geld vir haar moeder stuur vir die onderhoud van haar moeder, haar eie kind en Andile.

Die appellant en haar suster Mkatsomo het besluit dat Nolungephi vir Andile moet aanneem. Sy het daartoe ingestem. 'n Tradisionele seremonie wat deur die appellant se familie, die plaaslike kaptein en bure bygewoon is, is gehou. Die appellant se oorlede man se broer was as "oog" teenwoordig. Hy het die groep meegedeel dat die doel van die seremonie was om hulle in te lig dat Andile deur Nolungephi as kind aanvaar en erken is. 'n Skaap en 'n bok is geslag "to give the occasion the significance and solemnity of an act being done in

accordance with tribal custom''. Die doel van die seremonie was om aan die publiek bekend te maak dat die aanneming inderdaad plaasgevind het.

Die vraag is dus of dit 'n werklike aanneming was en of 'n vrou ingevolge die gewoontereg 'n kind mag aanneem.

3 Geldigheid van aanneming

Professor Mqeke van die Transkeise Universiteit, 'n spesialis op die gebied van die gewoontereg, het getuig dat die prosedure wat nagevolg is wel op aanneming in die gewoontereg neerkom. Hy het verder getuig dat

> ''since self rule up to the time of independence there has been a gradual emancipation of women . . . with the result that females have got the right to establish their own homesteads . . . and adoption by woman is not a new custom but the adaptation of an established custom''.

Verskeie ander persone het ook getuig dat 'n ongetroude vrou wel 'n kind volgens die gewoontereg mag aanneem. Daar was ook getuies wat namens die respondent tot die teendeel getuig het.

Volgens die getuienis was dit duidelik dat die kind deur die aanneming Nolungephi se kind geword het en dat sy die verwantskap nie kon beëindig nie. Deur die aanneming het sy ook verantwoordelikheid vir sy onderhoud aanvaar, 'n verpligting wat sy tot haar dood nagekom het.

Die Grondwet van die Transkei van 1976 maak in artikel 57(d) spesifiek voorsiening vir aanneming (ook gewoonteregtelike aanneming) waarvolgens 'n persoon ook Transkeise burgerskap mag verkry.

Om bogenoemde redes word die kruisappèl van Santam verwerp.

4 Appellant se saak

Die hof gee daarna aandag aan die appèl van die appellant teen die bevinding dat daar geen regsplig op die oorledene as aannemende ouer ten opsigte van onderhoud gerus het nie.

Nolungephi is gedood terwyl sy 'n passasier op 'n bus was wat omgeslaan het. Die respondent was die derdepartyversekeraar. Die appellant, die moeder van die oorledene, het namens haarself en as verteenwoordiger van die oorledene se eie kind en Andile skadevergoeding van Santam geëis. Santam het erken dat die oorledene 'n regsplig gehad het om haar moeder en kind te onderhou. Hulle was egter van oordeel dat geen sodanige plig ten opsigte van Andile bestaan het nie. Verder het hulle ontken dat aanneming deur 'n vrou deel van die gewoontereg uitmaak. Die appèl was gerig teen die volgende bevinding van die hoofregter in die hof *a quo*:

> ''[E]ven though customary law recognises that a female, no less than a male, may adopt a child and even though Andile was adopted by the deceased in accordance with tribal custom, no common law or statutory right is enjoyed by him to claim compensation for loss of support resulting from negligent killing of the deceased . . .''

5 Beslissing

Die belangrikste vraag was of daar 'n regsplig om Andile te onderhou op die oorledene gerus het. Die hof verwys na artikel 53 van die Grondwet van die Transkei wat soos volg bepaal:

> ''(1) In all proceedings involving questions of tribal customs followed by persons in Transkei it shall be in the discretion of the court to decide such questions in accordance with the tribal law applying to such customs except in so far as the court may

find that such law has been repealed or modified or is contary to public policy or opposed to the principles of natural justice; Provided that no such finding shall be made by any court in respect of the custom providing for the payment of *lobola* or *bogadi*.

(2) The court shall not, in the absence of any agreement between the parties regarding the system of law to be applied in any such proceedings, apply any system of customary law other than that –

(a) which is observed at the place in Transkei where the defendant or respondent resides, carries on business or is employed; or

(b) if more than one system of customary laws is in operation at that place, which is observed by the tribe to which the defendant or respondent belongs."

Die hof kom tot die gevolgtrekking dat daar wel volgens die gewoontereg 'n plig om Andile te onderhou op die oorledene gerus het. Die vraag is egter of dit 'n regsplig is en of so 'n plig ingevolge die gewoontereg regtens afdwingbaar is. Die verpligting om te onderhou is in ooreenstemming met die gewoontereg en ingevolge artikel 53 afdwingbaar. Die eis om skadevergoeding is egter nie kragtens die gewoontereg of die gemenereg nie maar ingevolge die Wet op Verpligte Motorvoertuigversekering van 1977 (Transkei) aanhangig gemaak. Die bestaan van die afdwingbare plig om te onderhou, is dus uit die gewoontereg afkomstig terwyl die reg op skadevergoeding deur die wet gereël word. Die oorledene se plig tot onderhoud is nie ingevolge artikel 53 van die Grondwet teen die staatsgedragslyn of natuurlike geregtigheid nie. As die gewoontereg wat 'n plig tot onderhoud oplê nie herroep of gewysig is nie, sal die plig afdwingbaar wees.

Daar word aangevoer dat die aanneming nie ingevolge die Kinderwet van 1960 gedoen is nie. Gevolglik is daar geen verpligting tot onderhoud nie. Die Kinderwet het egter nie die gewoontereg insake aanneming gewysig of herroep nie. Die gewoontereg bly dus ingevolge artikel 53 van die Grondwet afdwingbaar.

Die Wet op Verpligte Motorvoertuigversekering beperk nie die verpligting tot vergoeding van aangenome kinders tot kinders wat ingevolge die Kinderwet of enige ander statutêre voorskrif aangeneem is nie. Dié wet is van toepassing in die Transkei en artikel 21 daarvan bepaal soos volg:

"An authorized insurer which has insured or is deemed to have insured a motor vehicle in terms of section 12, 13 and 14 shall, subject to the provisions of this Act, be obliged to compensate any person whatsoever (in this Act, called the third party) for any loss or damage which the third party has suffered as a result of –

(a) any bodily injury to himself;

(b) the death of or any bodily injury to any person,

in either case caused by or arising out of the driving of the insured motor vehicle by any person whatsoever at any place in the Republic during the period over which the insurance extends, if the injury or death is due to the negligence or other unlawful act of the person who drove the motor vehicle (in this Act called the driver) or of the owner of the motor vehicle or his servant in the execution of his duty."

Artikel 21 beperk nie skadevergoeding slegs tot 'n reg daartoe ingevolge die wet nie. 'n Eis vir skadevergoeding kan ook volgens die gemenereg ingestel word benewens die eis wat deur die Wet op Verpligte Motorvoertuigversekering verleen word. Die hof verwys na appèlregter Holmes se uitspraak in *Legal Insurance Company Limited v Botes* 1963 1 SA 608 (A) 614B waar hy die gemeenregtelike reg om skadevergoeding te eis soos volg opsom:

"At the outset it is necessary to deal with the nature and scope of the action, according to existing South African Law, by dependants against a person who has unlawfully killed the breadwinner who was legally liable to support them. The remedy was unknown to Roman Law, in which no action arose out of the death of a freeman,

and consequently the Aquilian action was not available. It had its origin in Germanic custom, in which the reparation of 'maaggeld' was regarded as a conciliation to obviate revenge by the kinsmen of the deceased, and it was divided among the latter's children or parents or other blood relatives. The Roman-Dutch Law modified the custom by regarding the payment as compensation to the dependants for loss of maintenance. The Roman-Dutch jurists felt that this could be accommodated within the extended framework of the Roman Aquilian action by means of a *utilis actio*. The remedy has continued its evolution in South Africa – particularly during the course of this century – through judicial pronouncements, including judgements of this Court and it has kept abreast of the times in regard to such matters as benefits from insurance policies. The remedy relates to material loss 'caused to the dependants of the deceased man by his death'. It aims at placing them in as good a position, as regards maintenance, as they would have been in if the deceased had not been killed. To this end, material losses as well as benefits and prospects must be considered. The remedy has been described as anomalous, peculiar, and *sui generis* – but it is effective. In assessing the compensation the trial judge has a large discretion to award what under the circumstances he considers right. He may be guided but is certainly not tied down by inexorable actuarial calculations. In its present form, robust and practical, the remedy illustrates the growth and flexibility of the system of law, basically Roman-Dutch, which we have as a heritage in this country."

Die appellant se eis vir skadevergoeding vir die verlies van onderhoud ingevolge die Wet op Verpligte Motorvoertuigversekering word nie deur die gemeenregtelike voorskrifte oor die onderwerp geraak nie. Die hof is van oordeel dat artikel 21 van die wet eerder statutêre krag aan die gemenereg oor dié onderwerp verleen. 'n Eis om skadevergoeding kan dus alternatief ingevolge die gemenereg of die Wet op Verpligte Motorvoertuigversekering ingestel word.

6 Samevatting

Die appellant is dus geregtig om skadevergoeding van Santam te verhaal, ook ten opsigte van Andile omdat die oorledene regtens verplig was om hom te onderhou. Gevolglik slaag die appèl.

Hierdie uitspraak bied 'n duidelike aanduiding dat die howe die tradisionele gebruike erken en aanvaar. Die Grondwet van die Transkei beskerm ook uitdruklik die toepassing van die gewoontereg in artikel 53. Laasgenoemde artikel toon groot ooreenkomste met artikel 1 van die Wysigingswet op die Bewysreg 45 van 1988.

FRIK VAN HEERDEN
Universiteit van Pretoria

I say the business of a law school is not sufficiently described when you say that it is to teach law, or to make lawyers. It is to teach law in the grand manner, and to make great lawyers (Holmes *Use of law schools. Speeches* (1913) 30).

BOEKE

SKADEVERGOEDINGSREG, LAW OF DAMAGES en LAW OF DAMAGES THROUGH THE CASES

deur PJ VISSER en JM POTGIETER

Juta Kaapstad Wetton Johannesburg 1993; lxxxvii en 472 bl (Afr), lxxxviii en 457 (Eng), xxviii en 527 bl (Vonnisbundel)

Prys R137,50 (Afr en Eng) R97,90 (Vonnisbundel) (sagteband)

Skadevergoedingsreg en *Law of damages* het saam met *Law of damages through the cases* in 1993 by Juta verskyn. Regsmateriaal wat tot op 1 November 1992 beskikbaar was, is in ag geneem. Vanweë die beoogde noue samehang tussen die basiswerk(e) en die vonnisbundel, as dit geriefshalwe maar so onderskei kan word, word in hierdie kort bespreking na die hele projek verwys as *die werk*, terwyl die *hoofwerk* en *vonnisbundel* waar nodig van mekaar onderskei word.

Volgens die voorwoord van die hoofwerk word met die werk bedoel om 'n algemene en omvattende inleiding tot die teorie en praktyk van die skadevergoedingsreg te bied. Die stof is in vier hoofdele uiteengesit, te wete die algemene begrippe en beginsels ten aansien van skade en vergoeding; kwantumbepaling by eise op grond van kontrakbreuk; kwantumbepaling by eise op grond van delik en verwante regsfeite; en laastens, sekere prosesregtelike en algemene kwessies. Die oogmerk met die vonnisbundel is dan om die grondbeginsels van die skadevergoedingsreg aan die hand van sleutelvonnisse en toepaslike statutêre bepalings te illustreer, en die stof is in ses hoofstukke uiteengesit, te wete algemene beginsels, skadevergoeding in gevalle van kontrak, liggaamlike beserings, dood, sekere ander delikte en *iniuria*.

Om in 'n resensie reg te laat geskied aan 'n werk soos hierdie, sal vereis dat een geskryf moet word wat so omvangryk sal wees dat dit sy doel waarskynlik sal mis. Daar is so baie dinge waaroor verder gedebatteer kan en sal moet word, dat die bespreking baie maklik in 'n minstens ewe omvangryke geskrif kan ontaard. Die resensent se taak is gevolglik moeilik. Sê hy min, kan lesers verkeerdelik dink dat daar min wat goed is oor die werk te sê is, of selfs dat daar min indien enige kritiek teen die werk ingebring kan word. Sê hy baie en bevat sy kommentaar baie kritiek, kan lesers dink dat die werk bra swak is of dat die resensent dalk liewer maar self ook 'n boek oor die onderwerp moes geskryf het. Skrywer hiervan en van sy studente het die werk 'n semester lank gebruik en 'n beeld gevorm van die groot taak wat die outeurs op hulle skouers geneem het met die skryf daarvan. Met wat hierna volg, word gepoog om soveel moontlik van die slaggate vir resensies te vermy.

Die besluit van die outeurs om die hoofwerk tegelyk in Afrikaans en Engels te laat verskyn, moet verwelkom word. Sodoende het hulle die geleentheid geskep om by te dra tot die ontwikkeling van die terminologie in albei tale op hierdie terrein. Dit is egter jammer dat hulle nie self in hierdie werk die geleentheid daarvoor opsigtelik en voluit benut het nie. Daar heers soveel verwarring weens die relatiewe vakterminologiese armoede

van die Engelse taal dat hulle meer van hierdie aspek kon gemaak het. Nietemin het hulle nou 'n basis daargestel waarop voortgebou sal kan word.

Beskou 'n mens die inhoudsopgawe van die hoofwerk en vonnisbundel, is dit dadelik duidelik dat die outeurs 'n baie groot hap afgebyt het. Die volle breedte van die werk kom na vore as gelet word op die altesaam 22 hoofstukke, met seker 'n paar honderd paragrawe en subparagrawe waarin die werk verdeel is. Die koppeling van die hoofwerk met die vonnisbundel is so gedoen dat dit die gesamentlike gebruik daarvan sal vergemaklik.

Wat pas gesê is, regverdig nie die afleiding dat die inhoudsopgawes van die werk oormatig gedetailleerd is, of dat die stof deur die outeurs versplinter is nie. Die werklike fyner analise van die stof blyk eers uit die alfabetiese onderwerpregister van die hoofwerk, wat self 12 dubbelkolombladsye beslaan. In die vonnisbundel word die verfyning van die onderwerpregister selfs nog verder gevoer, soos blyk uit die benaming daarvan as 'n "concise subject index". Die indekse sal self baie nuttig wees om – veral waar dit saam met die volledige inhoudsopgawes gebruik word – die stof op hierdie veelkantige en verwikkelde regsgebied toegankliker te maak.

Van enige boek op die terrein van die skadevergoedingsreg – des te meer van een wat "geskryf is met die oog op die behoeftes van praktisyns, dosente en studente" (luidens die voorwoord van die hoofwerk) – kan 'n indrukwekkende lys van hofbeslissings, wetgewing en uitgebreide bibliografie sekerlik verwag word. Hierdie werk stel die leser daarvan beslis tevrede met die groot hoogte waartoe die outeurs daarin geslaag het om 'n magdom beskikbare materiaal byeen te bring en te orden. Trouens, meer as 66 bladsye is aan die bronnelyste van die twee dele bestee! Terwyl dit so is dat daar op hierdie regsgebied onoorsienbaar baie stof bestaan, maak die omvang van die bronnelyste die resensent se taak tegelykertyd moeiliker en makliker; moeiliker omdat dit bykans onmoontlik is om bronne uit te wys wat bykomend geraadpleeg moes gewees het; makliker omdat sonder meer gesê kan word dat 'n baie wye ondersoek deur die outeurs gedoen is. Laat dus net hieroor gesê word dat die verwysings wat verwag kon word, almal wel in die werk voorkom. Ander gebruikers van die werk sal gevolglik oor bykans elke denkbare aspek wel iets in die werk kan vind om die ondersoek waarmee hulle besig mag wees, verder te voer. Sodoende is die taak van die outeurs se teikengroepe beslis vergemaklik.

Vonnisse en wetgewing wat in die hoofwerk bespreek word, is nie in die vonnisbundel herhaal nie. Dit bring mee dat die hoofwerk en die vonnisbundel saam gebruik sal moet word. Verder word ten opsigte van sommige onderwerpe verwys na ander werke van die outeurs, sonder om die argumente wat in sodanige ander werke aangebied is, weer te gee. Dit veroorsaak ook dat die leser, om die werk onder bespreking voluit te kan gebruik, eintlik meerdere boeke sal moet raadpleeg. In hierdie dae van beperkte begrotings en stygende koste en pryse is dit jammer dat die werke nie meer selfstandig gebruik sal kan word nie. Dit maak voorts dat diegene wat in hierdie werk na antwoorde op hulle vrae soek, steeds na te veel uiteenlopende bronne sal moet kyk. Die ideaal om 'n hanteerbare en algemeen toeganklike bron oor die hele terrein van die skadevergoedingsreg daar te stel, is dus tog nog nie bereik nie.

'n Probleem wat sekerlik ook vir die outeurs hoofbrekens besorg het, is die keuse van stof. Daar is eenvoudig soveel uitsprake en standpunte dat daar vir byna enige siening gesag gevind kan word. Die outeurs het hulle keuse so uitgeoefen dat hulle dit vir navorsers makliker sal maak om toegang tot die vakgebied te verkry. Die keuse van hofsake en ander materiaal is sodanig dat dit die problematiek van die terrein goed belig en die navorser by verskillende standpunt uitbring. Al kan nie al die outeurs se standpunte as finale waarhede bestempel word nie, sal die debat oor die skadevergoedingsreg, iets wat tot nou in ons reg nog baie onderontgin was, nie sonder ernstige oorweging van hulle sienings kan plaasvind nie.

Om te sê dat hierdie werk my op die teoretiese vlak deurgaans oortuig of selfs werklik bevredig het, sou te ver gaan. Dit kan wees omdat sommige van die standpunte wat in

die werk gestel word, reeds uit ander geskrifte van die outeur(s) bekend is, en dit dus vir ingewydes nie so nuut sal wees nie. Vir die leser wat nog nie daaraan blootgestel was nie, kan die manier waarop die outeurs hulle standpunte stel en aantoon hoe dit volgens hulle ter oplossing van sommige van die moeilike probleme van die skadevergoedingsreg aangewend kan word, van groot hulp wees om kennis te maak met en tot begrip te kom van hulle benadering tot talle kwessies waarmee daagliks op die terrein van die skadevergoedingsreg te make gekry word. Dit kan die leser dus goed toerus om verdere ondersoek te doen.

Die versameling van die groot aantal gewysdes en standpunte oor so 'n verskeidenheid kwessies was op sigself reeds 'n groot taak. Verder het die outeurs die stof aan die hand van 'n raamwerk georden. Dit kan help om hierdie regsterrein toegankliker te maak. Dat die beginsellyne nog nie noodwendig konsekwent of selfs oral ewe duidelik deurkom nie, en dat dit veral uit die eerste gedeelte blyk dat die outeurs geneig mag wees om die debat te vertroebel deur aan bloot sekondêre kwessies oormatige belang toe te ken, sal net vir die werklik ingewyde leser onnodig voorkom. Die outeurs probeer in die meer dogmatiese gedeeltes van die werk na my mening te opsigtelik vir hulle eie sienings regverdiging vind. Baie van die ywer wat daaraan bestee word, lyk onnodig omdat veel van wat die outeurs sê, in elk geval goeie sin maak. Intense en uitgebreide apologetiek is dus onnodig. Sodanige gedeeltes bemoeilik die leesbaarheid en oortuigingskrag van die uiteensetting, maar is iets wat maklik genoeg in latere uitgawes van die werk vermy kan word. Kyk 'n mens by hierdie kritiseerbare aspek verby, kan gesê word dat die werk 'n beduidende bydrae maak om die debat op hierdie belangrike terrein van die regswetenskap te stimuleer en verder te voer. Na my mening sal dan ook oor die stof vervat in die eerste elf hoofstukke nog baie dinkwerk deur alle belanghebbendes gedoen moet word. Die aspekte wat op die eerste deel van die skrywers se uiteensetting volg, is opvallend van 'n meer kasuïstiese aard en is weinig meer as 'n taamlik kritieklose versameling van die groot aantal gewysdes op hierdie terrein. Die kursoriese aantekeninge wat gebied word, is van min nut, afgesien daarvan dat die leser weer vir die eintlike kommentaar na ander boeke verwys word.

Dit is natuurlik so dat die blote versameling en ordening van die regspraak die werk van groot waarde vir die praktisyn sal maak. So iets verouder egter ongelukkig baie gou en die feit dat groot dele van so 'n omvangryke werk taamlik vinnig bygewerk sal moet word, sal dit vir potensiële kopers minder aantreklik maak. Uiteraard is dit vir elke outeur moeilik om te besluit wat hy gaan insluit en wat nie. Vir die feit dat hierdie outeurs besluit het om die stof taamlik volledig saam te vat en te orden, kan, behoudens die probleem van veroudering, net dank uitgespreek word.

Die werk is in 'n leesbare trant geskryf en goed uiteengesit. Die uitleg en afwerking is goed en die werk vertoon aantreklik. Die kleiner lettertipe wat in die voetnote gebruik is, maak dat 'n geweldige hoeveelheid stof in die voetnote voorkom maar kan die leesbaarheid daarvan vir die ernstige navorser bemoeilik.

Om saam te vat: Ons het hier 'n baie omvangryke werk, wat die veelkantige en uiters komplekse terrein van die skadevergoedingsreg werklik toegankliker maak. Enigeen wat voortaan op hierdie gebied wil werk, sal in hierdie werke 'n goeie beginpunt vir sy of haar ondersoek vind. Kritiek kan sekerlik uitgespreek word op aspekte van die werk, veral wat die dogmatiese kant daarvan betref, maar die groot getalle waarskynlike gebruikers van die werk sal die waarde daarvan eerder in die breedte en detail van die aanslag vind. Die werk sal eenvoudig in die versameling van elkeen wat hom op hierdie gebied begewe, 'n plek moet vind.

CFC VAN DER WALT
Potchefstroomse Universiteit vir CHO

GORDON AND GETZ ON THE SOUTH AFRICAN LAW OF INSURANCE

by DM DAVIS

Fourth edition; Juta Cape Town Wetton Johannesburg 1993; xlii and 626 pp

Price R264,00 (hard cover); R198,00 (soft cover)

"Old soldiers never die; they only fade away!" To anybody interested in insurance law, a new edition of a local textbook on insurance law arouses a great deal of interest. This is even more so in South African law where there is a relative dearth of publications in this field and where academics who specialise in insurance law are few and far between. The first edition of Gordon and Getz appeared in 1936, the second in 1969 and the third in 1983. Apart from this work, there is only one other textbook that deals solely with insurance law, Reinecke and Van der Merwe *General principles of insurance* (1989). Gordon and Getz can truly be referred to as the "old soldier" of textbooks on insurance law in South Africa and any new edition is therefore welcome. However, on reading the fourth edition of this work one wonders if this "old soldier" is not in fact fading away. This may appear to be a rather strong view but – as will appear from the discussion which follows – it is not unwarranted.

A brief look at the *Key to authorities* (ix – xiii) provides the first indication that the reader will have to be careful when consulting the latest edition of Gordon and Getz. In a number of cases reference is still made to works of which to my knowledge a later edition has appeared. The following may be noted by way of example: Bamford *The law of shipping in South Africa* 2 ed (1973) (correct title *The law of shipping and carriage in South Africa*) 3 ed (1983); Christie *The law of contract in South Africa* (1981) – 2 ed (1991); Holder *Houseman's law of life insurance* 7 ed (1970) – *Houseman and Davies law of life insurance* 10 ed (1984) by Davies; Keeton *Basic insurance law* (1960) – (1971) with *1978 Case supplement to Keeton's basic text*; Kerr *The principles of the law of contract* 3 ed (1980) – 4 ed (1989); Lowndes and Rudolf *The law of general average and the York-Antwerp rules* 10 ed (1975) – 11 ed (1991); Megrah (assisted by Ryder) *Paget's law of banking* 8 ed (1972) – 10 ed (1989) by Hapgood; Schmitthoff *The export trade* 6 ed (1977) – 9 ed (1990); Sutton *Insurance law in Australia and New Zealand* (1980) – *Insurance law in Australia* 2 ed (1991). While on the topic of the *Key to authorities*, it may be pointed out that *The Comparative and International Law Journal of Southern Africa* should be referred to as *CILSA* (and not *Comparative and International LJ of SA*) and that the abbreviation for *South African Mercantile Law Journal* is *SA Merc LJ* (and not *SAMLJ*). However, the fact that an abbreviation is provided for the *SA Merc LJ* in the *Key to authorities* seems to be of no importance. In the text itself it is referred to as the *SA Mercantile Law Journal* (42 fn 261 118 fn 42 305 fn 64).

A cursory examination of the *Table of cases* (xv-xlii) reveals that this table abounds with errors. In a number of cases the page numbers are incorrect. For example, *Carter v Boehm* is also cited at 114 (where it is incorrectly stated that this case was decided in 1976 instead of 1766); *Dalby v India & London Life Assurance Co* (1854) 15 CD 365 is cited at 107 and not 106; *HB Farming Estate (Pty) Ltd v Legal and General Assurance Society Ltd* 1981 3 SA 129 (T) is not cited at 242; *President Versekeringsmaatskappy Bpk v Trust Bank van Afrika Bpk* 1989 1 SA 208 (A) is cited at 118 and not 117, and also at 122. Some cases are referred to in the text but are not contained in the *Table of cases*. For example, *Premier Milling Co (Pty) Ltd v Van der Merwe* 1989 2 SA 1 (A), *S v Melk* 1988 4 SA 561 (A) and *S v Moloi* 1987 1 SA 196 (A) at 41; *Fulton v Waksal Investment (Pty) Ltd* 1986 2 SA 363 (T) at 242 fn 38. Some case are incorrectly

referred to. For example, *AA Mutual Life Assurance Limited* 1991 3 SA 314 (A) should be *AA Mutual Life Assurance Association Ltd v Singh* 1991 3 SA 514 (A). *Videtsky v Liberty Life Insurance Association of Africa Ltd* 1990 1 SA 386 (W) is alternatively referred to as *Lidelsley* (see also 6 fn 66) and *Videlsky* (see also 117 fn 37 and 304).

Before any attempt is made to review the book, the author's statement in the foreword that "[i]n many ways . . . this work has benefited from . . . the incisive reviews of the previous edition" must be noted. However, it will be indicated below that it is doubtful whether this object has (in fact) been achieved.

A previous reviewer (see 1983 *SALJ* 773) pointed out that "the time has come for the standard work on the law of insurance to identify the nature and purpose of the South African system of control of insurance" (see also 1984 *TSAR* 96). This suggestion has not been followed in the new edition. But even if the author did not deem it necessary to discuss the nature and system of control, one would at least have expected the measures of control contained in the Insurance Act (and other relevant acts?) to be accurately stated. This is not the case. For example, the definition of compulsory third party insurance is stated to be "the business of insuring motor vehicles in terms of the Multilateral Motor Vehicle Accident Fund Act [93 of 1989]". It is furthermore stated that "[t]he law of this class (or category) of insurance is not treated in this work" (22). The assumptions underlying the latter statements are of course not entirely correct. The definition of compulsory third party insurance as contained in the Insurance Act does not even refer to the Multilateral Motor Vehicle Accident Fund Act 93 of 1989. The reference is to the Compulsory Motor Vehicle Insurance Act 56 of 1972. In a footnote an attempt is made to explain that this later act "was repealed and replaced by the Motor Vehicle Accidents Act 84 of 1986" and that "[i]n turn the principles of this Act have been suspended and the present system, although unchanged is now administered in terms of the Multilateral Motor Vehicle Accident Fund Act 93 of 1989" (22 fn 93). However, since the passing of the 1986 act the liability of a third party is no longer founded on an insurance contract (see Klopper "Die aard, inhoud, omvang en belangrikheid van derdepartyvergoedingsreg" 1993 *THRHR* 285 – 291 where this matter is discussed in greater detail). It is therefore incorrect to suggest that motor vehicles are "insured" in terms of the Multilateral Motor Vehicle Accident Fund Act 93 of 1989.

Even more remarkable is the in-depth discussion of the duties of an insurer to make deposits (33 – 34). Section 6 of the Insurance Act, which required every registered insurer to make deposits was repealed by section 2 of the Financial Institutes Amendment Act 64 of 1990 with effect from 1 September 1990. The fact that this section has been repealed, is acknowledged by the author (see 33 fn 192). One can only but wonder why the duty to make deposits still merits discussion.

The discussion of the position of the registrar is also no longer correct (23). Without going into too much detail, it may be pointed out that the position of the registrar of insurance has been considerably changed by the creation of the Financial Services Board (see Financial Services Board Act 97 of 1990). One of the most important consequences of this act is that the registrar no longer exercises his powers or performs his duties under the control of the minister. This act came into operation on 1 April 1991. The work is supposed to reflect the law as at 30 April 1992 (v).

In the chapter dealing with insurable interest, and more specifically with insurable interest in relation to life insurance, the second footnote already provides a clue that all is not well. The statement is made that "[i]n Grotius' time a life insurance contract was unenforceable; Decker doubted whether human life could be the subject of an insurance contract" (92 fn 2). Although one may argue whether life insurance contracts were unenforceable in Grotius's time, it seems clear that Decker was of the opinion that human life could be the subject of an insurance contract. Decker in fact argues that life insurance contracts with an honorable cause are valid (see in general Havenga *The origins and nature of the life insurance contract in South African law with specific reference to the requirement of an insurable interest* (LLD thesis Unisa 1993) 31 *et seq*).

The impression which is created that there is no relevant Roman-Dutch law on the subject of life insurance and that consequently Roman-Dutch law need not be discussed, is therefore not correct. However, since the author seems to be of the opinion that even where Roman-Dutch law does provide authority it will not have a tangible effect on the South African law of insurance, this argument is not pursued further (5). Of more importance is the discussion of the origins of the requirement of an insurable interest in English law and the incorporation of this requirement into South African law (92 *et seq*). Not only does the exposition on the origins of the requirement of an insurable interest in English law seem to be incorrect but the grounds upon which it is attempted to incorporate this requirement into South African law also seem, to say the least, doubtful. Two examples suffice: the conclusion that the requirement of an insurable interest was established in English law by the Gaming Act 1845 seems to be incorrect; the same may be said of the argument that the requirement of an insurable interest was incorporated in the Cape via the Betting Houses, Gaming Houses and Brothels Suppression Act 36 of 1902. The reason why these arguments are incorrect is that neither the Gaming Act nor the Cape Betting Houses Act even mentioned the requirement of an insurable interest. This is apart from the fact that the Gaming Act never applied in South Africa and that the Cape Betting Houses Act was repealed by the Gambling Act 51 of 1965. The latter is not mentioned in the work and the implications thereof for the (imputed) incorporation of the requirement of an insurable interest into South African law are thus not discussed (see Havenga *op cit* 242 *et seq* where this matter is discussed in greater detail).

However, even if one accepts that an insurable interest similar to that required in English law is required in South African law, it seems that Gordon and Getz do not always correctly apply English law. In English law, an insurable interest of a pecuniary nature is required and this requirement is strictly applied. Statements such as "[a] person's legal right to claim support from a relative is sufficient to constitute his insurable interest in the latter's life" (108), "[a] person has an insurable interest in the life of his partner" and "[a] company has an insurable interest in the life of its manager or managing director" (109) must therefore be approached with caution. It seems doubtful whether English law necessarily recognises the existence of an insurable interest in these cases (see Havenga *op cit* 63 *et seq* 251 *et seq*).

The discussion of stamp duties does not reflect the current legal position (145). Stamp duty is no longer payable on policies other than life insurance policies. This change was brought about by the implementation of the Value-added Tax Act 89 of 1991 (see s 1(1ii) read with s 7, and s 2(1)(i) read with s 12(a) of this act).

The section dealing with the position of insurance brokers is wholly inadequate. Apart from some additional comments in a footnote (see 161 fn 95) the discussion is the same as that which appeared in the third edition. The same may be said of chapter 15 which deals with the measure and effect of the indemnity. It was pointed out by reviewers of the third edition that both these topics merit a more comprehensive treatment (see 1983 *SALJ* 775; 1984 *MBL* 122).

New cases which are of importance for insurance law have not always been taken into account. One example is the discussion of section 156 of the Insolvency Act 24 of 1936 (282). In recent years a number of cases have been decided where the effect of section 156 was in issue (see *Woodley v Guardian Insurance Company of SA Ltd* 1976 1 SA 758 (W); *Supermarket Haasenback (Pty) Ltd v Santam Insurance Ltd* 1989 2 SA 790 (W) confirmed in *Supermarket Leaseback (Elsburg) (Pty) Ltd v Santam Insurance Ltd* 1991 1 SA 410 (A); *Gypsum Industries Ltd v Standard General Insurance Co Ltd* 1991 1 SA 718 (W); *Przybylak v Santam Insurance Ltd* 1992 1 SA 588 (C)). Not one of these cases is even mentioned.

The book is badly edited. A number of printing errors occur. For example, "astipulation" for "a stipulation" (98); "insurance interest" for "insurable interest" (100); "*Five v General*" for "*Fine v General*" (114); "baove" for "above" (161 fn 94); "*bunoe*

fidei" for "*bona fidei*" (305 fn 64); "indemnity" for "non-indemnity" (325). References to authorities are neither correct nor consistent. For example, *Dawsons Ltd v Bonnin* [1922] 2 AC 413 is alternatively cited as *Dawsons Ltd v Bonin* [1922] AC 413 (HL) (261 fn 18 220 fn 57), *Dawsons Ltd v Bonnin* [1922] AC 413 (225 fn 90) and *Dawsons, Ltd v Bonnin* [1922] AC 413 (HL) (438 fn 10). The same criticism applies to references of articles in journals. Sometimes the full names of the author and the volume numbers of the journals are included, sometimes not. The titles of articles in journals are not always cited, and if they are, not necessarily correctly. For example, the correct and full reference to S van der Merwe "*Uberrima fides* en versekering" 1977 *THRHR* 1 (114 fn 17) is Schalk van der Merwe "*Uberrima fides* en die beraming van die risiko voor sluiting van die versekeringskontrak" (1977) 40 *THRHR* 1. Conclusive proof of the bad editing is the fact that hardly any of the cross-references to other pages in the book are correct. The cross-references are to pages of the third edition. This has prompted another reviewer to suggest that the publishers should republish the book in properly revised form and exchange the corrected editions for those already sold for a nominal charge (see October 1993 *De Rebus* 834). However, I am of the opinion that even this will not suffice. Gordon and Getz needs to be (thoroughly) updated, to take account of changes brought about by new legislation and to incorporate the views of academics writing on insurance law. In this regard a point of departure would indeed be to take note of opinions expressed by reviewers of the third edition. Furthermore, every reference must be checked to ensure that it is consistent and correct. Unless this is done, the "old soldier" of insurance law will surely fade away.

PETER HAVENGA
University of South Africa

INTERDICTS AND RELATED ORDERS

by JOHAN MEYER

Legal Publications and Services Verwoerd Park 1993; vi and 240 pp

Price R100,00 (soft cover)

In his preface to this short work the writer emphasises that this volume is not an academic treatise. It is intended as a handbook providing access to the procedural tool of interdictory relief.

The substance of the book comprises two parts preceded by a brief introduction. Part I, consisting of 160 pages, contains a short exposition of the general principles of interdictory relief. The first chapter of Part I indicates briefly the nature and effects of the various forms of interdictory relief and distinguishes it from related orders, namely, orders for specific performance, Anton Piller orders, rules *nisi* and decrees of perpetual silence. The second chapter is devoted mainly to setting out the requisites for the attainment of interdictory relief. The third chapter, entitled "Jurisdiction", does not profess to be an exhaustive discussion of the topic of jurisdiction, but deals only with the relevant statutory provisions and principles emerging from decided cases in which interdictory relief was sought in the Supreme Court, the magistrates' courts, the court of the Commissioner of Patents, the Court of Admiralty and the Water Court. The last three chapters of Part I deal respectively with procedural matters, evidence and the important question of costs. Part II consists of a very useful classified index of the most

important cases relating to interdictory relief. In this regard the author states that his research of the cases prior to 1984 was selective but that from 1984 to June 1993 it was exhaustive. Cases in the index in which verbatim reference is made to the terms of the various motions and claims, and which can therefore serve as useful precedents, are marked with an asterisk.

Part I is of a cursory nature and does not deal with the general principles and procedure in great detail. The succinct description of the relevant principles is, however, backed up by fairly exhaustive reference to the relevant decisions. This, coupled with the classified index, enables the author to achieve his objective of providing ready access to the tool of interdictory relief.

Although one is reluctant to engage in nit-picking in a review of this nature, it would be irresponsible not to mention in this case that the text is riddled with grammatical errors. The book gives the impression of being the product of desk-top publishing in the course of which the editing function was gravely neglected. A second revised edition is recommended.

AJ MIDDLETON
University of South Africa

THE DRAFTING OF WILLS

deur HJ BARKER

Juta Kaapstad Wetton Johannesburg 1993; 137 pp

Prys R79,00

Hierdie boek is 'n baie handige handleiding vir enigiemand gemoeid met die opstel van testamente. Van aanvang af word die belang van eenvoudige taalgebruik by die opstel van 'n testament benadruk. Goeie voorbeelde van die probleme wat as gevolg van die gebruik van toutologie kan ontstaan, asook voorstelle om sodanige probleme te vermy, word verskaf. Die opsteller van 'n testament word gelei in die tipe vrae wat aan 'n voornemende testateur gevra moet word ten einde te verseker dat sy testamant sy bedoeling duidelik weergee. Aan die einde van hoofstuk vier verskyn 'n "check-list" van hierdie vrae wat vir die opsteller baie nuttig behoort te wees.

In hoofstuk drie word die formaliteite vir 'n geldige testament, soos vereis deur die Wet op Testamente 7 van 1953 (en gewysig deur die Wysigingswet tot die Erfreg 43 van 1992), verduidelik. Die kommissaris van ede se taak by die verlyding van 'n testament wat deur 'n merk, of deur iemand anders namens die testateur, geteken word, asook al die ander formaliteite word in detail verduidelik. Daarmee saam word praktykswenke verskaf, soos dat die praktyk dat getuies elke bladsy teken (of minstens parafeer) behou moet word. Ander belangrike nuwe bepalings, soos artikel 2(3) (die hof se kondoneringsbevoegdheid), artikel 2B (effek van egskeiding) en artikel 2C (substitusie) word ook bespreek. Artikel 2C(1) en 2C(2) kon miskien, in die lig van veral artikel 2C(2) se ingewikkelde bewoording, breedvoeriger bespreek gewees het. Hoe dit ook al sy, hierdie hoofstuk van die boek is onmisbaar vir enige testamentopsteller. Aan die einde van die hoofstuk verskyn daar ook 'n bruikbare opsomming van die inhoud van die wet met artikelnommers vir maklike kruisverwysing.

In die hoofstukke ná hoofstuk vier word bekende erfregtelike figure soos "joint/mutual wills", "massing" en trusts ondersoek en word volledig uitgewerkte voorbeelde verskaf. Die goeie voorbeelde, asook illustrasies uit die mees resente regspraak, is 'n kenmerk van die boek wat dit selfs vir die leek uiters leesbaar en maklik hanteerbaar maak. Die boek word voorts interessant en soms ook amusant gemaak deur talle aanhalings uit bekende letterkundige werke en is gewis 'n moet vir menige boekrak.

JUANITA JAMNECK
Universiteit van Suid-Afrika

DIE STRAFPROSESWET 51 VAN 1977 en THE CRIMINAL PROCEDURE ACT 51 OF 1977

saamgestel deur OJ BARROW

Sesde uitgawe; Juta Kaapstad Wetton Johannesburg 1993; 306 bl

Prys R69,40 (sagteband)

Die eerste en vierde uitgawes van hierdie werk in Afrikaans en Engels is reeds voorheen in die *Tydskrif* geresenseer (1988 *THRHR* 412-413; 1992 *THRHR* 697-698). Sedert die verskyning van die vierde en vyfde uitgawes is verskeie wysigings tot die Strafproseswet afgekondig en hulle is in hierdie uitgawe aangebring. Die sesde uitgawe het in Desember 1993 verskyn en die wetgewing en regulasies is op datum soos op 1 Oktober 1993.

Die sesde uitgawe bevat die volledige teks van die Strafproseswet 51 van 1977, 'n lys van datums van inwerkingtreding van wysigingswette, regulasies wat kragtens artikels 79(11), 191(3) en (4) en 334 van die Strafproseswet uitgevaardig is (al die tariewe betaalbaar aan psigiaters en getuies in strafregtelike verrigtinge, asook die verklaring van vredesbeamptes), 'n sakeregister (verwysings tot en met November 1993 SA en Oktober 1993 SASV) waar die beslissings teenoor die betrokke artikel van die Strafproseswet weergegee word en 'n register wat alfabeties volgens onderwerp met verwysing na die relevante artikel(s) opgestel is.

Voorts is daar uittreksels uit verskeie wette, die bepalings waarvan materiële betrekking op die Strafproseswet het. Hulle is die volgende: artikel 1 van die Wysigingswet op die Bewysreg en die Strafproseswet 103 van 1987 (getuienis van geslagsgemeenskap deur 'n seun onder 14 jaar kan aangebied word); artikels 1 en 2 van die Strafregwysigingswet 1 van 1988 (handelinge verrig onder invloed van sekere stowwe is strafbaar, en die pleging van 'n misdryf terwyl die liggaamsvermoëns aangetas was, kan as verswarende omstandigheid beskou word); artikel 3 van die Wysigingswet op die Bewysreg 45 van 1988 (toelating van hoorsê-getuienis in sekere omstandighede); artikel 1 van die Wysigingswet op die Strafreg en die Strafproseswet 39 van 1989 (aanranding van vrou deur haar man); artikels 19 en 20 van die Strafregwysigingswet 107 van 1990 (heroorweging van vonnisse van sekere ter dood veroordeelde persone en onafgehandelde sake wat voor 27 Julie 1990 'n aanvang geneem het); artikel 6(5) van die Wet op Besighede 71 van 1991 (in Natal, Kaap en die OVS is bepalings van enige wet wat die beslaglegging van voorwerpe magtig nie van toepassing op die beslaglegging van goedere van straathandelaars, venters of smouse nie); artikels 17 – 21 van die Tweede Strafregwysigingswet 126 van 1992 (verhoor van spesiale misdrywe); artikel 19 van die Algemene Regswysigingswet 139 van 1992 (appèl deur Minister van Justisie ten behoewe van sekere ter dood

veroordeeldes); en artikels 319(3) en 384 van die Strafproseswet 56 van 1955 wat nie deur die huidige Strafproseswet herroep is nie (aanklagtes weens die aflê van valse getuienis – die sogenaamde statutêre meineed – en die oplegging, onder sekerheidstelling, van die verpligting om die vrede te bewaar).

Vir die strafregpraktisyn en -akademikus is hierdie hanteerbare boekie baie handig en selfs onontbeerlik, veral waar 'n mens nie die lomp (en duur!) statute oral kan rondkarwei nie.

PEET BEKKER
Universiteit van Suid-Afrika

It is perfectly proper to regard and study the law simply as a great anthropological document (Holmes *Law in science and science in law: Collected legal papers* (1920) 210 212).

Enkele gedagtes oor die moontlike rol van *paralegals* in die Suid-Afrikaanse regsisteem

Susan Scott
BA LLD
Professor in die Privaatreg, Universiteit van Suid-Afrika

SUMMARY

Introductory remarks on the possible role of paralegals in the South African legal system

In this article introductory remarks are made on the role of paralegals in order to stimulate the debate on this issue which is still in its early stages in South Africa. In view of the legitimacy crisis of legal administration and the problem of access to justice confronting the public and lawyers, the role of paralegals deserves special attention; recognition of this type of practitioner should receive careful consideration from all concerned. Aspects which should be addressed are the following: the definition of paralegals; their role in legal practice; the fields in which they can operate (of particular importance is the recognition of paralegals in the criminal-law sphere); training and education as well as control. The last two aspects are not dealt with in the article. The author is of the opinion that the traditional legal professions should give serious attention to the role of paralegals, if they really wish to address the problems of access to justice in South Africa. Their contribution in this regard is of the utmost importance, since they are directly affected by the recognition of paralegals. Their involvement is necessary not only because of their concern with the access to justice problem, but also to protect members of their profession and the public at large.

1 INLEIDING

Die oogmerk met hierdie artikel is om enkele inleidende gedagtes uit te spreek ten einde die debat oor *paralegals*[1] wat in Suid-Afrika nog in sy babaskoene staan, maar nietemin werklik dringende en diepgaande besinning verg, aan die gang te kry.

Die Suid-Afrikaanse regstelsel en regsadministrasie beleef tans 'n legitimiteitskrisis. Een van die belangrikste probleme wat ondervind word, is die feit dat 'n groot gedeelte van die bevolking sonder verteenwoordiging in die hof verskyn of nie toegang tot advies van 'n regs- of regsverwante aard het nie[2] – hierna kan verwys word as die *access to justice*-probleem.[3] Die oplossing van

1 In die res van hierdie artikel sal die woord *paralegal* met "pararegspraktisyn" vertaal word.
2 Vir statistiek in hierdie verband sien Steytler *The undefended accused* (1988) vii; *S v Rudman, S v Mthwana* 1992 1 SA 343 (A) 367E ev.
3 Vir 'n bespreking van die hele *access to justice*-probleem, sien Cappelletti en Garth *Access to justice* vol 1 (1978) 3 49. In die res van hierdie artikel sal dié begrip met "toegang tot die reg" vertaal word.

hierdie probleem moet uit verskeie oogpunte aangepak word,[4] maar die aspek wat in hierdie artikel onder die loep geneem sal word, is die besondere rol wat pararegspraktisyns kan speel om die gebrek aan toegang tot die reg te verlig.

Dit ly geen twyfel nie dat daar wyd, en ook reeds in Suid-Afrika,[5] van hierdie soort regspraktisyns gebruik gemaak word en dat daar ook 'n behoefte aan die erkenning van pararegspraktisyns as 'n vertakking van die regsberoep is. Na my mening is dit vir die tradisionele regsberoepe, en moontlik in die besonder vir die prokureurs, van die aller-grootste belang om op die voorpunt van hierdie ontwikkeling te staan aangesien die beroep wesentlik deur die optrede van pararegspraktisyns geraak word, die vermoë het om leiding in hierdie verband te gee en baie daarby kan baat.[6] Voorts is dit vir die tradisionele regsberoepe van belang omdat die beroep nie alleen geregtig en verplig is om die belange van die lede van die betrokke beroep te beskerm nie, maar ook 'n plig het om die breë publiek van die benodigde regshulp te voorsien en teen uitbuiting op hierdie terrein te beskerm.

Ten aanvang dien vermeld te word dat daar vir regsvergelykende doeleindes hoofsaaklik op die posisie in die Verenigde State van Amerika en Australië gekonsentreer is.[7] Die rede hiervoor is tweeledig van aard: Eerstens kan die regsposisie in hierdie twee lande met vrug as regsvergelykende basis gebruik word omdat daar fundamentele ooreenkomste met die posisie van pararegspraktisyns in Suid-Afrika is. Die vernaamste ooreenkoms is die feit dat die verskyning van pararegspraktisyns 'n direkte gevolg van die gebrek aan toegang tot die reg[8]

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4 Cappelletti en Garth *Access to justice* vol 1 49 ev.

5 Sien bv die verrigtinge by 'n kongres wat in 1990 deur *LEAP* (*Legal Education Action Project*) en die *Black Sash* (Wes-Kaapstreek) gereël is in Fine (red) *Working for justice: the role of para-legals in South Africa.*

6 Die grootste voordeel van pararegspraktisyns vir die tradisionele regsberoepe is 'n ekonomiese een (sien Eimermann *Fundamentals of paralegalism* (1980) 36 – 37). Goodrich *The basics of paralegal studies* (1991) 3 ev 3 verklaar: "While members of other professions, such as doctors and dentists, have used paraprofessionals for many years, attorneys and other employers in lawrelated fields have only recently realized the value of using paralegals in their offices. Attorneys discovered that if they could delegate certain kinds of tasks to employees who were not attorneys, they could spend more time on matters that required the expertise of an attorney and increase their billable hours . . . As a result of the obvious advantages of employing paralegals, more and more firms in recent years have chosen to hire paralegals. Legal assisting has become one of the fastest growing professions in the country, and there is every reason to believe that the market will be a continually expanding one in the coming years." Pararegspraktisyns kan dienste wat van sodanige aard is dat die tradisionele regspraktisyn dit nie hoef te verrig nie, teen 'n goedkoper tarief verrig en die prokureur of advokaat se hande losmaak om meer ingewikkelde werk te doen. Dit beteken nie dat pararegspraktisyns dieselfde dienste maar van 'n minderwaardige kwaliteit lewer nie, maar ander dienste waarvoor dieselfde mate van opleiding en oordeel nie vereis word nie (sien Cappelleti en Garth *Access to justice* vol 1 109; sien ook Fine in *Working for justice* 52).

7 In 'n verslag oor pararegspraktisyns (*Report: Para-legals*) aan die Access Sub-committee: Investigation into the Ladder System verwys Budlender na die posisie in Afrika en ander derdewêreldlande.

8 Daar moet egter in gedagte gehou word dat die hele probleem van toegang tot die reg nie opgelos kan word alleen deur die erkenning van pararegspraktisyns nie (sien Cappelletti en Garth *Access to justice* vol 1 49 ev; Noone in Vernon en Regan (reds) *Improving access to justice: The future of paralegal professionals* (Proceedings of a Conference held 1990-02-19/20, Australian Institute of Criminology Canberra) 35.

is wat in al drie lande ervaar word. Die ontwikkeling van die pararegspraktisyn-beroep is 'n direkte uitvloeisel van die situasie dat 'n sekere gedeelte van die gemeenskap[9] 'n probleem met toegang tot die reg ondervind, byvoorbeeld vanweë finansiële probleme of geografiese faktore, of as gevolg van faktore wat met taal, ras of geslag[10] verband hou of selfs op sielkundige oorwegings gegrond is, soos die feit dat die tipiese hofopset of regstaal wat deur almal behalwe die beskuldigde of eiser of verweerder gebesig word, gevoelens van angstigheid by die betrokkenes ontlok.[11]

Die tweede rede waarom na hierdie twee lande verwys word, is die feit dat volop resente literatuur oor die betrokke onderwerp ten aansien van hierdie lande beskikbaar is.

De Kock[12] vestig die aandag op enkele probleemgebiede rakende pararegspraktisyns wat dringende aandag verdien, maar daar is nog vele ander aspekte van hierdie uiters belangrike ontwikkeling wat binne die regsgemeenskap plaasvind wat deeglike ondersoek verg. Die fasette waaraan besondere aandag gegee moet word, kan in die woorde van Sumner[13] saamgevat word:

> "The issues which both the specialist legal community and the wider community must examine include: the extent to which non-lawyers should play a role in legal service delivery and the nature of their training; the circumstances in which paralegals may be used; their relationship to lawyers; their specialisation and remuneration; and their training and accreditation if this is considered desirable."[14]

Die erkenning van 'n pararegspraktisyn-vertakking van die regsberoep of ten minste die erkenning dat daar ondersoek na die wenslikheid van sodanige ontwikkeling ingestel moet word, vereis van die tradisionele regsgemeenskap indringende, innoverende en skeppende denke waaraan sonder verwyl aandag gegee moet word, aangesien dit 'n onstuitbare ontwikkeling is wat dwarsoor die wêreld posgevat het en wat besondere momentum het vanweë die feit dat dit uit gemeenskapsbehoeftes ontstaan het.[15] Dit help nie om net bewus te wees van die

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9 Fry en Hoopes *Paralegal careers* (1986) 47: "The legal system in this country desperately needs to improve services to the lower middle class, the poor, the elderly, the handicapped, people in institutions, migrants, and minorities."

10 Noone in *Paralegal professionals* 25: "Access to justice may be restricted because of geographic factors; institutional limitations; racial, class, and gender biases; cultural differences as well as economic factors. The way legal services are delivered by the legal profession, the nature of court proceedings, including procedural requirements and the language used, are also barriers limiting people's opportunity to obtain justice"; Matthews in *Paralegal professionals* 74; Fry en Hoopes *Paralegal careers* 47, hierbo (fn 9) aangehaal: hierdie stelling kan net so goed tav die posisie in Suid-Afrika gemaak word.

11 Cappelletti en Weisner *Access to justice* vol 2 (1979) 877 ev.

12 *Die individu se reg op "access to justice" en die rol van die "pararegspraktisyn" met spesifieke verwysing na regulering* (ongepubliseerde LLB-skripsie UP 1993). Alhoewel hierdie navorsing duidelik die werk van 'n student is en op verskeie punte vir kritiek vatbaar is, kan dit nogtans baie nuttig gebruik word as uitgangspunt vir verdere navorsing.

13 Prokureur-Generaal van Suid-Australië.

14 In *Paralegal professionals* 3; sien ook Regan in *Paralegal professionals* 141.

15 Schacht in *Paralegal professionals* 23: "When we talk about paralegals, we are in a sense talking about a form of community action. Paralegals are predominantly employed and active at the community level. They are involved in services which are designed to empower individuals to resolve conflicts not only with each other, but also 'the system' . . . If paralegals can assist in the provision of justice to our community at a reasonable cost, then their participation should be encouraged." Sien verder Noone in *Paralegal professionals* 31 – 35, veral 35: "In any discussion of improving the community's access to the legal system, the increased use of paralegals must be seen as part of an overall concern for delivering legal services and not simply as a cost-saving exercise."

probleem nie; daar sal daadwerklik opgetree moet word om dit aan te spreek.[16] Die tradisionele regsberoepe wat in Suid-Afrika in elk geval op die vooraand van drastiese veranderings staan,[17] behoort nie in die weg van die ontwikkeling van hierdie nuwe vertakking van die regsberoep te staan nie; trouens die "tradisionele" regsberoep behoort sy juk van konserwatisme[18] af te gooi en leiding by hierdie ontwikkeling te gee.[19]

Alhoewel die pararegspraktisyn-beroep aanvanklik in die Verenigde State van Amerika ook teenstand van die tradisionele regsberoep ondervind het, is daar egter gou gevind dat dit besondere voordele, veral van 'n ekonomiese aard, vir die tradisionele regsberoepe as sodanig inhou en het die teenstand dan ook verslap.[20] Met die algemene gees van verandering wat in Suid-Afrika heers, behoort die ontwikkeling van die pararegspraktisyn-beroep hier te lande in elk geval nie te stuit teen besware wat op vooroordeel gebaseer is nie.[21] [22]

Een van die probleme wat in ander lande as 'n struikelblok in die weg van die erkenning van 'n afsonderlike pararegspraktisyn-beroep ervaar is, was weerstand van die regering van die dag. As die redes[23] vir hulle beweerde weerstand

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16 Asher in *Paralegal professionals* 135: "In the legal profession those who are interested in affordable justice for the average person in the street must take some time to identify community needs. Having assessed those needs it is vital that these services be delivered in a way that is affordable to those people."

17 Sien die versoeke wat reeds in 1990 in hierdie verband gerig is (Fine in *Working for justice* 81).

18 Oor die konserwatisme van 'n segment van die tradisionele regsberoepe in Suid-Afrika, sien die opmerking van Mojanku Gumbi soos aangehaal in *Cosmopolitan* (Januarie 1994) 46: "In short, her work involves challenging the legal profession to change – no easy task considering the prevailing conservatism of the profession. 'They are the last to change,' she says. 'They talk about tradition and they talk about values. Any time you challenge, they say "this is how we've always done it"'." Sien ook hieronder vn 21 oor die opmerkings aangehaal in *Cosmopolitan* wat die Voorsitter van die Pretoriase Balie na bewering aan die tydskrif sou gemaak het.

19 Wallace in *Paralegal professionals* 129: "Lawyers have been very slow to recognise the benefits of having paraprofessionals. The paralegal movement has been forced upon them, in contrast to other professions where the impetus for the paraprofessional has come from the senior professionals themselves. To date, there has been very little official recognition of paralegals." Sien ook Fry en Hoopes *Careers* 6 11.

20 Eimermann *Paralegalism* 36–37 39; sien ook hierbo vn 6.

21 Alhoewel ek hieroor twyfel as die Voorsitter van die Pretoriase Balie volgens *Cosmopolitan* (Januarie 1994) hom soos volg oor vroue in die regsberoep uitlaat: "'Most of the women who join get flak from me,' admits Bar Council chairman Anton le Roux. 'I don't believe in women joining the Bar,' he says, stressing that this is his personal view. 'I don't think it is the right profession for them. This is a helluva tough job. You stand up in court and a judge can criticise you in public. Some of them are very rude (*sic*). It is not easy for them – I'm talking about *ladies* (*sic*) – to stand there and be criticised. If you tend to cry every time you lose a case, you're not going to make it'" (46) en: "'It's the practical things that make it difficult. You can start at two in the morning and sometimes you work until two the next morning. When you're married, how do you deal with your husband? I expect my wife to be at home at five or six'" (48).

22 Regan in *Paralegal professionals* 138: "The 'traditional legal profession' or lawyers, are particularly wary of any such professions emerging. Why? The sociology of the professions suggests that all professions attempt to defensively shore up the cracks as other groups attempt to make inroads into 'their' work."

23 Regan in *Paralegal professionals* 138: "Governments too are very cautious making moves in this direction – partly because there are usually a number of lawyers in most governments, but also because most governments respond to a large extent to political pressure to bring about major change. At the moment this is not happening in any organized way in relation to paralegal professions." In Suid-Afrika is die tyd polities juis miskien ryp om die regering tot aksie te probeer oorreed.

in ag geneem word, behoort dit in die huidige klimaat in Suid-Afrika nie 'n probleem te wees nie.

2 TERMINOLOGIE

Daar bestaan verskeie probleme rondom die hele debat oor pararegspraktisyns wat in hierdie artikel selfs nie eers aangeraak word nie – een hiervan is die besonder prikkelende vraag of hier sprake van 'n professie kan wees.[24] Alhoewel dit 'n baie belangrike en interessante besprekingspunt is, sal ek my nie daaroor uitlaat nie.

'n Baie belangrike vraag waaraan egter wel aandag gegee moet word, is wanneer 'n mens met 'n pararegspraktisyn te doen het. Om as 'n pararegspraktisyn[25] te kwalifiseer, moet iemand werk van 'n *regsverwante aard* doen.[26] Hier moet 'n onderskeid gemaak word tussen werk van 'n regsaard en werk van 'n regsverwante aard. Werk van 'n regsaard is daardie regswerk wat volgens statuut slegs deur spesifieke persone gedoen mag word en die persone wat werk van laasgenoemde aard doen, is dan die regspraktisyns of *legals*.[27] Behalwe die spesifieke voorskrifte wat in die wette gegee word van die tipe werk wat slegs deur bepaalde persone gedoen mag word, mag pararegspraktisyns ook nie werk doen wat op die ongemagtigde beoefening van 'n regspraktyk (*the unauthorised practice of law*) neerkom nie, tensy hulle voldoen aan die vereistes wat deur die betrokke beroep voorgeskryf word. Indien hulle dit sou doen, maak hulle hulle skuldig aan 'n misdryf en kan vervolg word. Iemand wat dus voorgee dat hy/sy gemagtig is om die werk van 'n regspraktisyn te verrig of wat sekere dienste lewer wat tradisioneel deur 'n regspraktisyn verrig word, maak hom/haar skuldig aan die ongemagtigde beoefening van 'n regspraktyk.[28]

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24 Sien hieroor Goldring in *Paralegal professionals* 5 ev; Asher *idem* 131 ev; Wallace *idem* 124; Haskell "Issues in paralegalism: education, certification, licensing, unauthorized practice" 1981 *Georgia LR* 665; Moon "Malpractice: new profession, new responsibility" 1982 *TRIAL* 40 ev; Eimermann *Paralegalism* 60; Johnstone en Wenglinsky *Paralegals* (1985) 183 ev.

25 Eimermann *Paralegalism* 34: "The prefix *para* carries the meanings of 'near' or 'beside'; 'similar to' or 'subordinate to'. Thus a paralegal is one who works near or beside a lawyer, one who is similar to a lawyer, or one who is subordinate to a lawyer."

26 Haskell 1981 *Georgia LR* 631: "The occupation is loosely defined because anyone who does law-related work but is not an attorney may consider himself a paralegal or legal assistant"; Fry en Hoopes *Careers* 3.

27 Hieronder kan tans ingedeel word: advokate (die Wet op die Toelating van Advokate 74 van 1964); prokureurs (die Wet op Prokureurs 53 van 1979 en die Wet op die Staatsprokureur 56 van 1957); wetsagente (die Wet op Landdroshowe 32 van 1944) en moontlik ook die openbare verdedigers, alhoewel hulle "beroep" nog nie statutêr gereël word nie. Die term "regspraktisyn" sal voortaan in hierdie streng tegniese betekenis van "'n persoon wat statutêr gemagtig is om omskrewe dienste van 'n regsaard te doen", gebruik word.

28 In Suid-Afrika bepaal a 83(1) van die Wet op Prokureurs 53 van 1979 bv: "Iemand wat nie 'n praktisyn is nie, mag nie praktiseer.of hom as 'n praktisyn voordoen of voorgee om 'n praktisyn te wees of gebruik maak van 'n naam, titel, toevoeging of beskrywing wat impliseer of die indruk skep dat hy/sy 'n praktisyn is of regtens as sodanig erken word of enige handeling verrig wat hy/sy ingevolge 'n kragtens artikel 81(1)(g) uitgevaardigde regulasie verbied is om te verrig nie." "Praktiseer" word in die woordomskrywingsartikel soos volg omskryf: "'[p]raktiseer' as 'n prokureur, notaris of transportbesorger praktiseer, en het 'praktyk' 'n ooreenstemmende betekenis." A 9 van die Wet op die Toelating van Advokate 74 van 1964 bepaal ook dat dit 'n misdryf is vir iemand wat nie 'n toegelate advokaat is nie om op enige wyse, regstreeks of onregstreeks, as advokaat te praktiseer of voor te gee dat hy/sy as sodanig optree of selfs om die titel te gebruik.

Die moeilikste faset van hierdie bespreking is geleë in die vasstelling van die betekenis van die begrip "beoefening van 'n regspraktyk". Sekere spesifieke dienste wat slegs deur die betrokke regspraktisyns verrig mag word, word gewoonlik in die onderskeie wette[29] aangetref, maar dan word daar ook nog gewoonlik in die algemeen na die beoefening van 'n regspraktyk[30] verwys.[31] In laasgenoemde geval moet dan bepaal word wat presies met die beoefening van 'n regspraktyk bedoel word. Dit is veral baie moeilik om vas te stel wat dit behels in die geval van advokate, aangesien die enigste diens wat uitdruklik vir hulle gereserveer word, die bevoegdheid is om in die hooggeregshof te verskyn. 'n Mens is dus op die gemenereg[32] aangewese om vas te stel wat die dienste is wat spesifiek deur advokate verrig mag word. In hoofsaak wil dit egter voorkom

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29 Slegs prokureurs mag bv ingevolge die Wet op Prokureurs 53 van 1979 teen betaling van 'n fooi of verkryging van 'n ander voordeel, direk of indirek, dokumente mbt onroerende goed of regte op onroerende goed opstel (a 83(8)(i)); testamente of ander testamentêre stukke opstel (a 83(8)(ii)); enige akte van oprigting of statute of prospektus van 'n maatskappy opstel (a 83(8)(iii)); enige ooreenkoms, akte of geskrif mbt die stigting of ontbinding van 'n vennootskap of 'n verandering van voorwaardes daarvan opstel (a 83(8)(iv)); of enige stuk of dokument mbt of benodig of bedoel vir gebruik in 'n aksie, geding of ander proses in 'n hof met siviele jurisdiksie in die Republiek opstel (a 83(8)(v)). A 83(2) bepaal ook dat niemand tov die opstel van 'n testament of ander testamentêre stuk of die administrasie, likwidasie of distribusie van die boedel van 'n oorlede of insolvente persoon, geestesongestelde persoon of persoon wat aan 'n ander regsonbevoegdheid onderworpe is, te kenne mag gee of mag adverteer dat hy/sy of iemand anders daarmee gemoeid is of mag wees nie. Slegs advokate mag in die hooggeregshof verskyn om litigante of beskuldigdes by te staan. Hierdie "reg" word nêrens duidelik omskryf nie maar word deur sommige (sien bv Van Dijkhorst 14 *LAWSA* par 230) herlei uit a 10 van die Wet op die Toelating van Advokate 74 van 1964.

30 Sien bv a 83(1) van die Wet op Prokureurs 53 van 1979 en a 9 van die Wet op die Toelating van Advokate 74 van 1964, en die bespreking hierbo vn 28.

31 Haskell 1981 *Georgia LR* 652: "The practice of law may be defined very broadly as the representation of individuals in judicial and administrative proceedings and in negotiations involving legal matters, the counselling of individuals in legal matters, and the preparation of legal documents." Statsky *Essentials* 153: "Statutes defining the practice of law apply to paralegals. Criminal prosecution can result from violation of these statutes. In general the statutes prohibit non-lawyers from appearing for another in a representative capacity, giving legal advice, and drafting legal documents. A common theme in the literature is that if the activity calls for the exercise of professional judgment, a lawyer is required"; sien ook *idem* 161 oor die houding van die *American Bar Association* tov die definisie van "practice of law". Johnstone en Weglinsky *Paralegals* 15: "In their lawyerlike work, however, it is unusual for paralegals to be assigned tasks that call for a high level of professional skill or knowledge as to which lawyers have had special education and training and believe they have special, even unique, understanding and competence"; Fry en Hoopes *Careers* 9. In *Pretoria Balieraad v Beyers* 1966 1 SA 112 (T) 114G ev word die volgende *dictum* uit *Attorney-General v Tatham* 1916 TPD 160 169 met goedkeuring aangehaal: "It does not fall within the functions and offices of an advocate without the intervention of a solicitor to endeavour to arrange a settlement between parties who have a dispute, to interview witnesses, collect evidence and write letters in connection with contemplated proceedings. These are all matters which properly belong to the functions of a solicitor." Die appèlhof het in *Beyers v Pretoria Balieraad* 1966 2 SA 593 (A) met goedkeuring na die hof *a quo* se uitspraak en dus by implikasie na bogemelde aanhaling as riglyn in hierdie verband verwys.

32 Sien in hierdie verband Van Dijkhorst 14 *LAWSA* par 230, asook *Pretoria Balieraad v Beyers* 1966 1 SA 112 (T) en *Beyers v Pretoria Balieraad* 1966 2 SA 593 (A). Hieruit wil dit voorkom of die basiese taak van 'n advokaat is om advies aan 'n kliënt te gee of 'n litigant in 'n geding by te staan, maar dan slegs in opdrag van 'n prokureur.

of die basiese taak van die advokaat is om 'n kliënt in die hof by te staan ten einde te verseker dat geregtigheid sal seëvier.[33]

Om saam te vat, enigiemand wat sonder die nodige kwalifikasies en magtiging dienste verrig wat statutêr vir spesifieke tipes praktisyns gereserveer is of wat hom/haar in die algemeen met die beoefening van 'n regspraktyk besig hou,[34] tree ongemagtig op en maak hom/haar aan 'n misdryf skuldig.[35]

Werk van 'n regsverwante aard is nog moeiliker om te omskryf,[36] behalwe as 'n negatiewe omskrywing gebruik word soos die volgende: werk van 'n regsverwante aard is werk wat nie van 'n regsaard is nie maar daarmee verband hou. Hierdie omskrywing is natuurlik baie wyd en vaag maar uit sommige van die definisies wat van pararegspraktisyns gegee word, kan vasgestel word wat daaronder ingesluit word.[37] Een van die kriteria wat ook aangewend word om te bepaal wanneer 'n mens met werk van 'n regsaard te doen het wat slegs deur

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33 Van Dijkhorst 14 *LA WSA* par 230. Dit kan afgelei word uit die algemene strekking van hierdie par, asook uit die volgende stelling: "They are primarily experts in advocacy, which is the art of presenting the client's case in court." Dit blyk ook uit die kenmerke van 'n advokaat wat Van Dijkhorst soos volg weergee: "In a truly qualified advocate legal knowledge, forensic skills, professional ethics and good court-room etiquette are blended in total union in furtherance of the administration of justice."

34 Hier moet egter ook in gedagte gehou word dat daar wel gevalle is waar iemand hom/haar op die oog af met die beoefening van die regsberoep besig hou maar wat tog nie op ongemagtigde uitoefening daarvan neerkom nie, bv die "lay-advocate" in Amerika (sien Johnstone en Weglinsky *Paralegals* 8 218; Eimermann *Paralegalism* 62 ev). Dit kom voor waar dit vir 'n individu geoorloof is om in persoon te verskyn en hy/sy word dan deur 'n "lay-advocate" bygestaan. Dit kan selfs 'n vriend of 'n familielid wees en so 'n persoon hoef geen regsopleiding te hê nie.

35 Dan is daar ook nog sekere gevalle waar persone indirek verbied word om werk van 'n regsaard te doen in die sin dat fondse nie aan hulle uitbetaal sal word nie (sien a 48 van die Multilaterale Motorvoertuigongelukkefondswet 93 van 1989).

36 Statsky *Essentials* 6.

37 Haskell 1981 *Georgia LR* 653: "The paralegal is forbidden to represent clients, counsel them, or prepare documents for them. However, the paralegal may assist the lawyer in all these professional activities; that is to say, the paralegal may interview clients at the direction of the lawyer, collect information and do rudimentary forms of research for the lawyer, and draft documents for the lawyer. Whatever the paralegal does becomes incorporated in the lawyer's work." Johnstone en Weglinsky *Paralegals* 13: "PARALEGAL ASSISTANT. Law Clerk; Legal Aide. Researches law, investigates facts, and prepares documents to assist lawyer. Researches and analyzes law sources such as statutes, recorded judicial decisions, legal articles, treatises, constitutions, and legal codes to prepare legal documents such as briefs, pleadings, appeals, wills, contracts, deeds, and trust instruments for review, approval and use by attorney. Appraises and inventories real and personal property for estate planning. Investigates facts and law of case to determine causes of action and to prepare case accordingly. Files pleadings with court clerk. Prepares affidavits of documents and maintains document file. Delivers or directs delivery of subpoenas to witnesses and parties to action. May direct and co-ordinate activities of law office employees. May prepare office accounts and tax returns. May specialize in litigation, probate, real estate, or corporation law. May research patent files to ascertain originality of patent application and be designated patent clerk." Statsky *Essentials* 3: "A paralegal is a person under the supervision and direction of a licensed lawyer, who may apply knowledge of law and legal procedures in rendering direct assistance to lawyers engaged in legal research; design, develop, or plan modifications or new procedures, techniques, services, processes, or applications; prepare or interpret legal documents and write detailed procedures for practicing in certain fields of law; select, compile, and use technical information from such references as digests, encyclopedias, or practice manuals; and analyze and follow procedural problems that involve independent decisions."

die regspraktisyn gedoen mag word, is of daar 'n mate van professionele oordeel verwag word van die persoon wat die betrokke diens verrig.[38]

Daar is verskeie definisies en indelings van pararegspraktisyns wat in 'n mindere of meerdere mate ooreenstem,[39] maar as uitgangspunt kan dié van Statsky[40] geneem word:

> "A paralegal is a person with legal skills who works under the supervision of a lawyer[41] or who is otherwise authorized by law to use these skills."

Die interessantste aspek van die meeste definisies van pararegspraktisyns is die feit dat pararegspraktisyns in die reël onder toesig van 'n regspraktisyn[42] werk, óf in die privaatsektor teen betaling van 'n fooi deur die kliënt, óf in die openbare sektor waar hulle as werknemers vir 'n salaris werk of as vrywilligers waar hulle hulle dienste gratis aanbied. In die openbare sektor kan pararegspraktisyns vir die staat[43] of vir 'n regshulporganisasie[44] werk.

Die uitgangspunt in die Verenigde State van Amerika en Australië is dus dat pararegspraktisyns onder toesig van 'n regspraktisyn moet werk maar dan word daar tog ook melding van onafhanklike pararegspraktisyns gemaak.[45]

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38 Sien die bespreking hiervan deur Brown in Todd (red) *Professional responsibility for the paralegal* (1978) 506 ev.

39 Sumner in *Paralegal professionals* 3; Dickeson *idem* 47; Statsky *Paralegals* xi; Brown in *Professional responsibility* 491; Davidson "The freelance legal assistant" 1991 *Mich Bar J* 1184; Haskell 1981 *Georgia LR* 632; sien ook De Kock *Skripsie* 11 ev.

40 *The regulation of paralegals: ethics, professional responsibility, and other forms of control* (1988) 1 ev; sien ook Statsky *Essentials of paralegalism* (1988) 2; Brown in *Paralegal professionals* 491.

41 Statsky *Essentials* 6 omskryf "lawyer" soos volg: "A lawyer is someone with a licence to practice law." In die res van hierdie artikel sal ek die woord "regspraktisyn" as vertaling van die woord "lawyer" gebruik, dws dit sluit wetsagente, prokureurs en advokate in.

42 Sumner in *Paralegal professionals* 3: "Many legal practices in fact, now have paralegal workers, who, *under the supervision of lawyers* perform duties such as managing debt recovery practices, drafting company documentation, taking instructions for and drafting wills, conveyancing, and preparation of bills of costs in taxable form"; Noone *idem* 26; Dickeson *idem* 47; Matthews *idem* 73; Churchman *idem* 89; Murray *idem* 97 ev; Drew *idem* 103 ev. Statsky *Paralegals* xi: "A paralegal or legal assistant is a person with legal skills *who works under the supervision of a lawyer or who is otherwise authorized to use these skills*." Brown in *Professional responsibility* 491: "A paralegal is a person with legal skills *who works under the supervision of a lawyer, or who is otherwise authorized by law to use his skills*." Davidson 1991 *Mich Bar J* 1184: "By definition a freelance legal assistant is an individual who offers their (*sic*) expertise to the legal community at large, works under the supervision of an attorney and is autonomous of any one particular attorney or law firm." Haskell 1981 *Georgia LR* 632; Fry en Hoopes *Careers* 10; Johnstone en Weglinsky *Paralegals* 3 24 – 25; Goodrich *Paralegal studies* 2; sien ook De Kock *Skripsie* 11 ev. (Kursivering in aanhalings myne.)

43 Johnstone en Weglinsky *Paralegals* 49.

44 *Idem* 52. Sodanige organisasies is daarop ingestel om die arm dele van die bevolking te help en die kliënte betaal nie vir die dienste wat hulle ontvang nie.

45 Statsky *Paralegals* xi; Statsky *Essentials* 5: "Not all paralegals work under the supervision of a lawyer. As we shall see later, many paralegals working for the government are not supervised by lawyers." Haskell 1981 *Georgia LR* 632: "'Paralegal' has a broader connotation; it may refer either to a legal assistant or to a person who does law-related work *independently of the lawyer*." Davidson 1991 *Mich Bar J* 1184: "A legal assistant definitely cannot give legal advice or participate in the *unauthorized practice of law* . . . At present there is a nationwide controversy with regard to the 'independent legal assistant' or the 'independent paralegal' versus the true freelance legal assistant. There is a specific group of individuals operating under the title of independent legal assistants and independent paralegals who offer their services directly to the general public as well as to practising members of the Bar." Johnstone en Weglinsky *Paralegals* 8 218; sien ook De Kock *Skripsie* 11 ev.

As die definisies egter nader ontleed word, blyk dit dat die uitstaande kenmerk van almal die feit is dat daar een of ander vorm van *toesig* is, hetsy in die vorm van toesig deur 'n regspraktisyn in die privaat- of openbare sektor, of waar daar nie sodanige toesig is nie, kom dit meestal voor in die openbare sektor waar pararegspraktisyns vir die staat[46] of vir regshulporganisasies[47] werk. Daar moet egter in gedagte gehou word dat pararegspraktisyns in laasgenoemde twee gevalle werknemers is wat 'n salaris van hulle werkgewers ontvang, dat daar geen fooi van die kliënte gevra word nie en dat daar tog 'n mate van toesig en weinig geleentheid vir uitbuiting van die publiek is.[48] Een van die redes waarom toesig van 'n regspraktisyn vereis word, naamlik moontlike uitbuiting van die publiek, is dus in laasgenoemde gevalle grootliks afwesig.

Dan is daar ook nog gevalle waar nie-regsgeleerdes toegelaat word om sonder toesig van 'n regspraktisyn op te tree, maar dit is beperk tot optredes wat op een of ander wyse vir spesifiek omskrewe gevalle gemagtig is,[49] of tot gevalle waar die werk wat verrig word van 'n administratiewe aard is.[50]

Die hele aangeleentheid van die regulering[51] van erkende pararegspraktisyns is baie belangrik en omvattend en val buite die bestek van hierdie artikel, maar ek wil tog daarop wys dat daar in gedagte gehou moet word dat waar in die Anglo-Amerikaanse literatuur[52] verwys word na beheer of regulering van pararegspraktisyns, dit ter sprake kom ten opsigte van pararegspraktisyns wat op een of ander wyse in elk geval onder toesig van 'n regspraktisyn hulle dienste lewer of ten minste in diens van die staat of 'n regshulporganisasie is en wat dus nie teen betaling van 'n fooi hulle dienste direk aan die publiek aanbied nie.

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46 Sien bv Haskell 1981 *Georgia LR* 632; Kelly in *Paralegal professionals* 59 ev; Murray *idem* 97 ev; Drew *idem* 103 ev; Johnstone en Weglinsky *Paralegals* 49; Statsky *Essentials* 5.

47 Williams en Sparrow in *Paralegal professionals* 113 ev; Johnstone en Weglinsky *Paralegals* 52 ev; Fry en Hoopes *Careers* 27. In Suid-Afrika kan *LHR*, *LRC*, *LEAP*, *CLC*, die *Black Sash* en soortgelyke instellings genoem word. Dit is interessant om daarop te let dat dit wil voorkom of Johnstone en Weglinsky *Paralegals* 52 ev van mening is dat daar wel ook in hierdie gevalle toesig van 'n regspraktisyn moet wees, al is dit net in 'n baie beperkte mate, aangesien die verhouding regspraktisyn tot pararegspraktisyn in hierdie organisasies gewoonlik baie laag is.

48 Fry en Hoopes *Careers* 26–27.

49 Haskell 1981 *Georgia LR* 660 vn 82. Hier kan melding gemaak word van die sogenaamde "lay-advocates" (sien Johnstone en Weglinsky *Paralegals* 8 218). Brown in *Professional responsibility* 491: "The legal (*lay*) advocate, on the other hand, more often works independently of the lawyer, consulting directly with clients and client groups, providing representation for clients at administrative hearings of those agencies which authorize lay representation" (my gekursiveerde korreksie). Sien ook vn 34 hierbo.

50 Haskell 1981 *Georgia LR* 660; Fry en Hoopes *Careers* 10 vn 26; Eimermann *Paralegalism* 69–70; sien ook Budlender *Report: Para-legals* 7.

51 De Kock handel in haar skripsie redelik volledig met hierdie onderwerp, maar daar is baie ernstige punte van kritiek wat teen haar indelings en benadering ingebring kan word. Dit is egter wel interessant om dit te lees ten einde 'n idee te kry van al die probleme wat hier ter sprake kom. Sien ook Budlender *Report: Para-legals* 14 ev.

52 Wallace in *Paralegal professionals* 124 ev; Statsky *Paralegals* xi ev; Haskell 1981 *Georgia LR* 641 ev; Voisin "Ethical standards for legal assistants" 1991 *Mich Bar J* 1178; Ulrich en Clarke "Working with legal assistants: professional responsibility" 1981 *American Bar Ass J* 992; Moon 1982 *TRIAL* 40 ev; Eimermann *Paralegalism* 42 ev; Johnstone en Weglinsky *Paralegals* 153 ev; Statsky *Essentials* 153 ev.

3 ONAFHANKLIKE PARAREGSPRAKTISYNS

3 1 Inleiding

Die vraag wat ek veral in hierdie artikel wil aanspreek, is of pararegspraktisyns geheel en al onafhanklik en sonder toesig van 'n regspraktisyn mag optree, en indien wel, wat die aard van die dienste is wat hulle dan mag verrig. Voordat hierdie vraag beantwoord kan word, moet drie baie belangrike kenmerke van pararegspraktisyns weer kortliks uitgelig word:

(a) As uitgangspunt moet onthou word dat persone slegs kwalifiseer om op *para*regspraktisyn-status aanspraak te maak indien hulle werk van 'n regsverwante aard doen. Soos ek in die volgende punt sal aantoon, mag hulle egter nie as regspraktisyns optree of praktiseer of voorgee dat hulle regspraktisyns is nie. Hulle mag regspraktisyns net bystaan in die uitoefening van die regsberoep[53] – dit is waar die voorvoegsel "para" vandaan kom. Wanneer iemand dus werk van 'n regsaard doen, kwalifiseer hy/sy nie meer om die voorvoegsel *para* te gebruik nie, en is hy/sy 'n regspraktisyn wat aan die statutêre vereistes vir die betrokke beroep moet voldoen.

(b) 'n Tweede punt wat in gedagte gehou moet word, is dat pararegspraktisyns 'n mate van regskennis en/of vaardighede het.

(c) Voorts moet pararegspraktisyns saam met of onder toesig van 'n regspraktisyn werk. Hierdie aspek van die vraagstuk verdien ernstige aandag en is van wesentlike belang vir die ontwikkeling van hierdie beroep. Die vraag wat ontstaan, is of die tradisionele regsberoepe nie maar 'n "laat maar gaan" houding kan inneem nie en hulle oë sluit vir optredes ingevolge waarvan dienste van 'n regsverwante aard direk teen betaling van 'n fooi aan die publiek aangebied word. Die antwoord is eintlik voor die hand liggend: die tradisionele regsberoepe behoort nie sodanige houding in te neem nie. Aan die een kant moet die tradisionele regspraktisyns beskerm word – 'n mens sou selfs kon sê dat die betrokke beroep 'n reg en 'n plig het om die regspraktisyns onder sy beheer se monopolie op sekere dienste te beskerm. Aan die ander kant moet die algemene publiek teen uitbuiting deur gewetenlose opportuniste beskerm word.[54] Die tradisionele regsberoepe het dus nie net 'n plig teenoor sy lede nie maar veral ook teenoor die algemene publiek.

Na my mening moet daar dus besondere klem gelê word op die feit dat iemand wat wel as pararegspraktisyn kwalifiseer en slegs werk van 'n regsverwante aard doen, nog steeds op een of ander wyse onder die toesig van 'n regspraktisyn moet staan.[55] Alhoewel hierdie reël in die Verenigde State van Amerika in die geval van die staat verslap is en in 'n mindere mate moontlik ook ten opsigte van regshulporganisasies,[56] bly toesig deur 'n regspraktisyn steeds die uitgangspunt.

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53 Johnstone en Weglinksy *Paralegals* 13: "Legal assistants are a distinguishable group of persons who assist attorneys in the delivery of legal services. Through formal education, training, and experience, legal assistants have knowledge and expertise regarding the legal system and substantive and procedural law which qualify them to do work of a legal nature under the supervision of an attorney."

54 Eimermann *Paralegalism* 60 ev 82.

55 Sien die verskillende definisies van pararegspraktisyns hierbo.

56 Sien die bespreking hierbo by vn 46 ev.

In Suid-Afrika is hierdie vereiste van besondere belang aangesien 'n mens hier die interessante situasie het dat alhoewel daar 'n ernstige probleem met toegang tot die reg vir die grootste gedeelte van die bevolking is, daar terselfdertyd baie regsgeleerdes is, veral selfs *LLB*-gegradueerdes, wat nie werk het nie. Regsdienste bly egter selfs vir die gemiddelde man buite sy bereik omdat hierdie dienste besonder duur is. Dit lê nie binne die bestek van hierdie artikel om op die redes hiervoor in te gaan nie, maar na my mening is een van die redes die feit dat die meeste firmas op 'n té hoë vlak praktiseer. Sekere dienste wat tans deur goed opgeleide regspraktisyns gedoen word, kan goedkoper en meer effektief deur opgeleide pararegspraktisyns verrig word. Indien pararegspraktisyns onder toesig van 'n regspraktisyn moet werk, soos in meeste ontwikkelde lande, bied dit vir bestaande goed opgeleide praktisyns wat nie werk het nie goeie werksgeleenthede en terselfdertyd word verseker dat die regsdienste wat die publiek ontvang goedkoper maar tog van goeie gehalte is, en word die belange van die publiek teen uitbuiting genoegsaam beskerm.

3 2 Verhouding met regspraktisyns

Ten opsigte van dienste wat aangebied word deur persone of instansies wat nie as prokureurs of prokureursfirmas kwalifiseer nie of deur persone wat nie as advokate gelys is nie, kan die volgende verskillende moontlikhede onderskei word:

3 2 1 Dienste verrig onder toesig van regspraktisyn

(1) *Die dienste wat aangebied word, is van 'n regsverwante aard en die pararegspraktisyn werk onder toesig van 'n erkende regspraktisyn.* Twee moontlikhede moet hier in ag geneem word, te wete die geval waar die pararegspraktisyn in diens van 'n praktyk of 'n regspraktisyn is, of waar hy/sy los van 'n spesifieke regspraktyk maar nog altyd onder toesig van 'n regspraktisyn optree, in die sin dat hy sy/sy haar dienste aan die respraktisyn aanbied en nie direk aan die publiek nie.[57]

Omdat daar in hierdie gevalle direkte toesig en beheer deur 'n regspraktisyn is wat die verantwoordelikheid vir die pararegspraktisyn se optrede dra, behoort daar nie probleme met die werk van hierdie soort pararegspraktisyns te wees nie aangesien die publiek waarskynlik genoegsame beskerming teen uitbuiting en onprofessionele optrede geniet.

Waar die pararegspraktisyns voltyds of op 'n *ad hoc*-basis in diens van 'n regspraktisyn is, sal laasgenoemde vir hulle optredes aanspreeklik wees. Hy/sy sal dus moet toesien dat hulle optree ooreenkomstig die etiese en ander standaarde wat vir daardie regspraktisyn geld. Indien die pararegspraktisyns dit nie doen nie, kan die betrokke regspraktisyn deur sy/haar professionele beheerliggaam gedissiplineer word vir die spesifieke onbetaamlike gedrag of oor die algemeen vir die onbehoorlike gebruikmaking van pararegspraktisyns.[58] In die Verenigde State van Amerika het die professionele beheerliggame van die regspraktyk oor die jare ook reeds riglyne uitgevaardig waarvolgens vasgestel kan

57 Davidson 1991 *Mich Bar J* 1184: "By definition, a freelance legal assistant is an individual who offers his expertise to the legal community at large, works under supervision of an attorney and is autonomous of any one particular attorney or law firm."

58 Wanneer die pararegspraktisyn-beroep reeds goed ontwikkel en ingeburger is, het hulle meestal ook hul eie etiese kodes (sien Eimermann *Paralegalism* 77).

word watter tipe gebruikmaking van die dienste van pararegspraktisyns deur hulle lede op toelaatbare gebruikmaking van pararegspraktisyns neerkom.[59]

'n Ander vorm van "beskerming" waarop die publiek ook in hierdie geval kan reken, is die feit dat regspraktisyns middellik aanspreeklik gehou kan word vir die dade van hulle werknemers wat in die uitvoering van hulle dienste verrig is.[60] Hier is dit egter van belang dat die regspraktisyn seker moet maak dat sy/haar *malpractice*-versekering hom/haar behoorlik dek, ook vir die optredes van sy/haar werknemers of lashebbers.[61]

Dit is duidelik dat daar egter 'n besondere swaar las op die regspraktisyn rus om behoorlik toesig te hou oor die pararegspraktisyns wat onder hom/haar werk en om hulle deeglik bewus te maak van die etiese en ander norme waaraan hy/sy, en hulle dus by implikasie, moet voldoen.[62] Die pararegspraktisyns sal aan die ander kant in hierdie gevalle baie seker moet maak dat hulle optrede deur die versekering van die prokureur gedek is en dat hulle verhouding kontraktueel met hom/haar baie goed gereël is.

Die geval wat ek onder hierdie punt bespreek het, is die prototipe van pararegspraktisyns wat algemeen in die Verenigde State van Amerika voorkom; hier is daar dan nie sprake van ongemagtigde beoefening van die regsberoep nie. Na my mening behoort daar in Suid-Afrika ook veel meer aandag gegee te word aan die erkenning of gebruikmaking van hierdie tipe pararegspraktisyn. Dit sal egter van die tradisionele regsberoepe self afhang of hierdie tipe pararegspraktisyn by ons 'n bydrae sal lewer om regsdienste meer toeganklik en goedkoper te maak, al dan nie. Dit sal ook geen wetswysiging verg nie behalwe miskien in die geval van advokate.[63]

(b) *Die dienste wat aangebied word is van 'n regsaard maar word onder toesig van 'n regspraktisyn gelewer.* In beginsel mag pararegspraktisyns nie werk van 'n regsaard verrig nie al doen hy/sy dit ook onder toesig van 'n regspraktisyn want as hy/sy werk doen wat statutêr vir 'n sekere groep gereserveer is, moet hy/sy aan die vereistes voldoen wat in die wet vir daardie groep regspraktisyns gestel word. As hy/sy nie daaraan voldoen nie, kom sy/haar optrede op ongemagtigde beoefening van 'n regsberoep neer.

3 2 2 Dienste verrig sonder toesig van regspraktisyn

(a) *Dienste wat aangebied word, is van 'n regsverwante aard maar word sonder toesig van 'n regspraktisyn verrig.*[64] Hierbo is aangetoon dat dit baie moeilik is om 'n definisie van werk van 'n regsverwante aard te gee. Tog is daar persone wat dienste direk aan die publiek aanbied wat van sodanige aard is dat dit as werk van 'n regsverwante aard geklassifiseer kan word, byvoorbeeld skuldinvordering, skryf van briewe en invul van vorms wat regsimplikasies vir die opdraggewer kan inhou, bystand verleen by die afhandeling van boedels en die

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59 Statsky *Paralegals* 2–3; Statsky *Essentials* 154; Eimermann *Paralegalism*.
60 Statsky *Paralegals* 4; Statsky *Essentials* 155.
61 Statsky *Paralegals* 4.
62 Ulrich en Clarke 1981 *American Bar Ass J* 992 ev; Moon 1982 *TRIAL* 40 ev; Voisin 1991 *Mich Bar J* 1178 ev; Davidson 1991 *Mich Bar J* 1184; Eimermann *Paralegalism* 79.
63 Sien die bespreking hieronder.
64 Davidson 1991 *Mich Bar J* 1184; Middlemiss "Independent paralegals: friends in need or foes at the gate" 1993 *Canadian Lawyer* 26; Noone in *Paralegal professionals* 27 ev.

gee van regsadvies. Alhoewel hierdie soort praktisyns hulself as pararegspraktisyns tipeer en algemeen met agterdog bejeën word, is die vraag of aan hulle pararegspraktisyn-status of regspraktisyn-status verleen moet word – 'n vraag wat deesdae oor die hele wêreld, en ook by ons, al hoe meer opduik en aandag verdien.

Indien hierdie persone hulle duidelik aan die verlening van dienste van 'n regsaard of die beoefening van 'n regsberoep in die streng statutêr omskrewe sin skuldig maak, sal sodanige optrede nie toelaatbaar wees nie en die persone wat dit doen, stel hulleself aan vervolging bloot en behoort ook vervolg te word. Daar is egter 'n redelike groot grys gebied waar dit moeilik is om te besluit of persone hulle inderdaad in een of ander opsig aan die beoefening van 'n regsberoep skuldig maak sonder dat hulle behoorlik daartoe opgelei of gemagtig is.

Die rede waarom al hoe meer aandag aan onafhanklike pararegspraktisyns gegee word, is dat aanvaar word dat hulle wel as sodanig optree en ook 'n belangrike rol kan vervul by die oplossing van die probleem van toegang tot die reg.[65] Daar word geargumenteer dat daar ten opsigte van sekere gebiede[66] van die reg wel plek vir sodanige pararegspraktisyns bestaan en dat hulle 'n belangrike bydrae kan lewer om regskoste te verlaag en die reg vir 'n groter deel van die gemeenskap meer toeganklik te maak.

In beginsel stem ek saam dat hierdie ontwikkeling nie gestuit kan word nie en dat dit ook 'n heilsame een is, maar na my mening kan daar nie toegelaat word dat die ontwikkeling sy eie loop neem nie. Daar sal aktief deur die tradisionele regsberoepe aandag aan verskeie aspekte van die probleem gegee moet word. Daar sal besluit moet word watter dienste van 'n regsaard is en watter van 'n regsverwante aard. Indien besluit word dat alhoewel sekere dienste van 'n regsaard is, dit tog van so 'n aard is dat dit nie noodwendig deur 'n praktisyn uit een van die erkende vertakkings van die regsberoep gelewer hoef te word nie, moet daardie dienste statutêr omskryf word; daarna word die praktisyns wat gemagtig word om dit te doen nie meer as pararegspraktisyns beskou nie maar as onafhanklike regspraktisyns.

Alhoewel dit baie moeilik is om te besluit watter dienste van 'n regsverwante aard is, soos ek hierbo aangetoon het, is daar tog dienste wat tans as van 'n regsaard beskou word terwyl dit eerder as van 'n regsverwante aard geklassifiseer kan word, byvoorbeeld aktevervaardiging. Ander dienste wat in die praktyk ook reeds uitgekristalliseer het as synde van 'n regsverwante aard maar ten aansien waarvan daar onsekerheid bestaan, byvoorbeeld die dienste wat deur immigrasiekonsultante, eenvoudige egskeidings- en testamente-konsultante, verkeersoortredingkonsultante, skuldinvorderingsagente, ensovoorts gelewer word, kan as dienste van 'n regsverwante aard geklassifiseer word en die persone wat daardie dienste lewer, moet dan as pararegspraktisyns erken word met die noodwendige gevolg, volgens my mening, dat hulle onder toesig van 'n erkende regspraktisyn moet werk.

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65 Noone in *Paralegal professionals* 27 ev; Davidson 1991 *Mich Bar J* 1184; Middlemiss 1993 *Canadian Lawyer* 26 ev.

66 Bv immigrasiekonsultante; eenvoudige egskeidings- en testamente-konsultante, verkeersoortredingkonsultante, skuldinvorderingsagente, ens. Hier sou die strafregpraktisyns moontlik ook ingebring kon word, maar dit is mi beter om hulle onder toesig van 'n prokureur as volkome onafhanklik te laat werk (sien die bespreking hieronder).

Bogenoemde besluit sal in wetgewing neerslag moet vind en kan alleen deur die tradisionele regsberoepe geneem word na deeglike besinning oor die invloed wat dit op die bestaande regsberoep kan hê. In sommige gevalle kan dit neerkom op inbreukmaking op die monopolie wat die tradisionele regspraktisyns[67] op sekere soort dienste het en sal die nut en geregverdigheid van die monopolie op sekere regsdienste, soos aktevervaardiging, die opstel van testamente en ander kontrakte, dus onder die vergrootglas geplaas moet word. Daar sal ook oorweging geskenk moet word aan die beswaar dat sodanige formalisering van dienste van 'n regsaard en veral dié van 'n regsverwante aard neerkom op 'n ernstige inbreukmaking op die fundamentele reg of vryheid van mense om ekonomies bedrywig te wees. Hier sal dus 'n beleidsbesluit geneem moet word wat moet geskied deur middel van die opweging van die belange van die lede van die tradisionele regsberoepe en die belange van die breë gemeenskap, sowel van diegene wat toegang tot die beroep wil hê, as diegene wat toegang tot die reg wil hê.

Wetgewing, wat myns insiens noodsaaklikerwys ook regulering moet insluit, waarin erkenning verleen word aan 'n nuwe groep praktisyns, hetsy as regspraktisyns of pararegspraktisyns, moet egter nie deur die beroepe as slegs nadelig beskou word nie[68] aangesien dit veral in die Verenigde State van Amerika geblyk het dat dit ook besliste voordele vir die beroepe self inhou.[69]

Nadat 'n beginselbesluit ten gunste van die erkenning van 'n nuwe tipe praktisyn geneem is, hetsy as onafhanklike regspraktisyn of as pararegspraktisyn wat onder toesig van 'n prokureur sekere spesifieke dienste mag verrig, moet aan twee uiters belangrike aspekte aandag gegee word: Eerstens moet daardie gebiede[70] waar aanpassings aan die bestaande situasie geverg word, geïdentifiseer en afgebaken word en dan moet aandag aan die regulering van die

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67 Tans sal dit op die terrein van die prokureurs en advokate wees.

68 Sien die bespreking hierbo oor die weerstand wat hierdie ontwikkeling in ander lande van die tradisionele regsberoep ervaar het.

69 Goodrich *Paralegal studies* 3; sien ook vn 6 hierbo.

70 Statsky *Essentials* 153 noem 'n verskeidenheid gevalle waar nie-regsgeleerdes sonder toesig werk verrig wat wesentlik op die beoefening van 'n regspraktyk neerkom, maar waar sodanige optrede nie as ongemagtigde beoefening van 'n regspraktyk beskou word nie. Die rede waarom dit nie op ongemagtigde beoefening van 'n regspraktyk neerkom nie, is dat die optrede spesifiek deur wetgewing gemagtig is. In die VSA kom die volgende gevalle voor: eiendomsagente wat kontrakte mag opstel, inwoners in tronke wat mekaar by administratiewe aangeleenthede in die tronk mag bystaan, nie-regsgeleerdes wat die betrokkenes in laer howe mag verteenwoordig en nie-regsgeleerdes wat partye by sekere administratiewe instellings mag verteenwoordig. In Suid-Afrika lewer konsultante in arbeidsreg, belastingreg, padvervoer, dranklisensies, huurbeheer, ensovoorts eintlik reeds sonder toesig of beheer direk aan die publiek dienste van 'n regsverwante aard, sonder dat hulle onderworpe is aan die beheermaatreëls wat vir lede van die tradisionele regsberoepe geld. Dan is daar ook reeds 'n verskeidenheid tribunale waarin nie-regsgeleerdes mag verskyn, bv die Nywerheidshof, die Padvervoerraad en die Nasionale Vervoerkommissie. Ander gebiede waaraan in Suid-Afrika aandag gegee kan word, is aktevervaardiging (vir die posisie in dié verband in Groot-Brittanje sien Noone *Paralegal professionals* 28); skuldinvordering (tans kan daar moontlik probleme ontstaan tav die geldigheid van skuldinvorderaars se kontrakte met hulle opdraggewers: sien bv *Goodgold Jewellery (Pty) Ltd v Brevadau CC* 1992 4 SA 474 (W)); en verkeersoortredings (sien oor die ervaring in Kanada in hierdie opsig Middlemiss 1993 *Canadian Lawyer* 26 ev). Sien ook Budlender *Report: Para-legals* 7. Wanneer volle uitvoering aan die Wet op Dekriminalisasie 107 van 1991 gegee word, behoort daaruit ook verskeie administratiewe tribunale te ontstaan waar pararegspraktisyns 'n waardevolle rol te vervul sal hê.

betrokke praktisyns gegee word. Wetgewing is dus noodsaaklik ten einde die sfere te omskryf waarbinne sodanige praktisyns mag optree sodat hulle van vervolging deur die tradisionele regsberoepe gevrywaar is asook om die breë publiek se belange te beskerm. Die betrokke wetgewing moet dus ook reguleringsmaatreëls tref.

Wat die regulering[71] van hierdie nuwe soort praktisyns betref, sal op die vorm van regulering vir 'n bepaalde geval besluit moet word. Indien byvoorbeeld besluit word dat hulle as pararegspraktisyns slegs dienste van 'n besondere aard mag lewer en wel onder toesig van bestaande regspraktisyns, kan hulle onder beheer van die bestaande beheerliggame val; of indien hulle as 'n nuwe kategorie van regspraktisyns erken word, kan 'n eie afsonderlike beheerliggaam in die lewe geroep word; of enige van verskeie ander vorme van regulering kan gevolg word.[72]

Daar moet hier in gedagte gehou word dat hierdie soort magtiging nie neerkom op 'n algemene magtiging aan hierdie klas praktisyns om 'n regspraktyk van 'n mindere omvang of op 'n eenvoudiger vlak te beoefen nie, en dat daar ten alle koste gewaak moet word teen "second class lawyers for second class people"[73] waarna Budlender verwys. Die idee is om óf 'n nuwe kategorie onafhanklike regspraktisyn te skep wat op beperkte gebiede mag funksioneer, óf om toe te laat of selfs voor te skryf dat sekere dienste van regsverwante aard deur pararegspraktisyns onder toesig van 'n erkende regspraktisyn verrig mag word.

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71 Regulering is in die belang van die publiek, soos Wallace in *Paralegal professionals* 128 dit so goed beskryf: "In economic theory, consumers seek to maximise their satisfaction or 'utility' when choosing between alternative goods and services. Consumers are always constrained by the amount of information they have about the quality of the goods or service that they want to buy. If the services are technical or complex, consumers cannot make informed choices because the costs of obtaining information about the services or goods may be high. In these cases, it can sometimes be appropriate for government to take corrective action . . . The problem is that the provider of information knows what services will be provided, but the buyer does not. This assymmetry of information can lead to market failure: the average quality of services falls below the socially desirable level. In this climate of economic theory, occupational licensing is designed to provide sound information to the public about which individuals can provide the services." Haskell 1981 *Georgia LR* 665 laat hom soos volg hieroor uit: "To achieve status as a subprofession, there must be substantial and measurable standard of achievement. The initial step should be specialized certification. A substantial percentage of paralegals work in the probate, real estate, corporate, and litigation areas. The paralegal function in these areas is defined, and competence can be measured. If the certification is to receive acceptance from the legal profession, the organized bar must participate in the certification program . . . There are those in the field of paralegalism who look forward to the time when the paralegal is allowed to practice in certain areas of the law independently of lawyer supervision, beyond the administrative areas in which nonlawyers are now permitted to practice by federal and state law. *Whether such a development ultimately would be desirable or not, it is unlikely that it will evolve without the safeguard of licensing*" (my kursivering). Sien ook Eimermann *Paralegalism* 61; Johnstone en Wenglinsky *Paralegals* 153; Statsky *Essentials* 186 ev.

72 Die probleme en moontlikhede wat daar tov regulering bestaan, word redelik volledig deur De Kock *Skripsie* 25 ev bespreek. Daar is wel gebreke in haar benadering maar as uitgangspunt kan dit met vrug gebruik word.

73 *Access-subcommittee* Minutes of meeting 1993-07-01.

'n Moontlikheid wat tans nie in Suid-Afrika bestaan nie en wat sover ek kon vasstel ook nie in die Verenigde State van Amerika bestaan nie, is dat 'n nuwe kategorie praktisyn erken word wat slegs strafwerk van 'n beperkte omvang in die laer howe mag verrig. Steytler[74] is reg as hy daarop wys dat daar nêrens in die wêreld, ten minste nie in die stelsels waarna ek gekyk het nie, regspraktisyns is wat net strafwerk doen nie. Daar is gevalle waar pararegspraktisyns dienste in strafhowe verrig maar dan is hulle spesifiek tot 'n besondere optrede gemagtig. Verder kan dit natuurlik ook gebeur dat 'n firma een of meer regspraktisyns afsonder wat saam met 'n groep pararegspraktisyns slegs strafwerk doen. Op hierdie wyse kan hulle moontlik dan ook hulle dienste goedkoper aan die publiek aanbied.

'n Ondersoek na praktisyns wat uitsluitlik strafwerk in laer howe verrig, verdien vanweë die besondere probleme wat in Suid-Afrika ten aansien van toegang tot strafregsdienste ervaar word, ernstige oorweging. Ten opsigte van hierdie klas praktisyns sal 'n beginselbesluit geneem moet word of hulle as onafhanklike regspraktisyns, met ander woorde as strafregpraktisyns naas advokate of prokureurs erken moet word, en of hulle as pararegspraktisyns beskou moet word wat onder toesig van 'n prokureur moet werk.

Persoonlik sou ek ten gunste van 'n stelsel wees waarvolgens hierdie strafregpraktisyns onder toesig van 'n prokureur as pararegspraktisyns moet werk.[75] Hulle moet nog steeds as pararegspraktisyns gesien word omdat hulle nog nie voldoen aan die formele vereistes wat vir die beoefening van die prokureursberoep gestel word nie; en alhoewel die moontlikheid bestaan dat hulle die spesifieke strafregfunksie kan verrig, behoort hulle na my mening nie onafhanklik te kan praktiseer nie maar moet hulle by 'n prokureur inskakel en onder sy/haar toesig werk.[76] Indien hierdie strafregpraktisyns as pararegspraktisyns beskou word, sal daar ook die minimum wetswysiging vereis word aangesien slegs die omvang van hulle bevoegdhede omskryf sal moet word; vir die res sal hulle dan soos ander pararegspraktisyns behandel word.[77]

Dit wil egter voorkom of die oogmerk met die instelling van hierdie tipe praktisyns beter gedien sal word indien hulle as onafhanklike regspraktisyns sal kan funksioneer. Die redes hiervoor is die uitgebreide opleiding wat van hulle geverg sal word en die feit dat persone moontlik nie vir die beroep sal aspireer as hulle van mening is dat dit tog nog 'n ondergeskikte of minderwaardige beroep is nie. Erkenning van hierdie groep persone as regspraktisyns wat onafhanklik kan praktiseer, impliseer egter in beginsel aanvaarding van strafregpraktisyns as 'n vertakking van die tradisionele regsberoepe, natuurlik met die nodige voorskrifte ten aansien van opleiding en beheer.[78]

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74 *Idem* 5.
75 Sien die bespreking hieronder onder 4.
76 *Ibid.*
77 Sien die bespreking hierbo onder 3 2 1.
78 Hier sal daar waarskynlik wetgewing vereis word om die kwalifikasies en presiese werksaamhede van sodanige pararegspraktisyns duidelik te omskryf.

Steytler[79] stel 'n trappestelsel vir die opleiding van regstudente voor ingevolge waarvan 'n persoon na verkryging van 'n *B Iuris*-graad[80] as 'n strafregpraktisyn behoort te kan optree. Hierdie stelsel word blykbaar reeds by die Universiteit van Wes-Kaapland geïmplementeer en verdien myns insiens indringende aandag van ander regsfakulteite.

Afgesien daarvan of hierdie strafpraktisyns as regspraktisyns of as pararegspraktisyns erken word, sal daar aan hulle praktiese opleiding en die instel van 'n toelatingseksamen aandag gegee moet word. Hier kan moontlik vereis word dat 'n voornemende strafregpraktisyn na of tydens sy *B Iuris*-opleiding ses maande of een jaar praktiese ervaring in 'n prokureurskantoor, as staatsaanklaer of as openbare verdediger moet ondergaan. Voordat hy/sy egter vir hom/haar eie rekening mag praktiseer, moet hy/sy 'n toelatingseksamen aflê wat moontlik ten beste deur die Vereniging van Prokureursordes afgeneem kan word. Die moontlikheid kan ook ondersoek word dat die Skool vir Praktiese Opleiding van die Vereniging van Prokureursordes 'n praktiese opleidingskursus aanbied wat op dié eksamen gerig is.

Wat beheer betref, kan hierdie strafregpraktisyns myns insiens sinvol by die Vereniging van Prokureursordes ingeskakel word en kan daar ook van hulle geverg word om, waar toepaslik, te voldoen aan die vereistes wat vir die prokureurs in die algemeen gestel word, byvoorbeeld ten opsigte van bydraes tot die trustfonds, etiese gedragsreëls ensovoorts.

In die lig van die besondere probleme wat in Suid-Afrika met betrekking tot toegang tot strafregdienste ondervind word, is die idee van strafpraktisyns, hetsy

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79 Sien sy verslag aan die *Access sub-committee* getiteld "Making legal education more accessible: a proposal for a ladder system of legal education" 13: "A ladder system would entail the following: (i) A three year degree (B Iuris degree) with focus on criminal justice, enabling a graduate to seek employment as a public prosecutor or (public defender)." Die vakke wat dan vir hierdie basiese kursus geneem sal word, is die volgende:
"*First year (B Iuris I):*
1 Private Law I (Law of Persons and the Family);
2 Public Law I (Constitutional and Administrative Law);
3 Customary Law;
4 Non-legal course (Afrikaans/English/other);
5 Non-legal course (Second language or any other non-legal course)
(5 courses).
Second year (B Iuris II):
1 Private Law II (Things and Succession);
2 Criminal Law;
3 Foundations of South African Law (Roman Law and Jurisprudence);
4 Interpretation of Statutes (semester);
5 Non-legal course at second year level.
Third year (B Iuris III):
1 Private Law III (Contract and Delict);
2 Criminal Procedure;
3 Evidence;
4 Human Rights (Constitutional Litigation) (semester)."

80 Alhoewel daar stemme opgaan vir die gedagte dat die technikons ook toegelaat moet word om 'n *B Iuris*-graad aan te bied, word dit ten strengste afgekeur om die volgende redes: eerstens is daar reeds 'n oorproduksie van studente met hierdie grade by universiteite; tweedens sal dit onnodige koste-implikasies vir die staat hê aangesien die technikons tans nie die infrastruktuur het om hierdie grade aan te bied nie en ook nie die nodige mannekrag nie. Dit sou dus neerkom op 'n ongewenste duplikasie wat tersiêre onderwys in Suid-Afrika eenvoudig nie kan bekostig nie.

as strafregpraktisyns of as pararegspraktisyns, vir my 'n besonder aanvaarbare en oorwegingswaardige moontlikheid.

(b) *Die dienste wat aangebied word, is van 'n regsverwante aard maar dit word nie onder toesig van 'n regspraktisyn verrig nie. Die dienste word egter gratis gelewer en daar is "accountability" in die sin dat daar vir 'n regshulporganisasie gewerk word.*[81] Hieronder val die dienste wat gratis deur regshulporganisasies aan minderbevoorregte persone in die gemeenskap gebied word. Alhoewel dit in beginsel natuurlik te verkies is dat daar ten minste 'n regspraktisyn in diens van sodanige organisasies sal wees, maak beperkte fondse dit gewoonlik onmoontlik vir die organisasies om aan hierdie vereiste te voldoen. In elk geval, sowel die beperkte beheer wat daar tog is as die feit dat die dienste nie teen betaling van 'n fooi gelewer word nie, maak die kanse vir uitbuiting van die publiek baie gering. As die nadele van die afwesigheid van toesig deur 'n regspraktisyn opgeweeg word teen die voordele van groter toeganklikheid tot die reg wat hierdie moontlikheid vir die publiek inhou, weeg die voordele die swaarste.

In hierdie tipe geval word verpligte beheermaatreëls nie voorgestaan nie[82] maar moontlik sal sertifisering[83] tog van groot nut wees vir sowel die betrokke pararegspraktisyns as vir die organisasies wat van hulle dienste gebruik maak.[84]

(c) *Die dienste wat aangebied word, is van 'n regsverwante aard maar daar is geen vorm van toerekenbaarheid ("accountability") nie en dit word vir eie rekening gedoen.* Volgens definisie kwalifiseer persone wat dienste aanbied of adverteer dat hulle dienste aanbied wat op die beoefening van 'n regsberoep neerkom, nie as pararegspraktisyns nie en behoort hulle verbied te word om voor te gee of te adverteer dat hulle dienste van 'n regsverwante aard aanbied. Aangesien hierdie persone hulle dienste direk aan die publiek aanbied en vir eie rekening optree, is die geleentheid vir uitbuiting groot en behoort dit eenvoudig verbied te word.[85] Die belange van die gemeenskap om teen uitbuiting op hierdie gebied beskerm te word, weeg in hierdie omstandighede swaarder as die belange van die persone wat die dienste aanbied om ekonomies vrylik bedrywig te wees op 'n terrein wat ten nouste met die regsberoep saamhang.

'n Aspek wat hier vermelding verdien, is die posisie van diegene wat namens ander vorderingsregte teen betaling van 'n kommissie opvorder.[86] Hierdie persone beywer hulle daarvoor om mense, gewoonlik minderbevoorregtes, ook in die sin van minderbevoorreg wat kennis van die reg betref, op te spoor en dan in ruil vir die mededeling van die bestaan van die onopgeëiste reg (byvoorbeeld ingevolge die werkloosheidsversekeringwet of derdeparty-eise of erflatings) 'n

81 Budlender *Report: Para-legals* 5 ev; Fine in *Working for justice* 175.
82 Budlender *Report: Para-legals* 20.
83 Sien De Kock *Skripsie* 29 ev. Sien ook Watson "A submission to the Association of Law Societies on the para-legal training project and the role of community based para-legals generally in South Africa", wat baie sterk ten gunste is van sertifisering en erkenning van sodanige sertifiserings.
84 Sien die standpunt van *Lawyers for Human Rights*, soos uiteengesit deur Watson *Submission*.
85 In hulle uiteensetting van die werk van pararegspraktisyns in Fine *Working for justice*, is dit duidelik dat die betrokke organisasies ook gekant is teen hierdie soort dienslewering.
86 Sien Scott *The law of cession* (1991) 74 ev. Vroeër het hierdie persone ook namens eisers van die MMF opgetree, maar tans sluit a 48 sodanige optrede effektief uit aangesien net prokureurs of sekere amptenare namens 'n eiser mag optree.

sessie of volmag ontvang om verder, teen betaling van dikwels buitensporige kommissie, die eis namens die reghebbende af te dwing.

Regter Corbett het reeds in *Lekeur v Santam Insurance Co Ltd*[87] hierdie tipe optrede verwerp, onder andere met die volgende woorde: "[T]his battening upon underprivileged litigants should be stopped or at any rate, subjected to very strict controls." Waar nodig maak hierdie mense soms gebruik van die dienste van prokureurs, en vanweë die besondere verhouding wat daar tussen hulle en die betrokke prokureurs kan bestaan, kan die rol wat prokureurs soms in hierdie verband speel ernstig bevraagteken word.[88] As hierdie persone toegelaat word om hierdie werk as pararegspraktisyns onder toesig van 'n prokureur te doen en met inagneming dus van die etiese en ander reëls wat op prokureurs van toepassing is, behoort sommige van die besware van die regter teen hierdie optrede ondervang te word en kan hulle 'n nuttige funksie verrig.

Sover my kennis strek, is tot op hede nog weinig aandag aan hierdie tipe ongemagtigde optrede gegee. In plaas daarvan om dit te verbied – die mense lewer tog in 'n sin 'n diens aan die gemeenskap – kan moontlik eerder oorweging daaraan gegee word om hulle toe te laat om as pararegspraktisyns in diens van 'n prokureur op te tree, mits aandag aan die nodige beskermingsmaatreëls gegee word. Die mate waarin hulle kliënte mag werf, sal omskryf moet word, die omvang van hulle kommissie sal vasgestel moet word en die aard van die ooreenkoms wat hulle in hierdie omstandighede sluit, sal omskryf moet word ten einde te verseker dat dit nie ongeldig verklaar sal word nie as synde in stryd met die openbare belang.[89]

4 GEVOLGTREKKING

Dwarsoor die wêreld is gevind dat daar geen keer aan die ontwikkeling van die pararegspraktisyn-vertakking van die regsberoep is nie en dat dit sowel vir die tradisionele regsberoepe as die algemene publiek van besondere waarde kan wees. In Suid-Afrika staan hierdie ontwikkeling in sy babaskoene, maar daar is by my geen twyfel nie dat dit ook nie hier te lande gestuit sal word nie en dat die tradisionele regsberoepe in die algemeen, maar die prokureurs in die besonder, sonder verwyl aandag aan hierdie ontwikkeling moet gee. Veral die prokureurs mag nie 'n "laat maar gaan"-houding inneem nie om die redes hierbo uiteengesit. Dit kom my ook ietwat vreemd voor dat daar aan lede van die beroep hoë eise gestel word, sowel wat opleiding as etiese gedrag betref, maar aan persone wat hulle in wese aan die publiek as 'n tipe regspraktisyn voordoen, vrye teuels gegee word.

Een van die belangrikste probleme wat die Suid-Afrikaanse regsisteem in die gesig staar, is die gebrek aan toegang tot die reg. Pararegspraktisyns kan 'n baie belangrike bydrae lewer om regsdienste goedkoper en meer toeganklik te

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87 1969 3 SA 1 (K) 8 ev.

88 *Lekeur v Santam Insurance Co Ltd supra* 9A – B: "[A]ny firm of attorneys appointed by such a firm allies itself to an organization which freely touts for clients in a manner contrary to the attorneys' code of ethics and enters into champertous agreements with them."

89 Tans sal ooreenkomste tussen hierdie persone en die persone wat hulle verteenwoordig waarskynlik ongeldig wees as synde *pacta de quota litis* (sien bv *Goodgold Jewellery (Pty) Ltd v Brevadau CC supra*).

maak, maar erkenning van die rol wat pararegspraktisyns in hierdie verband kan speel, is maar net een van die wyses waarop die probleem van toegang tot die reg aangespreek kan word. 'n Ander baie belangrike moontlikheid wat hierbo ter sprake gekom het en deeglike navorsing en dringende implementering verg, is die moontlike erkenning van strafregpraktisyns as 'n nuwe kategorie regspraktisyn naas prokureurs en advokate. Aangesien 'n *B Iuris*-graad as voorvereiste vir hierdie tipe regspraktisyns beoog word, het hulle 'n breër opleiding as net agtergrond in strafwerk en behoort hulle 'n groot bydrae te kan maak om die onreg te verlig wat kan voortvloei uit die feit dat baie beskuldigdes geen regsbystand het nie. Steytler is van mening dat hulle as onafhanklike regspraktisyns wat net strafwerk doen, moet kan optree, maar na my mening moet hulle as pararegspraktisyns optree en wel onder toesig van 'n prokureur.[90] Hierdie praktisyns het genoegsame kennis van die reg en sou, as hulle toegelaat word om as onafhanklike strafregpraktisyns te praktiseer, maklik in die versoeking kom om tog maar op 'n laer vlak as prokureur te funksioneer sonder dat hulle aan al die vereistes vir toelating tot die betrokke beroep voldoen. As hy/sy aan die ander kant as pararegspraktisyn onder toesig van 'n prokureur werk, kan hy/sy hierdie breër kennis van die reg ook sinvol aanwend deur sy/haar kliënt, waar nodig, na iemand anders binne die praktyk te verwys indien regshulp van 'n ander aard as strafwerk ook benodig word. Alhoewel ek van mening is dat strafpraktisyns eerder as pararegspraktisyns beskou moet word, is daar sterk menings dat hulle as onafhanklike regspraktisyns moet kan funksioneer.

Hierbo is reeds verskeie moontlikhede genoem en aanbevelings gemaak. Om saam te vat, wil ek die volgende aspekte van die debat oor pararegspraktisyns in Suid-Afrika beklemtoon:

(a) Persone wat hulle tans skuldig maak aan ongemagtigde beoefening van 'n regspraktyk moet onverwyld vervolg word. Dit is in belang van sowel die algemene publiek as die regsberoep self.

(b) Dringende aandag sal aan die erkenning van pararegspraktisyns gegee moet word. Daar sal deeglik ondersoek ingestel moet word na die volgende aspekte:

- *Pararegspraktisyns se verhouding met regspraktisyns* Daar sal bepaal moet word of pararegspraktisyns in alle omstandighede onder toesig van 'n regspraktisyn moet optree, en, indien nie, in watter omstandighede daar nie van hulle verwag hoef te word om onder toesig van 'n regspraktisyn op te tree nie.

Soos reeds aangetoon is, is hierdie vereiste in Suid-Afrika van besondere belang aangesien ons hier die interessante situasie het dat alhoewel daar 'n ernstige probleem met toegang tot die reg vir die grootste gedeelte van die bevolking is, daar terselfdertyd baie regsgeleerdes is, veral selfs *LLB*-gegradueerdes, wat nie werk het nie. Regsdienste, nie slegs van 'n strafaard nie maar ook siviele regsdienste, bly egter selfs vir die gemiddelde man buite sy bereik omdat hierdie dienste besonder en onnodig duur is. Indien pararegspraktisyns onder toesig van 'n regspraktisyn moet werk, soos in meeste ontwikkelde lande die geval is, bied dit vir bestaande goed opgeleide praktisyns wat nie werk het nie goeie werksgeleenthede; terselfdertyd word verseker dat die regsdienste wat die publiek ontvang goedkoper maar tog van goeie gehalte is, en word die belange van die

90 Sien my bespreking van hierdie moontlikheid hierbo onder 3 3 2 punt (a).

publiek teen uitbuiting genoegsaam beskerm. Hierdie moontlikheid bied ook aan iemand met inisiatief besondere uitdagings.

Ten aansien van die vraag of erkenning verleen behoort te word aan 'n groep praktisyns wat slegs strafwerk in laer howe doen, is ek van mening dat hulle eerder as pararegspraktisyns onder toesig van prokureurs moet werk totdat hulle ten volle as prokureurs toegelaat is. Aangesien hierdie benadering na bewering egter 'n negatiewe effek op die aantreklikheid van hierdie opsie vir voornemende praktisyns kan hê, moet oorweeg word om praktisyns wat slegs strafwerk wil doen as regspraktisyns, en nie as pararegspraktisyns nie, te beskou en moet deur wetgewing gestalte aan hierdie nuwe vertakking van die regsberoep gegee word. In beginsel behoort pararegspraktisyns egter onder toesig van regspraktisyns op te tree.

● *Formele erkenning van pararegspraktisyns* In beginsel behoort ook formeel aanvaar te word dat daar plek in die Suid-Afrikaanse regsisteem vir pararegspraktisyns is en behoort hulle rol en moontlike optrede op een of ander wyse geformaliseer te word. Die tipe dienste wat deur hulle verrig kan word, moet geïdentifiseer word.[91] Dit sal statutêr omskryf moet word en impliseer moontlik ook herstrukturering van die howe sodat sekere pararegspraktisyns in spesifieke tribunale, byvoorbeeld administratiewe of verkeerstribunale, verskyningsbevoegdheid sal hê.

● *Opleiding van pararegspraktisyns* Universiteite, technikons en regshulporganisasies sal ernstig moet besin oor die rol wat hulle by die opleiding van pararegspraktisyns kan speel. Waar pararegspraktisyns spesifiek omskrewe dienste mag verrig, byvoorbeeld by aktevervaardiging, skuldinvordering ensovoorts, kan die technikons en ook die universiteite myns insiens 'n groot bydrae lewer om hulle op te lei.

Dit wil voorkom of 'n trappestelsel by regsopleiding 'n baie belangrike rol kan speel om die reg meer toeganklik te maak en daarom sal universiteite ernstig oor hulle rol in dié verband moet besin. Die gedagte wat Steytler in sy verslag gestel het dat regsgeleerdes met 'n *B Iuris*-graad reeds toegang tot 'n beperkte vorm van regspraktyk behoort te kry, kan myns insiens veral 'n belangrike rol vervul by die moontlike instelling van strafregpraktisyns, hetsy as onafhanklike regspraktisyns, hetsy as pararegspraktisyns.

Alhoewel ek sterk gekant is teen die gedagte dat technikons *B Iuris*-grade mag toeken,[92] is ek van mening dat hulle wel 'n rol te vervul het by die opleiding van pararegspraktisyns in die algemeen, asook vir 'n bepaalde gespesialiseerde rigting. Hier kan aandag gegee word aan die moontlikheid dat die technikon[e] universiteite[93] of selfs regshulpinstansies[94] 'n tweejarige diploma kan aanbie[e] wat so gestruktureer is dat dit aan die student die nodige basiese vaardighe[e] en regskennis verskaf wat hom/haar in staat sal stel om suksesvol as pararegspraktisyn saam met of onder toesig van 'n prokureur of advokaat te kan werk.

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91 Sien ook die aanbeveling in Fine *Working for justice* 80.

92 Sien vn 79 hierbo.

93 Universiteite het ook die infrastruktuur om sertifikate of diplomas in dieselfde omstandighede op dieselfde vlak as die technikons aan te bied, en met die nodige beroepsgerigte oogmerk. Hier sal die gedagtes uitgespreek in Fine *Working for justice* 83 ev egter ter harte geneem moet word.

94 Sien in die verband die werk wat reeds deur *LEAP, CLC* en *LHR* gedoen word. Sien veral Fine in *Working for justice* 87 ev.

Na 'n verdere jaar, waarin in een of meer spesifieke rigtings gespesialiseer word, kan 'n verdere diploma/sertifikaat aan sodanige persoon uitgereik word wat hom/haar dan 'n spesialis pararegspraktisyn in 'n besondere rigting, byvoorbeeld aktevervaardiging, strafreg, egskeidings, ensovoorts maak. Moontlik moet oorweging daaraan geskenk word om die opleiding so te struktureer dat aan 'n persoon wat so 'n driejarige opleiding as pararegspraktisyn deurloop het, vrystelling van sy/haar eerste jaar op universiteit gegee kan word.

Verskeie moontlikhede bestaan dan langs hierdie weg vir 'n persoon wat van plan is om 'n pararegspraktisyn-beroep te volg: hy/sy kan na twee jaar besluit om geen verdere opleiding te ondergaan nie en by 'n prokureur of advokaat as pararegspraktisyn te gaan werk. 'n Tweede moontlikheid is dat hy/sy kan besluit om 'n spesialis pararegspraktisyn te word en vir nog 'n verdere sertifikaat/diploma te probeer kwalifiseer. Na verkryging van laasgenoemde kan hy/sy besluit om met regstudies by 'n universiteit voort te gaan, in welke geval hy/sy dan as tweedejaarstudent behoort te kan begin.[95]

● *Beheer en regulering* Die belangrikste aspek waaraan aandag geskenk sal moet word, is die kwessie van beheer of regulering.[96] Laasgenoemde is 'n baie wye begrip en sluit aspekte soos opleiding,[97] akkreditering, lisensiëring,[98] sertifisering,[99] etiese standaarde ensovoorts in.

Indien van pararegspraktisyns vereis word om onder toesig te werk, sal sertifisering waarskynlik voldoende wees aangesien die probleme wat by regulering en beheer ondervang trag te word, ondervang word deur die feit dat die pararegspraktisyns onder toesig van 'n prokureur of advokaat staan wat verantwoordelikheid vir hulle optredes dra.

Hierbo is egter ook reeds gemeld dat aandag gegee sal moet word aan praktiese opleiding en die instel van 'n toelatingseksamen vir strafregpraktisyns.[100]

● *Voordele van pararegspraktisyns* Die voordele verbonde aan die erkenning van die rol van pararegspraktisyns vir die tradisionele regsberoepe, en veral ten opsigte van die verligting van die probleem van toegang tot die reg, moet deur die prokureurs-[101] en advokateberoep[102] deeglik nagevors word aangesien daar

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95 Sodanige erkenning behoort geen probleem te wees nie solank daar tussen al hierdie opleidingsinstansies en die universiteite genoegsame koördinering plaasvind sodat houers van sodanige sertifikate/diplomas ten minste vir hulle eerste jaar op universiteit vrystelling kan kry.

96 Budlender *Report: Para-legals* 18 ev; Fine in *Working for Justice* 55.

97 Budlender *Report: Para-legals* 11 ev.

98 *Idem* 17.

99 De Kock *Skripsie* 29 ev.

100 Sien bespreking hierbo by vn 80 ev.

101 Inskakeling van pararegspraktisyns by die werk van prokureurs behoort mi relatief maklik en effektief te wees en sal in 'n groot mate afhang van die gesindheid van elke betrokke firma. Daar is mi egter nie beginselstruikelblokke in die weg van sodanige erkenning nie.

102 Advokate sal bv moet besin oor die wenslikheid of nodigheid van a 9(2) van die Wet op die Toelating van Advokate 74 van 1964 wat soos volg lui: "Geen persoon wat ingevolge 'n bepaling van hierdie Wet toegelaat is of geag word toegelaat te gewees het om as advokaat te praktiseer, *mag enige gedeelte van sy professionele gelde, hetsy by wyse van vennootskap, kommissie of korting of op enige ander manier, oormaak aan of deel of verdeel met 'n persoon wat nie 'n persoon is wat as advokaat praktiseer nie*" (my kursivering). In effek verbied hierdie artikel enige samewerking met iemand anders as 'n toegelate advokaat. Dit laat dus slegs vir senior advokate die moontlikheid om van

waarskynlik aanvanklik besonder sterk teenkanting vanuit dié beroepe teen pararegspraktisyns sal wees. Die effektiwiteit en sukses[103] van pararegspraktisyns hang in hoofsaak egter af van die benadering tot pararegspraktisyns van die regspraktisyn saam met wie hulle werk.[104] Erkenning van die rol wat pararegspraktisyns by verligting van die nood ten opsigte van toegang tot die reg en werkverskaffing in Suid-Afrika kan speel, hou nie slegs finansiële gewin[105] nie maar ook baie ander praktiese voordele in.[106]

Pararegspraktisyns kan gebruik word om aan die een kant dienste te lewer wat nie werklik die aandag van die regspraktisyns self verg nie maar nogtans huidig deur hulle gedoen word, of om aan die ander kant dienste wat tans deur onopgeleide sekretaresses of werknemers gedoen word, meer effektief te verrig. Die dienste wat pararegspraktisyns lewer, is meer effektief vanweë hulle kennis en opleiding en goedkoper omdat hoogsopgeleide persone nie gebruik word om minder ingewikkelde take te verrig nie. Dit behoort dus ook die koste van regsdienste in die algemeen te verlaag.[107]

'n Voordeel wat myns insiens in Suid-Afrika besonder relevant is, is die moontlikheid dat die taalprobleem wat dikwels 'n baie belangrike rol speel in sowel onderhandelinge tussen regspraktisyns en hulle kliënte as in die hof self, grotendeels oorbrug kan word deur gebruikmaking van pararegspraktisyns. Dit sal veel beter wees om hier van pararegspraktisyns se dienste gebruik te maak wat 'n mate van regskennis het as van die dienste van iemand wat taalvaardig in die betrokke taal is maar geen regskennis het nie.

Pararegspraktisyns kan ook 'n besondere diens lewer aan sowel lede van verafgeleë of plattelandse gemeenskappe as aan die prokureurs vir wie hulle werk, deurdat hulle takke van firmas in die betrokke gemeenskappe kan vestig en regsdienste binne die bereik en vermoë van die lede van daardie gemeenskappe kan bring.

Die moontlike dienste wat pararegspraktisyns aan regspraktisyns en in samewerking met laasgenoemde aan die breë publiek kan lewer, is onbeperk en móét bydra tot die verbetering van regsdienste wat deur praktisyns gelewer word. Hulle kan byvoorbeeld aanvanklike onderhoude met kliënte voer ten einde deur te dring tot die werklike probleem. Die regspraktisyn hoef dus nie by konsultasies betrokke te wees totdat die probleem geïdentifiseer is en die wense van die kliënt vasgestel is nie; hierbenewens kan die pararegspraktisyn ook by die werklike onderhoud tussen die kliënt en die regspraktisyn teenwoordig wees om

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vervolg van vorige bladsy
die dienste van 'n junior(s) gebruik te maak om hom/haar by te staan. Selfs vir relatief eenvoudige take soos "devilling" mag slegs 'n senior advokaat van hulp gebruik maak en dan net van 'n ander junior advokaat se dienste. Hierdie artikel sluit samewerking met pararegspraktisyns effektief uit en maak die dienste van advokate besonder duur. Moontlik kan daar deur die beroep oor die sin en wenslikheid van hierdie artikel besin word?

103 Fine in *Working for justice* 79: "A good para-legal is a lawyer's eyes and ears."

104 Brown in *Professional responsibility* 500.

105 Sien bv die uiteensetting hiervan deur Statsky *Essentials* 8 ev.

106 Eimermann *Paralegalism* 36–37 39; Goodrich *Paralegal studies* 3; Brown in *Professional responsibility* 500 ev. Pararegspraktisyns kan bv onderhoude met kliënte voer, basiese korrespondensie of dokumente opstel wat deur die regspraktisyn nagegaan moet word, basiese regsnavorsing ("devilling") doen, feitelike gegewens met betrekking tot 'n saak selfstandig versamel, ens.

107 Sien ook Fine in *Working for justice* 79.

verdere taal- of ander probleme te help bylê. Pararegspraktisyns kan ook die basiese korrespondensie opstel en afhandel in die taal wat die kliënt die beste verstaan.

'n Spesialis pararegspraktisyn kan die regspraktisyn bystaan in die besondere veld sonder om die werk te doen wat vir die regspraktisyn gereserveer is. Dit behoort daartoe te lei dat die gehalte van die regspraktisyn se werk op die betrokke vlak verhoog word teen 'n verlaging van die koste daaraan verbonde.

Pararegspraktisyns sal waarskynlik ook met meer sukses as tolke in die howe gebruik kan word, aangesien hulle wel 'n mate van regskennis en opleiding sal hê wat hulle beter sal toerus om as hofamptenare te funksioneer. Pararegspraktisyns sal ook ander funksies in die howe kan verrig, soos die *Schiedsmann* en *Rechtspfleger* in Duitsland.[108]

5 SLOT

As dit die tradisionele regsberoepe se erns is om die reg vir die algemene publiek meer toeganklik te maak, sal die erkenning van die rol wat pararegspraktisyns in hierdie verband kan speel, nie geïgnoreer kan word nie. Die beroep mag na my mening ook nie 'n "laat maar gaan"-houding inneem nie aangesien die belange van die algemene publiek hier op die spel is. Boonop het die beroep nie alleen 'n reg om lede van die betrokke vertakking van die beroep te beskerm en te beheer nie, maar inderdaad ook 'n plig om sowel 'n bydrae te lewer ten opsigte van die verligting van die probleem van toegang tot die reg as om toe te sien dat die publiek nie uitgebuit word nie.

'n Ondersoek na die rol en plek van pararegspraktisyns in die tradisionele regsberoepe verdien dus dringende aandag en behoort voorkeur te geniet. Die grondwerk is reeds gedoen en daar is besonder baie te leer uit die ontwikkeling van die pararegspraktisyn in die Verenigde State van Amerika en ander lande met soortgelyke ervaring. Die tradisionele regsberoepe en universiteite behoort leiding te gee by die verdere ontwikkeling van hierdie groep praktisyns.

Daar sal egter as 'n saak van dringendheid onmiddellik aandag gegee moet word aan die erkenning van strafregpraktisyns, hetsy as pararegspraktisyns, hetsy as regspraktisyns in eie reg.

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108 Sien veral Cappelletti en Weisner *Access to justice* vol 2 887 ev; Cappelletti en Garth *Access to justice* vol 1 109 ev.

Die eiseres in die huidige geval is . . . geen openbare figuur nie . . . Eiseres val eerder in daardie kategorie van persone wat teen wil en dank vir 'n vlietende oomblik op die verhoog van die lewe gestoot word. Sommige van diesulkes word gewillige medespelers, blakend in die gloed van openbare belangstelling. Andere rem teensinnig terug na die duisternis van vergetelheid. Volgens respondente val eiseres in die eerste kategorie van lewensakteurs en kan sy haar nie bekla as sy deur die gloed van die vloedligte geskroei word nie (*per* Olivier R in *Jooste v National Media Ltd* 1994 2 SA 634 (K) 646).

Die toets vir nalatigheid in die privaat- en strafreg

Rita-Marié Jansen
BIur LLB BSocSc (Hons)
Senior Lektrise in die Privaatreg, Universiteit van die Oranje-Vrystaat

Teuns Verschoor
BIur LLD
Professor in die Straf- en Geneeskundige Reg, Universiteit van die Oranje-Vrystaat

SUMMARY

The test for negligence in private law and criminal law

This article compares the reasonable man test for negligence as applied in private law and criminal law. It appears that substantial differences have developed in the application of the test in the respective disciplines. In criminal law the reasonable foreseeability criterion may suffice whilst in private law the additional criterion as to whether preventive steps should reasonably have been taken, must also be satisfied. The question concerning foreseeability and legal causation also differs in the said disciplines. Although both disciplines acknowledge the objective nature of the test, criminal law gradually allows more and more subjective factors into its application (personal traits, superstition, et cetera). Unqualified statements, such as that the test for negligence in private law and criminal law is one and the same, should be avoided. Caution should be exercised in applying case law on negligence in one discipline to the other.

Daar is in die verlede algemeen aanvaar dat die toets vir nalatigheid in die straf- en privaatreg dieselfde is. In *R v Meiring*[1] beslis hoofregter Innes:

> "In civil actions we have adopted as the simple test that standard of care and skill which would be observed by the reasonable man. And it seems right as well as convenient to apply the same test in criminal trials."

Daar word aan die hand gedoen dat hierdie stelling nie meer ongekwalifiseerd geld nie. Alhoewel beide die strafreg en die privaatreg die redelike man-toets by die vasstelling van nalatigheid gebruik, het daar wesenlike verskille in die toepassing daarvan ontwikkel.

Enkele aspekte van die toets vir nalatigheid soos dit in die privaat- en strafreg toegepas word, word vervolgens vergelyk.

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1 1927 AD 41 47.

1 DIE TOETS VIR NALATIGHEID

In die privaatreg word die formulering van die toets vir nalatigheid deur appèlregter Holmes in *Kruger v Coetzee*[2] as gesaghebbend aanvaar:[3]

> "For the purposes of liability *culpa* arises if –
> (a) a *diligens paterfamilias* in the position of the defendant –
> (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
> (ii) would take reasonable steps to guard against such occurrence; and
> (b) the defendant failed to take such steps."

In die strafreg vind hierdie toets slegs by gevolgsmisdade aanwending. In sodanige gevalle[4] berus nalatigheid, soos in die privaatreg, nie bloot op die redelike voorsienbaarheid van nadeel nie maar ook op welke voorkomende stappe gedoen moes word.[5]

By formeel omskrewe misdade[6] word die toets anders geformuleer, naamlik of die redelike man hom in die omstandighede waarin die beskuldigde hom bevind, van die handeling sou weerhou het. Die redelike man sou hom van die handeling weerhou het indien dit redelikerwys voorsienbaar was dat hy deur die verrigting daarvan wederregtelik sou optree – die vraag wat dus gestel word, is: Sou die redelike man wederregtelikheidsbewussyn gehad het?[7] Dit is nodeloos om ook te vra of die redelike man stappe sou gedoen het om te voorkom dat die misdaad gepleeg word, want die antwoord sal altyd wees dat die redelike man hom sou weerhou het van die pleging van die misdaad.[8]

Hierbenewens verklaar Whiting[9] dat selfs by 'n aanklag van strafbare manslag ('n gevolgsmisdaad) waar die slagoffer se dood voortspruit uit 'n wederregtelike aanranding, die beskuldigde se aanspreeklikheid slegs sal berus op die vraag of die dood self redelikerwys voorsienbaar was. Dit is dan eweneens onnodig om te vra na die moontlikheid van voorkomende stappe omdat die antwoord altyd sal wees dat die redelike man nie die slagoffer sou aangerand het nie.

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2 1966 2 SA 428 (A) 430.

3 *Ngubane v South African Transport Services* 1991 1 SA 756 (A) 776; *Deysel v Carsten* 1992 3 SA 290 (OK); *Butters v Cape Town Municipality* 1993 3 SA 521 (K); Neethling, Potgieter en Visser *Deliktereg* (1992) 123; Burchell *Principles of delict* (1993) 86; Van der Merwe en Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 128; Boberg *The law of delict* vol 1 (1984) 274 voeg 'n verdere vraag in, nl wat daardie stappe is; Van der Walt *Delict: principles and cases* (1979) 68 wys tereg daarop dat daar geen rede is om die toets te beperk tot skade aan 'n ander "in his person or property" nie aangesien die nalatige veroorsaking van suiwer vermoënskade ook in beginsel in die Suid-Afrikaanse reg ageerbaar is.

4 Die bekendste voorbeeld van so 'n misdaad is strafbare manslag.

5 Whiting "Negligence, fault and criminal liability" 1991 *SALJ* 434.

6 In teenstelling met gevolgsmisdade bestaan 'n formeel omskrewe misdaad bloot uit die wederregtelike positiewe handeling of late wat spesifiek omskryf is, sonder verwysing na 'n gevolg (Whiting 1991 *SALJ* 433).

7 Kyk Burchell en Milton *Principles of criminal law* (1991) 299 en Snyman *Strafreg* (1992) 223 vir 'n aanpassing van die toets soos geformuleer in *Kruger v Coetzee supra* om ook formeel omskrewe misdade in te sluit. Whiting 1991 *SALJ* 433 beskryf die toets in so 'n geval soos volg: "With such crimes, the requirement of negligence will be satisfied if the accused, at the time he unlawfully committed the conduct specifically prohibited, should have foreseen that he might be doing so."

8 Whiting 1991 *SALJ* 433.

9 *Idem* 434.

Anders as in die strafreg behels die toets vir nalatigheid in die privaatreg egter dat daar benewens die vraag na die voorsienbaarheid van die nadelige gevolg, altyd ook gevra moet word na die moontlikheid van voorkomende stappe.[10]

2 VOORSIENBAARHEID VAN SKADE EN DIE ROL VAN JURIDIESE KOUSALITEIT

Die eerste been van die toets vir nalatigheid, soos in *Kruger v Coetzee* uiteengesit, handel oor die voorsienbaarheid van skade: Dit is naamlik of die redelike man in die omstandighede van die dader die redelike moontlikheid dat sy optrede skade of nadeel aan 'n ander kan veroorsaak, sou voorsien het. Die toets self gee geen aanduiding van watter skade redelikerwys voorsienbaar moet wees nie.[11] Dit is dus moontlik dat skade aan 'n ander *in die algemeen* ("some harm") voorsienbaar moet wees, of daar kan vereis word dat 'n *spesifieke gevolg* voorsienbaar moet wees voordat nalatigheid sal vasstaan.

2 1 Strafreg

In die strafreg geld die beginsel dat waar nalatigheid by gevolgsmisdade die skuldvereiste is, dit bewys moet word ten opsigte van *elke essensiële gevolg* van die misdaad.[12] Hiervolgens moet op 'n aanklag van strafbare manslag (die wederregtelike en nalatige veroorsaking van die dood van 'n ander mens) die dood van die oorledene en nie net ernstige liggaamlike besering nie, redelikerwys voorsienbaar wees alvorens 'n skuldigbevinding sal volg.[13]

By eierskedelgevalle[14] sal 'n skuldigbevinding aan strafbare manslag slegs volg indien die redelike man sou voorsien het dat die oorledene moontlik deur die aanranding gedood kan word.[15] Die Engelsregtelike stelreël,[16] "the wrongdoer takes his victim as he finds him" (die *talem qualem*-reël), geld dus nie in die strafreg nie. Toepassing van dié stelreël sou neerkom op die gebruik van die *versari in re illicita*-leerstuk wat in die *Van der Mescht*- en *Bernardus*-saak verwerp is.

Aanspreeklikheid word dus beide gevestig en beperk deur nalatigheid. Daar word trouens aan die hand gedoen dat juridiese kousaliteit as aanspreeklikheidsbeperkende element geen rol te speel het in die strafreg waar nalatigheid as skuldvorm ter sprake is nie (ten spyte van die appèlhof se implisiete verwerping van die skuld-aan-die-skade-benadering in *S v Mokgethi*[17]).

By formeel omskrewe misdade moet dit redelikerwys voorsienbaar wees dat die spesifieke handeling verbode is. Ten aansien van gevolgsmisdade word

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10 *Kruger v Coetzee supra* 430; *Ngubane v South African Transport Services supra* 776; Neethling, Potgieter en Visser 133; Van der Walt 78 ev.

11 Boberg 275.

12 Burchell en Milton 301; Whiting 1991 *SALJ* 432.

13 *S v Van As* 1976 2 SA 921 (A); *S v Bernardus* 1965 3 SA 287 (A); *S v Van der Mescht* 1962 1 SA 521 (A).

14 Neethling, Potgieter en Visser 189 omskryf eierskedelgevalle soos volg: "[W]aar die eiser, as gevolg van die een of ander liggaamlike of psigiese swakheid, ernstiger benadeling opdoen weens die dader se optrede as wat die geval sou gewees het as die eiser nie aan so 'n swakheid gely het nie."

15 *S v Bernardus supra.*

16 Die reël het sy ontstaan in die Engelse beslissing *Dulieu v White and Sons* 1902 2 KB 669 gehad (Neethling, Potgieter en Visser 189).

17 1990 1 SA 32 (A) 39.

bogenoemde aanname geïllustreer deur die feite in *S v Van As.*[18] Die beskuldigde is aangekla van strafbare manslag. Hy het 'n baie vet persoon op die wang geklap. Die persoon het agteroor geval, sy kop het 'n sementvloer getref en hy sterf. Die appèlhof bevind dat sy dood nie redelikerwys voorsienbaar was nie en dat die beskuldigde dus nie sy dood nalatig veroorsaak het nie. Alhoewel die hof na die kousaliteitsvereiste verwys, word geen besondere aandag hieraan gegee nie.

2 2 Deliktereg

In die deliktereg bestaan daar twee benaderings oor die *aard* van die voorsienbaarheidstoets, naamlik die *abstrakte* en die *konkrete* benadering.[19] Die benadering wat gevolg word, het aanvanklik saamgehang met 'n bepaalde opvatting oor die noodsaaklikheid al dan nie van juridiese kousaliteit as begrensingskriterium vir aanspreeklikheid.

2 2 1 Abstrakte benadering

Hiervolgens tree die dader nalatig op indien nadeel aan andere *in die algemeen* redelikerwys voorsienbaar was.[20] Vir die bestaan van nalatigheid is dit geen vereiste dat die spesifieke gevolg wat ingetree het,[21] die algemene aard[22] of die omvang[23] daarvan redelikerwys voorsienbaar hoef te wees nie.[24]

Die aanspreeklikheid van die dader vir 'n *spesifieke gevolg* word bepaal aan die hand van juridiese kousaliteit.[25] Indien die gevolg te ver van die handeling verwyderd is ("too remote"), is die dader nie vir die gevolg aanspreeklik nie.[26] Anders as in die strafreg, bepaal nalatigheid op sigself dus nie of 'n dader vir 'n *spesifieke gevolg* aanspreeklik is nie.[27]

2 2 2 Konkrete benadering

Neethling, Potgieter en Visser[28] vat hierdie benadering soos volg saam:

> "'n Dader is net nalatig met betrekking tot 'n spesifieke gevolg as daardie spesifieke gevolg en nie bloot skade in die algemeen nie, redelikerwys voorsienbaar was."

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18 *Supra* 927–928.

19 Neethling, Potgieter en Visser 130.

20 Van der Walt 68 is 'n voorstander van hierdie benadering. Kyk ook Van der Walt "Enkele gedagtes oor nalatigheid en die beperking van deliktuele aanspreeklikheid" 1964 *SALJ* 505; Potgieter en Van Rensburg "Die toerekening van gevolge aan 'n delikspleger" 1977 *THRHR* 383; Visser "Denkmodelle oor deliktuele aanspreeklikheid" 1977 *De Jure* 398.

21 *Herschel v Mrupe* 1954 3 SA 464 (A) 474.

22 *Robinson v Roseman* 1964 1 SA 710 (T) 715; *S v Bernardus supra* 302: "In ons deliktereg word 'n persoon aanspreeklik gehou vir skade indien hy kon voorsien dat skade uit die daad kan ontstaan. Dit is nie nodig dat hy inderdaad moet voorsien presies watter soort skade die daad kan veroorsaak of wat die omvang van die skade sal wees nie."

23 *Botes v Van Deventer* 1966 3 SA 182 (A) 191; *Ocean Accident and Guarantee Corporation v Koch* 1963 4 SA 147 (A) 152.

24 Neethling, Potgieter en Visser 131; Boberg 275; Potgieter en Van Rensburg 1977 *THRHR* 383.

25 Van der Walt 68; Neethling, Potgieter en Visser 131.

26 Neethling, Potgieter en Visser 170; Van der Walt 68.

27 Hoewel die vraag na juridiese kousaliteit meestal as 't ware stilswyend binne die raamwerk van die ondersoek na die ander delikselemente – veral onregmatigheid en skuld – afgehandel word en slegs uitdruklik ter sprake kom by verwyderde gevolge, moet die perke van aanspreeklikheid in beginsel by elke deliktuele eis vasgestel word. Juridiese kousaliteit is nie slegs in uitsonderingsgevalle ter sake nie (Neethling, Potgieter en Visser 170–171).

28 131.

Tradisioneel het voorstanders van hierdie benadering juridiese kousaliteit as afsonderlike delikselement bestaansreg ontsê aangesien nalatigheid op sigself as voldoende beskou is om aanspreeklikheid te beperk.[29] Aanspreeklikheid kan dan nooit verder strek as skadeposte waaraan die dader skuld het nie;[30] en hy is slegs nalatig ten opsigte van die spesifieke gevolge wat redelikerwys voorsienbaar was. Volgens dié benadering sou die straf- en deliktereg meer in ooreenstemming wees, maar die appèlhof het hierdie skuld-aan-die-skade-benadering by implikasie verwerp[31] en ook die noodsaaklikheid van beide feitelike en juridiese kousaliteit herhaaldelik beklemtoon.[32]

'n Derde benadering is dié van Neethling en Potgieter[33] wat die konkrete benadering steun maar met behoud van juridiese kousaliteit. Hulle beklemtoon die wesenlike verskil tussen die vraag na skuld en toerekenbaarheid van skade.[34] Dit sou volgens hulle nie sinvol wees om, nadat nalatigheid eenmaal bevind is (omdat die dader in die lig van die spesifiek voorsienbare gevolg(e) anders moes opgetree het), by verdere gevolge weer te vra of hy dit spesifiek moes voorsien *en anders moes opgetree het nie*. Die vraag is nou slegs watter van die gevolge van sy nalatige optrede hom toegereken moet word. Anders as in die strafreg sou dit dus ook volgens hierdie benadering moontlik wees om 'n dader aanspreeklik te hou vir verdere gevolge wat nie volgens die toets vir nalatigheid vir die redelike man spesifiek voorsienbaar was nie.

Daar is gesag vir beide die abstrakte[35] en die konkrete[36] benadering in die regspraak maar laasgenoemde skyn in onlangse regspraak neerslag te vind.[37]

Met betrekking tot eierskedelgevalle is dit volgens die positiewe reg duidelik dat die stelreël "the wrongdoer takes his victim as he finds him", wel ten volle

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29 Boberg 439, 'n voorstander hiervan, is kernagtig op die punt: "[T]he issue of legal causation holds no terrors for those who take a relative view of wrongfulness and fault – it simply does not exist." Kyk ook Van der Merwe en Olivier 143 207–210.

30 Boberg 278.

31 *S v Mokgethi supra* 39.

32 *Minister of Police v Skosana* 1977 1 SA 31 (A); *Tuck v Commissioner for Inland Revenue* 1988 3 SA 819 (A); *S v Mokgethi supra*; *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A). Dit is ook in regspraak nagevolg: kyk *Smit v Abrahams* 1992 3 SA 158 (K).

33 "Aspekte van die delikselemente nalatigheid, feitelike en juridiese kousaliteit (insluitend die sogenaamde eierskedelgevalle)" 1993 *THRHR* 157. As rede vir hulle aanvaarding van die konkrete benadering steun hulle Boberg se siening dat die vraag na die moontlikheid van voorkomende stappe slegs sinvol beantwoord kan word met verwysing na spesifieke voorsienbare gevolge. Dit val buite die bestek van hierdie artikel om 'n kritiese evaluering van die onderskeie benaderings te doen, maar hier kan net kortliks vermeld word dat daar nie met hierdie aanname akkoord gegaan word nie. Ook by die abstrakte benadering kan die vraag na voorkomende stappe sinvol oorweeg word. Die redelike man word immers in *dieselfde omstandighede* as die dader geplaas en indien skade in die algemeen voorsienbaar is, sal die redelike man soveel stappe doen as wat in daardie omstandighede redelik moontlik is ten einde nadeel te voorkom.

34 *Contra* Burchell 33. Die vraag na juridiese kousaliteit word volgens hom geïnkorporeer in die vraag na nalatigheid indien beide op die redelike voorsienbaarheidsmaatstaf berus.

35 *Robinson v Roseman supra* 715; *Botes v Van Deventer supra* 191.

36 *Minister van Polisie en Binnelandse Sake v Van Aswegen* 1974 2 SA 101 (A) 108.

37 *Ablort-Morgan v Whyte Bank Farms (Pty) Ltd* 1988 3 SA 531 (OK).

in die deliktereg toepassing vind.[38] Volgens Van der Walt[39] word die dader aanspreeklik gehou vir gevolge wat syns insiens nie redelikerwys voorsienbaar was nie. Die aanvaarbaarste manier waarop hierdie aanspreeklikheid verklaar kan word, is dat indien nalatigheid by die dader vasstaan (hetsy volgens die abstrakte of die konkrete benadering – laasgenoemde soos voorgestaan deur Neethling en Potgieter) sy aanspreeklikheid dan bepaal word deur die "direct consequences"-juridiese kousaliteitsteorie. Soos reeds vermeld, geld dié stelreël nie in die strafreg nie.

3 SUBJEKTIVERING VAN DIE TOETS VIR NALATIGHEID

Die appèlhof het al by verskeie geleenthede beklemtoon dat die toets vir nalatigheid objektief is.[40] Tog is dit duidelik dat daar wat die strafreg betref, baie water in die see geloop het sedert die uitspraak in *R v Mbombela*:[41]

> "The 'reasonable man' is in this connection the man of ordinary intelligence, knowledge and prudence. . . the Roman-Dutch law clearly recognises, for this purpose, a single standard 'reasonable man'. . . In all these cases it can hardly be contended that the standard of 'reasonable man' varies according to the accused's peculiarities. It seems to me, therefore, that the standard to be adopted in deciding whether ignorance or mistake of fact is reasonable, is the standard of the reasonable man, and that the race or the idiosyncrasies, or the superstitions, or the intelligence of the person accused do not enter into the question."

In 'n heterogene bevolking soos dié van Suid-Afrika kan 'n absolute handhawing van 'n objektiewe toets tot onbillikhede lei.[42] Die stelling dat die howe 'n objektiewe toets vir nalatigheid toepas, word gekwalifiseer deur die volgende uitsonderings:[43]

3 1 Nalatigheid word beoordeel vanuit die omstandighede

By die aanwending van die objektiewe redelike man-toets in die delikte- en strafreg, is die vraag dieselfde, naamlik hoe sou die redelike man opgetree het *in die omstandighede* waarin die dader hom bevind?[44]

Ten aansien van die toets in die strafreg sê waarnemende appèlregter Steyn die volgende in *S v Dhlamini*:[45]

> "[T]o my mind it cannot be said that a reasonable man in the position and condition of the appellant at the time of the second shot would have been capable of such disregard in view of the serious impairment of his senses."

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38 *Wilson v Birt (Pty) Ltd* 1963 2 SA 508 (D); *Masiba v Constantia Insurance Co Ltd* 1982 4 SA 333 (K); Neethling, Potgieter en Visser 189 – 191.

39 99 – 100.

40 *Weber v Santam Versekeringsmaatskappy Bpk* 1983 1 SA 381 (A); *Ngubane v South African Transport Services supra*; *S v Ngubane* 1985 3 SA 677 (A); *S v Bochris Investments (Pty) Ltd* 1988 1 SA 861 (A); *Attorney General, Natal v Ndlovu* 1988 1 SA 905 (A).

41 1933 AD 269 272 – 274.

42 *S v Melk* 1988 4 SA 561 (A) 578; *R v Nkomo (1)* 1964 3 SA 128 (SR) 131; kyk ook De Wet en Swanepoel *Strafreg* (1985) 156 – 162; Snyman 219; Whiting 1991 *SALJ* 440 ev; Visser en Maré *Visser and Vorster's general principles of criminal law through the cases* (1990) 553.

43 Snyman 222.

44 Neethling, Potgieter en Visser 136 – 139; Burchell 86; Van der Merwe en Olivier 144 – 148; Boberg 269 333 ev; Snyman 248; Burchell en Milton 303 – 304.

45 1988 2 SA 302 (A) 308.

In *S v Southern*,[46] waar die beskuldigde die bestuurder was van 'n bus waarvan die remme gefaal het, is sy optrede gemeet aan dié van "a reasonable man driving a fully loaded passenger bus in the particular circumstances which existed on the day of the accident".

Wat die deliktereg betref, is dit eweneens duidelik dat nalatigheid altyd beoordeel word vanuit die omstandighede.[47] So word 'n groter mate van sorg geverg waar met gevaarlike goed gewerk word[48] of waar die dader te doen het met individue wat aan die een of ander onbekwaamheid of gebrek ly. Veral die teenwoordigheid van kinders is hier ter sprake.[49] Daar word ook erkenning gegee aan die feit dat die redelike man in bepaalde omstandighede 'n oordeelsfout kan begaan, byvoorbeeld in 'n toestand van skielike gevaar.[50]

Die mate van subjektivering in die delikte- en strafreg is hier dieselfde.

3 2 Subjektivering ten aansien van sekere groepe persone

3 2 1 Deskundiges

By die beoordeling van die dader se optrede waar sodanige optrede deskundigheid verg, word die "redelike deskundige"-toets gebruik. In beide die delikte- en strafreg word die redelike man-toets eenvoudig opwaarts gesubjektiveer.[51] Dit spreek vanself dat byvoorbeeld 'n hartchirurg se optrede tydens 'n operasie tog nie gemeet kan word aan dié van die redelike man, wat 'n leek op mediese gebied is nie.[52] Die redelike deskundige is wesenlik dieselfde as die redelike man, maar aangevul deur 'n redelike mate van toepaslike deskundigheid.[53] Volgens *Van Wyk v Lewis*[54] word die deskundige gemeet aan

> "the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs".

3 2 2 Kinders

In die deliktereg word die redelike man-toets ook in die geval van kinders[55] gebruik om nalatigheid te toets. Voor 1965 was daar by die howe 'n neiging

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46 1965 1 SA 860 (N) 861; sien ook *S v Naidoo* 1989 2 SA 163 (N); *S v Blanket Mine (Pvt) Ltd* 1992 2 SASV 41 (ZSC); *S v Marais* 1972 2 PH H5 64 (T); *S v Crockart* 1971 2 SA 496 (RA).

47 Kyk *supra* vn 5 vir gesag.

48 *Oosthuizen v Homegas* 1992 3 SA 463 (O); *Havenga v Minister of Police* 1981 2 SA 344 (T).

49 *Maylett v Du Toit* 1989 1 SA 90 (T); *Ndlovu v AA Mutual Assurance Association* 1991 3 SA 655 (OK); *Keown v Ned-Equity-Versekeringsmaatskappy Bpk* 1984 1 SA 656 (A); kyk ook Boberg 355–356 en gesag daar aangehaal.

50 *Msutu v Protea Assurance Co Ltd* 1991 1 SA 583 (K).

51 *Van Wyk v Lewis* 1924 AD 438; *Pringle v Administrator, Transvaal* 1990 2 SA 379 (W); *Guardian National Insurance Co Ltd v Weyers* 1988 1 SA 255 (A); *Moatshe v Commercial Union Assurance Co of SA Ltd* 1991 4 SA 372 (W); *Ex parte Lebowa Development Corporation Ltd* 1989 3 SA 71 (T); *Dews v Simon's Town Municipality* 1991 4 SA 479 (K); *S v Shivute* 1991 1 SV 656 (Nm); *S v Kramer* 1987 1 SA 887 (W); kyk Snyman 225 en Boberg 347–348 vir verdere gesag.

52 Visser en Maré 563; Snyman 228.

53 Neethling, Potgieter en Visser 129.

54 *Supra* 444.

55 Dit geld slegs vir kinders van 7 jaar en ouer aangesien 'n kind onder 7 as onweerlegbaar ontoerekeningsvatbaar beskou word.

om 'n kind te toets aan die hand van 'n redelike kind van die dader se ouderdom en verstandelike ontwikkeling.[56] In *Jones v Santam Bpk*[57] is egter onomwonde verklaar dat daar slegs een objektiewe standaard is, naamlik die *diligens paterfamilias* en dat ook kinders aan dié standaard gemeet word. Die dader se kindskap kom slegs ter sprake by die vraag na toerekeningsvatbaarheid waar al die subjektiewe eienskappe van die kind self in ag geneem word.[58] Hierdie standpunt is deur die appèlhof bevestig in *Roxa v Mtshayi*[59] en *Weber v Santam Versekeringsmaatskappy Bpk*,[60] en in regspraak nagevolg[61] ten spyte van fel kritiek daarteen deur die meerderheid akademici.[62]

Wat die strafreg betref, is die posisie tans onseker en daar is baie min regspraak hieroor beskikbaar. In *R v Fortuin*[63] en *R v Wemyss*[64] is die redelike man-toets gebruik maar in beide gevalle was die beskuldigdes ouer as veertien jaar. In *S v T*[65] is die redelike kind-toets toegepas (per regter Steyn):

> "Optrede wat volgens die volwasse maatstaf van die 'redelike man' as nalatig beskou moet word, sal derhalwe nie noodwendig ook aldus beskou word volgens die onvolwasse maatstaf van die 'redelike 16-jarige skoolkind' nie."

Aangesien die redelike kind-toets toegepas is selfs by 'n kind bo veertien, sou dit sinloos wees om die redelike man-toets toe te pas op kinders tussen sewe en veertien jaar. *S v T* bied dus indirek gesag vir die toepassing van die redelike kind-toets by kinders tussen sewe en veertien.[66] Die toepassing van die redelike kind-toets in die strafreg is allerweë verwelkom.[67]

Hoewel die appèlhof dus in die deliktereg die objektiewe redelike man-toets vir kinders voorstaan, is daar geen gronde om te aanvaar dat dit ook vir die strafreg geld nie.[68]

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56 *Smith v Burger* 1917 CPD 662; *Lentzner v Friedman* 1919 OPD 20; *Belsstedt v SAR & H* 1936 CPD 397; *Adams v Sunshine Bakeries* 1939 CPD 72; *Singh v Premlal* 1946 NPD 134. Van der Walt 73 asook De Bruin "Kinders en die toets vir nalatigheid in die privaatreg" 1979 *THRHR* 181 – 183 is van mening dat howe die toets vir nalatigheid verwar het met dié van toerekeningsvatbaarheid.

57 1965 2 SA 542 (A) 551.

58 554.

59 1975 3 SA 761 (A).

60 *Supra* 400. Jansen AR motiveer sy standpunt soos volg: "As die kind se doen en late gemeet word aan die maatstaf van die volwassene, dan moet daar gevra word of hy ryp genoeg was om tov die betrokke situasie aan daardie maatstaf te voldoen . . . As hierdie benadering met insig toegepas word, dan behoort baie van die besware deur ons kontemporêre skrywers teen die beginsels van die *Jones*-saak te verval en behoort dit ook nie nodig te wees om te bepleit dat, ten einde 'n billike resultaat te bereik, 'n redelike kind van toepaslike ouderdom, soos in die Anglo-Amerikaanse regstelsels, as maatstaf om nalatigheid te bepaal aangewend moet word in die plek van die maatstaf van die *bonus paterfamilias* nie."

61 *Ndlovu v AA Mutual Assurance Association* 1991 3 SA 655 (OK); *Haffejee v SAR & H* 1981 3 SA 1062 (W).

62 Van der Vyver "Subjectivity or objectivity of fault: the problem of accountability and negligence in delictual liability" 1983 *SALJ* 575; Van der Merwe en Olivier 137 ev; Neethling, Potgieter en Visser 127 – 128; Van der Walt 75. Kyk oor die algemeen Boberg 673 – 681. *Contra* Claasen "Toets vir toerekeningsvatbaarheid en nalatigheid van kinders in die deliktereg" 1984 *TRW* 90.

63 1934 GWL 16.

64 1960 1 PH H76 (SR).

65 1986 2 SA 112 (O) 127.

66 Visser en Maré 572.

67 Snyman 228; Visser en Maré 572.

68 Visser en Maré 572.

3 3 Meerdere kennis van die dader

Al die omstandighede en feite waarvan die dader *inderdaad kennis gedra het*, aangevul deur die feite waarvan die *redelike man in sy posisie kennis sou gedra het*, word in ag geneem by die toets vir nalatigheid.[69] In beide die delikte- en strafreg word die feit dat die dader oor meer kennis omtrent 'n besondere aangeleentheid beskik het as waaroor die redelike man sou beskik het, wel deeglik verreken.[70] Waar 'n motoris 'n blinde voetganger raakry wat onverwags oor die pad stap, sal hy nie nalatig bevind word indien die voetganger se blindheid nie redelikerwys voorsienbaar was nie. Indien die motoris egter toevallig van die betrokke voetganger se blindheid geweet het, sal sy optrede beoordeel word met inagneming van die besondere kennis.[71]

3 4 Subjektivering ten aansien van persoonlike eienskappe

Wat die deliktereg betref, spreek die volgende *dictum* van appèlregter Joubert in *Weber v Santam Versekeringsmaatskappy Bpk*[72] vanself:

> "Dit dien myns insiens geen doel om die aanwesigheid of die afwesigheid van allerlei antropomorfiese eienskappe aan die *diligens paterfamilias* te probeer toedig nie omdat dit nie oor 'n fisiese persoon nie, maar slegs oor die benaming van 'n abstrakte objektiewe maatstaf, handel. Dit gaan ook nie oor die vraag wat die sorg van 'n legio tipes van redelike persone, soos 'n redelike geleerde, 'n redelike ongeletterde, 'n redelike geskoolde arbeider, 'n redelike ongeskoolde arbeider, 'n redelike volwassene of 'n redelike kind sou wees nie. Daar is slegs één abstrakte objektiewe maatstaf en dit is die Hof se oordeel wat redelik is omdat die Hof hom in die posisie van die *diligens paterfamilias* plaas."

Hoewel die toets vir nalatigheid nie volkome objektief is nie omdat die redelike man in dieselfde omstandighede as die dader geplaas word, word behalwe by deskundiges dus geen ag geslaan op die persoonlike eienskappe van die dader nie.[73]

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69 Neethling, Potgieter en Visser 143.

70 *Santam Insurance Co Ltd v Nkosi* 1978 2 SA 784 (A); *S v Mahlalela* 1966 1 SA 226 (A).

71 Snyman 228; *AA Mutual Insurance Association Ltd v Manjani* 1982 1 SA 790 (A) is afwykend in hierdie opsig. *In casu* is 'n motoris nie nalatig bevind nie omdat die redelike man nie die teenwoordigheid van kinders sou voorsien het nie, in omstandighede waar die motoris hul teenwoordigheid wel voorsien het. Wessels AR verklaar (796H) dat die toets vir nalatigheid "is an objective one which is completely independent of his personal idiosyncracies". Die beslissing is gekritiseer (Boberg 273; Burchell 1982 *Annual Survey* 182 – 183) en weerspieël nie die huidige stand van die reg nie.

72 *Supra* 410 – 411; kyk ook Boberg 269 – 270; Burchell 87.

73 Daar is moontlik uitsonderings. Van der Walt 66 70 en Burchell 89 – 90 noem die moontlikheid dat fisiese gebreke soos blindheid in ag geneem word. Daar is egter geen gesag dat die fisiese eienskappe van die dader by die redelike man-toets 'n rol speel nie. Neethling, Potgieter en Visser 126 doen die volgende aan die hand: "Nietemin behoort, soos in die Anglo-Amerikaanse reg, by die bepaling van die moontlike nalatigheid van byvoorbeeld 'n blinde persoon of 'n kreupele, die betrokke gebreke nie totaal geïgnoreer te word nie. Die vraag behoort met ander woorde te wees hoe die redelike man met so 'n eienskap (soos blindheid) sou opgetree het. So toegepas, kan 'n persoon wat aan 'n fisiese gebrek ly steeds nalatig wees waar hy aktiwiteite onderneem wat die redelike man in sy posisie nie as veilig sou beskou het nie (byvoorbeeld 'n blinde wat motor bestuur)." Kyk verder Van der Merwe en Olivier 141 – 142 wat 'n subjektiewer toets vir nalatigheid bepleit; *Muller v Robbemond* 1967 3 SA 168 (K) 170; *Attorney-General, Natal v Ndlovu* 1988 1 SA 905 (A) 924 (Boshoff WAR se minderheidsuitspraak). *Weber supra* weerspieël egter die huidige stand van die reg.

Volgens *S v Mbombela*[74] was die posisie in die strafreg dieselfde as in die deliktereg. Onder akademici is daar nie eensgesindheid oor die vraag of die reg 'n subjektiewe dan wel 'n objektiewe toets vir nalatigheid behoort toe te pas nie.[75] Hoewel skrywers op die gebied van die strafreg verklaar dat ons howe in beginsel nie subjektiewe faktore soos die dader se persoonlike kennis, ervaring en bekwaamhede (of gebrek daaraan), bygelowigheid en persoonlike eienaardighede in ag neem by die vasstelling van nalatigheid nie,[76] het howe al dikwels stellings gemaak wat dui op die inagneming van subjektiewe faktore[77] in strafsake. 'n Bekende aanhaling is dié van hoofregter Rumpff in *S v Van As*:[78]

> "Hierdie *diligens paterfamilias* is natuurlik 'n fiksie en is ook maar al te dikwels nie 'n *pater* nie. Hy word 'objektief' beskou by die toepassing van die reg, maar skyn wesenlik sowel 'objektief' as 'subjektief' beoordeel te word omdat hy 'n bepaalde groep of soort persone verteenwoordig wat in dieselfde omstandighede verkeer as hy, met dieselfde kennisvermoë."

En in *S v Ngema*[79] verklaar regter Hugo:

> "One must, it seems to me, test negligence by the touchstone of the reasonable person of the same background and educational level, culture, sex and – dare I say it – race of the accused. The further individual peculiarities of the accused alone must, it seems to me, be disregarded."

Reeds in 1978 meld Schäfer[80] dat daar onsekerheid is oor watter mate van subjektivering van die toets vir nalatigheid aanvaarbaar is. Daar is inderdaad onsekerheid. Volgens *S v Netshiavha*[81] glo die objektiewe redelike man nie in toorkuns nie, en word die geloof daarin bloot as 'n strafversagtende omstandigheid in ag geneem. In *S v Ngema*[82] word daarenteen die geloof in bonatuurlike wesens soos "Tikoloshes" as "not uncommon amongst people of his ilk" beskou, en word beslis dat dit 'n faktor is wat wel by die toets vir nalatigheid in ag geneem moet word.

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74 Aangehaal *supra*.

75 Die bekendste voorstanders van 'n suiwer subjektiewe toets vir nalatigheid is De Wet en Swanepoel 156 ev; kyk ook Mogridge "The reasonable man: negligence and criminal capacity" 1980 *SALJ* 267; Botha "*Culpa* – a form of *mens rea* or a mode of conduct" 1977 *SALJ* 29. Hoewel 'n suiwer subjektiewe toets fel gekritiseer word (Snyman 220; Visser en Maré 550; Hunt *South African criminal law and procedure* vol II (1970) 378–379), is voorstanders van 'n objektiewe toets dit eens dat 'n *suiwer* objektiewe toets uiters onbillik kan werk en dat subjektiewe faktore wel 'n rol behoort te speel (Visser en Maré 553). Ander oplossings is oa dié van Burchell en Milton 305–307, nl dat die toets vir nalatigheid objektief bly maar voorafgegaan word deur 'n subjektiewe toets vir kriminele toerekenbaarheid; en Whiting 1991 *SALJ* 445 ev, wat as uitgangspunt die objektiewe redelike man-toets voorstaan tensy getuienis daarop dui dat so 'n toets nie geskik is tov die spesifieke dader nie, in welke geval 'n subjektiewe ("geïndividualiseerde") toets toegepas moet word.

76 Snyman 221 224–225; Burchell en Hunt *South African criminal law and procedure* vol I (1970) 105; Whiting 1991 SALJ 439.

77 In *R v Mara* 1966 1 SA 82 (R) 83G–H verwys Young R na "the accused, given his mental and physical make-up". Kyk ook *S v Bernardus supra* en *S v Naidoo* 1974 4 SA 574 (N) 599. Volgens Bertelsman "What happened to *luxuria*? Some observations on criminal negligence, recklessness and *dolus eventualis*" 1975 *SALJ* 59–63 het die howe sedert die sestigerjare 'n subjektiewer toets begin volg (kyk gesag daar vermeld).

78 *Supra* 928D–E.

79 1992 2 SASV 651 (D) 657F.

80 "The swing towards the subjective test for negligence in criminal law" 1978 *THRHR* 204.

81 1990 2 SASV 325 (A) 333.

82 *Supra* 657.

Hoewel die howe steeds die objektiewe redelike man-toets voorstaan,[83] is dit duidelik dat die toets, in teenstelling met die posisie in die deliktereg, al hoe meer gesubjektiveer word in die strafreg deurdat steeds meer persoonlike eienskappe van die dader in ag geneem word.

Ongeveer twee dekades gelede verklaar Hunt:[84] "A swing towards the subjective test is not inconceivable though it does seem improbable." Tans lyk dit glad nie meer so onwaarskynlik nie. Voorts verklaar Burchell en Milton:[85] "The objective standard is relaxed 'upwards' but it is not lowered." Soos gesien, is dit slegs waar ten opsigte van die deliktereg.

4 GEVOLGTREKKING

Ten spyte daarvan dat daar in beide die straf- en deliktereg gebruik gemaak word van die objektiewe redelike man-toets om nalatigheid te bepaal, blyk dit dat hierdie toets nie noodwendig dieselfde inhoud en betekenis in die onderskeie regsgebiede het nie.

Dit is verstaanbaar en aanvaarbaar dat die toets vir nalatigheid in die strafreg meer subjektief sal wees as in die deliktereg, veral in 'n heterogene land soos Suid-Afrika. In die strafreg is daar 'n owerheid-onderdaan-verhouding en gaan dit oor die verwytbaarheid van 'n persoon vir sy laakbare optrede.[86] In die deliktereg word daar tereg met 'n objektiewe standaard gewerk. Hier is die vraag wie van die twee partye die skadelas moet dra en "in die private regsverkeer word nie van 'n persoon verwag om die risiko verbonde aan die optrede van onontwikkeldes te dra nie".[87]

Ongekwalifiseerde verklarings[88] soos dat "[t]he traditional test of negligence applied by South African courts in criminal matters is like the test applied in civil cases, objective", en regter Thirion se stelling in *S v Zoko*[89] dat "the *culpa* which is an element of the crime of culpable homicide is the same as the *culpa* of the law of delict", skep 'n wanindruk. Verskille in die toepassing van die toets vir nalatigheid in die onderskeie regsgebiede met betrekking tot die mate van subjektivering en die voorsienbaarheidsaspek moet duidelik voor oë gehou word waar regspraak uit een regsgebied in die ander toegepas word.[90]

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83 *S v Ngubane supra* 686 – 687; *Attorney General, Natal v Ndlovu supra* 918; *S v Cleminshaw* 1981 3 SA 685 (K) 691; *S v Ngema supra* 656.

84 378.

85 304.

86 Joubert 6 *LAWSA* par 100. Volgens Whiting 1991 *SALJ* 440 452 is dit essensieel dat daar voldoen moet word aan die beginsel van *nulla poena sine culpa* wat in sommige gevalle slegs dmv 'n subjektiewe toets bereik kan word.

87 Neethling, Potgieter en Visser 122.

88 Burchell en Milton 300.

89 1983 1 SA 871 (N) 896E.

90 Visser en Maré 556. Kyk ook *S v Van As supra* 929 waar Rumpff HR melding maak van die onderskeid tussen die straf- en privaatreg mbt die voorsienbaarheidsaspek.

Die appelleerbaarheid van interlokutore beslissings en voorlopige vonnisse in die Romeins-Hollandse reg en Suid-Afrika vanaf 1795

CFC van der Walt
BJur et Art LLD
Professor in die Privaatreg, Potchefstroomse Universiteit vir CHO

SUMMARY

The appealability of interlocutory judgments and provisional sentences in Roman-Dutch law and in South Africa from 1795

Following on previous views regarding the desirability of returning to the less strict Roman-Dutch law approach to appealability, rather than upholding the less accommodating approach followed since the 1830s under the influence of English law, this article first shows what the approach under Roman-Dutch law was and how it had developed by 1795. Secondly, the importation of the English law approach is set out.

The distinctions made between so-called "definitive" and "interlocutory sentences", "interlocutory sentences regarding *emergente questien*" and "interlocutory sentences regarding *incidente questien*", and between "interlocutory sentences with and those without the effect of *definitive sententien*" are set out.

The unfortunate confusion between interlocutory orders and provisional sentences, arising from a Dutch Ordinance of 1622, which was put into the right perspective only in 1766 but which continued to confuse writers of no lesser standing than Van der Linden (upon whose authority it gained entrance into the South African case law), is discussed.

The criterion for the appealability of the relevant decisions in Roman-Dutch law, in spite of the apparent confusion that existed, was at all times whether the decision in question caused harm to the appellant's case which could not be remedied by a later decision.

In spite of the initial policy of maintaining the local legal system after the annexation in 1795, the call for the reformation of the civil procedure and other aspects of the legal system and for a policy of active anglicisation thereof were soon answered. The Charter of Justice 1832 and the Administration of Justice Act 1864 provided the turning points, after which the English legal terminology and practice became dominant in the question of appealability. Instead of simplifying matters, this added to the confusion, resulting in an approach to appealability which can only be labelled as too strict and which is generally felt to produce great delay and unjust results. The line currently being explored by the Appellate Division to develop a more accommodating approach towards appealability, while maintaining values such as that of the finality of judgments and fairness towards persons feeling aggrieved by court decisions, should be applauded.

1 INLEIDING

Elders[1] is aspekte van die appelleerbaarheid van sekere hofbeslissings, waaronder veral die verskillende klasse interlokutore[2] beslissings, aangeraak.

1 1992 *THRHR* 624 en 1993 *THRHR* 357.
2 Damhouder *Practycke in civile saecken* (1649) 144(1) noem dit "half volle vonnissen".

In die loop van daardie besprekings is die standpunt ingeneem dat dit vir die ontwikkeling van die Suid-Afrikaanse reg beter sou gewees het, en steeds sal wees, indien na die soepeler, Romeins-Hollandse benadering tot sodanige kwessies teruggekeer sou word ten einde 'n beginselgrondslag te vind vir die onderskeid tussen appelleerbare en nie-appelleerbare hofbeslissings van 'n interlokutore aard. Die strenger, meer Engelsregtelike benadering is as die minder aanvaarbare benadering getipeer; en baie van die onsekerheid wat op hierdie gebied bestaan het en moontlik steeds bestaan, is juis aan die invoer van 'n Engelsregtelike benadering iewers in die verlede toegeskryf. Met hierdie artikel word gepoog om vas te stel waar en hoe dit gekom het dat die Romeins-Hollandse benadering deur 'n ander benadering in ons reg vervang is. Daar moet dus eerstens bepaal word wat die benadering van die Romeins-Hollandse reg was. Tweedens moet gekyk word watter benadering teen 1795 aan die Kaap die Goeie Hoop gegeld het. Derdens moet vasgestel word wat na die kolonisasie van die Kaap die Goeie Hoop in hierdie verband gebeur het, en hoe dit in die res van die land neerslag gevind het.

2 DIE APPELLEERBAARHEID VAN INTERLOKUTORE HOFBESLISSINGS INGEVOLGE DIE ROMEINS-HOLLANDSE REG

Van Leeuwen[3] sê dat in beginsel geappelleer kan word teen alle vonnisse en bevele van (laer) regters, waardeur 'n mens gegrief of benadeel voel, want dit is 'n voorreg teen die verkeerde optrede ("wrong conduct") en onnoselheid ("stupidity") van die regters.[4] Hierdie standpunt het nooit ten opsigte van *alle* vonnisse gegeld nie en behoort dit ook nie te doen nie. In hierdie verband kom die onderskeid tussen *interlocutoire* en *definitive sententien* voor. Oor hierdie onderskeid en die groep interlokutore bevele wat iewers tussen hierdie twee klasse bevele lê, naamlik die *interlocutoire sententien met die krag van definitive sententien*, woed die debat nou reeds vir etlike eeue lank onverpoos voort.

2 1 Die verskillende soorte tersaaklike hofbeslissings

Die kwessie moet benader word in die lig van wat beskou is as 'n *sententie*, naamlik die uitspraak van 'n bevoegde regter waardeur die geskil in die geheel of gedeeltelik bygelê word, en wat die uiteinde van die geding is.[5] Die definisie van *interlocutoire sententie* wat deur Gail verskaf word, het volgens Kersteman[6] die spyker op die kop geslaan.[7] Gail[8] deel mee dat 'n *interlocutoire sententie* een is wat uitgespreek word tussen die begin en die einde van die regspleging, of wat handel oor sake wat insidenteel of tussenkomend is, of oor 'n tussengeval. Merula[9] omskryf 'n interlokutore beslissing as 'n beslissing (*vonnis*) wat tot voor afhandeling van 'n geskil gegee is, om iets te doen, of te gee

3 Van Leeuwen *Commentaries on the Roman-Dutch law* (CW Decker-uitg 1656, vertaal deur Kotze) (1886) 5 25 12 (521).
4 Ook Wessels *History of the Roman-Dutch law* (1908) 166 ev verwys hierna as die rede vir die toelaat van appèlle.
5 Vromans *Tractaat de foro competenti* (verwerk deur Van Middellant) (1722) 4 I I(1).
6 *Hollandsch rechtsgeleert woordenboek* (1768) sv *interlocutoire sententien*.
7 Kersteman tap noem dit 'n "pertinente en complete definitie".
8 *De keyserlyke practijke, ofte observantien van de Keyserlyke Kamer* (1656) I Obs 129.
9 *Manier van procederen* (1705) 4 91 1(2).

of nie te gee nie, of om die gang van die saak te vergemaklik (*sligten*) en te rig tot afhandeling van die proses, terwyl 'n *definitive sententie* tipies eindig in *absolutie* of *condemnatie*.[10] 'n Vergelykbare definisie is die van Damhouder (1507 – 1581).[11]

Sodanige interlokutore beslissings was volgens die siviele reg nie appelleerbaar nie tensy dit nadeel sou meebring wat nie deur middel van 'n moontlike appèl teen die *definitive sententie* reggestel kon word nie, of sodanig was dat *malitie* en *calumnie* sou voorkom[12] en nie teëgestaan kon word nie, of diegene wat die hoofgeding probeer vertraag of verhinder deur teen elke interlokutore beslissing allerlei besware te opper nie teëgestaan sou kon word nie, of die ander party met groot en onnodige koste belas sou word. Hierdie benadering is in die keiserlike howe toegepas terwyl in die Kanonieke reg geen sodanige beperking op appèlle geplaas is nie.[13]

Interlokutore beslissings handel oor *incidente* of *emergente questien* wat nie regstreeks met die *principaele saecke* te make het nie.[14] *Emergente questien* is dan kwessies rakende die proses, soos die geloofwaardigheid van getuies en toelaatbaarheid van getuienis. *Incidente questien* is kwessies wat onregstreeks met die hoofgeskilpunt verband hou,[15] soos 'n beslissing oor 'n beweerde *pactum de non petendo* en ander versoeke wat in die loop van die verrigtinge gerig word.[16]

Benewens die *definitive sententien* en *interlocutoire sententien* oor *emergente*,[17] is die *interlocutoire sententien* met die krag van *definitive sententien* onderskei. Hulle het waarskynlik die interlokutore bevele oor *incidente* ingesluit.[18] Damhouder sê verder dat 'n interlokutore beslissing nie die hoofgeskilpunt wegneem nie.[19] Eise in konvensie en eise in rekonvensie word ook altyd *pari passu* saam gehanteer en saam uitgemaak.[20]

2 2 Die implikasies van die onderskeid vir appelleerbaarheid

'n Interlokutore beslissing kan deur 'n *definitive sententie* uitgespreek deur dieselfde regter teruggetrek of verander word.[21] 'n *Definitive sententie* kan egter nie deur die regter teruggetrek, verbeter, aangevul of ingekort word nie, en moet skriftelik vervat word sodat dit onveranderlik is en geskille voorkom kan word.[22] Dit behou dus die krag van gewysde tensy 'n appèl daarteen slaag of dit weens hersiening teruggetrek word. 'n Interlokutore beslissing moes slegs

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10 4 91 1 3; so ook Vromans 4 I V.
11 In *Practycke in civile saecken*.
12 Merula 4 I III(4) wys ook daarop dat 'n interlokutore beslissing nie tot infamie kon lei nie.
13 So deel Vromans 4 I III en Merula 4 91 1(2) mee.
14 Damhouder 144.
15 Van der Linden *Rechtsgeleerd, practicaal en koopmans handboek* (1806) 2 24 2b dui aan dat *incidente* wel vir appèl vatbaar was.
16 Damhouder 144(15) en (16).
17 Die eerste waarvan appelleerbaar en die laasgenoemde waarvan nie appelleerbaar was nie.
18 Damhouder 145 gee vbe van interlokutore beslissings met die krag van *definitive sententie*, soos die takseer van koste.
19 Sien ook Merula 4 I III(5).
20 Van Leeuwen 5 24 8 (510).
21 Merula 4 I III en 4 I III(5).
22 *Idem* 4 I VI(9).

volgens die Kanonieke reg skriftelik wees. Voorts word by 'n interlokutore beslissing geen kostebevel gemaak nie maar word dit vir die hoofgeding oorgelaat.

Laastens, maar in hierdie konteks die belangrikste, was dat daar nie teen 'n interlokutore beslissing wat nie die krag van 'n *definitive sententie* het nie, geappelleer kon word nie.[23]

3 BELANGRIKE ASPEKTE VAN DIE ONTWIKKELING IN DIE ROMEINS-HOLLANDSE REG

3 1 Agtergrond

Dit is belangrik om by die ontwikkeling van die Romeins-Hollandse reg enkele datums in gedagte te hou. Die standpunte van skrywers moet verstaan word teen die agtergrond van sodanige datums. Reeds in die *Instructie van de Hooge Raad van Holland en Zeeland* van 31 Mei 1582[24] is dit onomwonde gestel dat dit wenslik was om duidelik te maak in watter sake die moontlikheid van appèl bestaan het en in watter nie. Daar is voorgeskryf dat 'n afskrif van die interlokutore beslissing by die aansoek aangeheg moet word om die neem van daardie besluit te vergemaklik. Voorts is bepaal dat appèl teen namptissemente ten bedrae van meer as f600 toelaatbaar was, mits daar redes voor was. Wat sodanige redes sou wees, hang seker saam met die gewone gronde waarop 'n appèl kon slaag.

Daarby is bepaal[25] dat dit die griffier se taak was om die rol te hou, en "sententien te minuteeren en te ontwerpen". Hy moes dus die verrigtinge notuleer en die vonnisse verwoord. Interessant is dat die griffier sy eie inkomste moes verdien (onder andere) met die bevele wat hy uitgeskryf het en dat hy vir 'n interlokutore beslissing slegs 16 stuiwers[26] en vir 'n *definitive sententie* ten bedrae van meer as f500, f5 ontvang het. Gevolglik was dit waarskynlik aantrekliker vir die griffier om 'n *definitive sententie* op te stel.[27]

Skynbaar is die oorspronklike (*pertinente en complete* soos Kersteman dit noem) definisie van interlokutore beslissings deur Gail later verwater. Wat gebeur het, is dat die begrip interlokutore beslissing uitgebrei is "na de slenter van de Practycq" (aldus Kersteman) om ook bevele in te sluit wat byvoorbeeld bepaal het dat getuieverklarings ingewin moet word; dat getuienis onder eed aangehoor moet word; dat 'n party wie se eksepsie afgewys word, aangesê word om op die hoofsaak te antwoord. Verder is in die praktyk aanvaar dat 'n interlokutore beslissing herroep of vernietig kon word voordat die *definitive sententie* gelewer is, in welke geval geen appèl moontlik was nie behalwe waar die uitvoering van so 'n interlokutore beslissing nie in die *definitive sententie* "reparabel" sou wees nie.[28]

In die *Ordonnantie, van niet te appelleren van interlocutoire vonnissen of namptissementen, waer bij is verstaen dat onder vonnissen Interlocutoire, de*

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23 *Idem* 4 VII II.
24 GPB V 866 par 103.
25 Par 64.
26 Par 77.
27 Par 81.
28 Van Leeuwen 5 25 13 (521) verklaar dat appèlle kan volg, behalwe teen interlokutore beslissings wat "definitively reparable" is in die hoofgeding, en wat nie *infamia* meegebring het nie.

Namptissementen meede begrepen zyn, van die state Holland en Wes-Friesland van 19 Maart 1622, is gepoog om hierdie praktyksreëls saam te vat. Dit het ongelukkig daartoe gelei dat groter verwarring ontstaan het deurdat interlokutore bevele en voorlopige vonnisse toe met mekaar verwar is vir sover dit oor die appelleerbaarheid daarvan handel. Dit het egter eers behoorlik aan die lig gekom in die anonieme *Consideratien over de Resolutie van niet te appelleren van interlocutoire vonnissen of namptissementen, van die state Holland en Wes-Friesland, 19 Maart 1622, waer bij is verstaen dat onder vonnissen interlocutoire, de Namptissementen "mede begrepen zyn" van 1766.*

Ingevolge hierdie *Consideratien van 1766* val nie alle interlokutore beslissings en namptissemente binne die trefwydte van die *Ordonnantie van 1622* nie, en sou sekere interlokutore beslissings (dit wil sê dié met die krag van *definitive sententien*) en namptissemente van meer as f600, wel appelleerbaar wees. Hierdie insig het klaarblyklik egter nie helder inslag gevind nie en die gelykskakeling van voorlopige vonnisse met interlokutore beslissings het steeds voorgekom. 'n Voorbeeld daarvan is te vinde in Van der Linden se *Rechtsgeleerd, practicaal en koopmans handboek*[29] van 1806.

3 2 Die nawerking van die *Ordonnantie van 1622* in die Suid-Afrikaanse reg

Van der Linden se pasgemelde werk, wat as sy *Institutes of Holland, or Manual of law, practice and mercantile law*[30] in die Suid-Afrikaanse regspraak neerslag gevind het, lui soos volg:[31]

> "The High Court cannot allow an appeal from the interlocutory judgments of the courts of the towns, bailiffs and goodmen, or villages (*provisional sentences being included*) . . . unless the execution of the interlocutory judgments would be irremediable upon final judgment."

Uit die gekursiveerde sinsnede blyk duidelik dat die ou gelykskakeling tussen namptissemente en interlokutore beslissings steeds by Van der Linden deurgeslaan het. Die erns vir die Suid-Afrikaanse reg van die feit dat Van der Linden teen 1806 nog die posisie weergegee het soos dit voor 1766 verstaan is, lê daarin dat in *Kowar(l)sky & Co v Sable*[32] regter Tindall, wat na bogenoemde weergawe van Van der Linden verwys is maar self geen gesag aangehaal het nie, beslis dat 'n voorlopige vonnis 'n interlokutore beslissing is en gevolglik slegs met toestemming in appèl aangeveg kan word. Regter Tindall is ook verwys na 'n terloopse opmerking van regter-president De Villiers in *Israelstam v Pillemer*,[33] waar hy sonder om na enige gesag te verwys eenvoudig sê dat "there is authority in the writers for so considering it".

Hierna is dieselfde standpunt verkondig in byvoorbeeld *Hattingh v Booth*[34] en *McLean v Wood NO*.[35] In *Oliff v Minnie*[36] word die volgende gesê:

> "Proceedings for provisional sentences are, as the word 'provisional' indicates, interlocutory in their nature and have always been so regarded by South African Courts."

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29 3 1 6 8(1) (348).
30 Vertaal deur Juta (1897).
31 254 (5(1)).
32 1923 TPD 156 159.
33 1911 TPD 781 786.
34 1928 NPD 339.
35 1953 1 SA 215 (K).
36 1952 4 SA 369 (A) 374G–H.

Dat hierdie stelling te sterk gestel is in die lig van wat hierdie navorsing oor die werklike strekking van die Romeins-Hollandse reg opgelewer het, staan vas. Nietemin verwys die hof na 'n hele aantal sake waarin toestemming om teen voorlopige vonnisse te appelleer, toegestaan of geweier is. Hulle is, benewens die *Kowar(l)sky*- en *Hattingh*-saak, ook *Searles Ltd v Hammersby & Sons*;[37] *De Wet v Joubert*;[38] *Campbell Bros, Carter & Co Ltd v Abrahams*;[39] *Gerst v Swede*;[40] *Abramowitz v Jacquet (3)*[41] en *Palmer v Goldberg*.[42] Dieselfde siening word ook in die Suid-Afrikaanse literatuur gehuldig.[43]

Ten spyte van die foutiewe standpunt dat voorlopige vonnisse uiteraard ook getref móét word deur die appèlvoorskrifte wat vir interlokutore beslissings gegeld het, val dit op dat Van der Linden steeds die Romeins-Hollandse maatstaf vir die bepaling van appelleerbaarheid gebruik, te wete of die beslissing 'n *gravamen irreparabile* veroorsaak het. Die feit dat die verwarring tussen voorlopige vonnise en interlokutore beslissings ons reg dus verkeerdelik (of ten minste op verkeerde en verouderde gesag) ingedra is "op gesag" van Van der Linden, kon geen regverdiging bied vir die vervanging van die Romeins-Hollandse maatstaf van "irremediable harm" vir appelleerbaarheid deur die gedagte van "finality" soos dit in die Engelse reg verstaan is nie.

3 3 Die maatstaf vir appelleerbaarheid in die Romeins-Hollandse reg

Die interlokutore beslissings wat in die Romeins-Hollandse reg appelleerbaar sou wees, word deur Merula[44] aangedui as daardie interlokutore beslissings wat die hoofsaak prejudiseer, omdat

- na die interlokutore beslissing geen ander vonnis te verwag is nie;
- die regter na die interlokutore beslissing *functus officio* is ("zijn ampt heeft gefungeert");
- die interlokutore beslissing die hoofsaak of 'n wesenlike deel daarvan definitief beslis of beëindig het;
- die regter deur die interlokutore beslissing die partye gelas het om iets te doen of te gee.[45]

Van der Linden[46] meld uitdruklik dat geen appèl of hersiening moontlik was teen enige interlokutore vonnis indien die uitvoering van daardie vonnis "ten definitiven reparabel" sou wees nie.[47] Ten einde hierdie *Resolutie*, wat klaarblyklik dikwels die onderwerp van geskille was, op te helder (in 1794 vind Van

37 1923 WLD 227.
38 1931 CPD 123.
39 1937 WLD 11.
40 1948 4 SA 206 (N).
41 1950 3 SA 378 (W).
42 1961 3 SA 692 (N).
43 Sien bv Van Winsen, Eksteen en Cilliers *Herbstein and Van Winsen. The civil practice of the superior courts in South Africa* (1979) 713, waar gesê word dat voorlopige vonnisse interlokutore beslissings is "in effect as well as in form"; asook Erasmus en Van Loggerenberg *Jones and Buckle. The civil practice of the magistrates' courts in South Africa* vol 1 (1988) 332–333.
44 4 91 1 6 en 7.
45 Kersteman sv *interlocutoire sententien*; Gail *Observantien* Bk I 130 n 6 sê ook so.
46 *Form van procedeeren* I 324.
47 *Ampliatie van Instructie van't Hof* van 1579-12-21; a 3 *Resolutie* van 1622-03-19.

der Linden dit nodig om so 'n stelling te maak aangaande die reëling wat in 1622 getref is!), maak hy die volgende opmerkings:

- Dat, net soos geensins teen 'n voorlopige namptissement in hoër beroep gegaan kan word nie, word hoër beroep ook nie toegelaat waar iemand 'n voorlopige vonnis teen hom het en die uitvoering daarvan dan kwaadwillig teenstaan nie.

- Dat die woord *interlocutie* in verband met appelleerbaarheid baie streng opgeneem moet word: Daar moet onderskei word tussen *interlocutoire vonnissen* en *vonnissen op incidenten*; teen eersgenoemde is daar geen appèl nie maar teen laasgenoemde wel. Voorbeelde van 'n *interlocutie* wat *inappellabel* is, is waar die regter bepaal dat iets beskryf of bepleit moet word; of die regter bepaal dat 'n getuie *in forma probanti* geroep moet word; of die regter opper vrae wat hy beantwoord wil hê ("pointen van officie openen"). Waar die regter dit doen, "interloqueeren" hy en daarteen kan nie geappelleer word nie. Tot *incidente* egter, behoort alle "*exceptive desensien* [eksepsies], *alle versoeken die in een process ontstaan, en ook appellabel zijn, gelijk daar van dagelijks bij de Hoven van Justitie voorbeelden exsteeren*".[48]

- Dat, hoewel streng volgens die *Resolutie* nie in hoër beroep gegaan kan word net omdat 'n interlokutore of provisionele vonnis 'n nietigheid bevat nie, "zulke nulliteiten, die zeer essentieel en van eene doorsteekende evidentie" is, tog appelleerbaar is al is dit maar net 'n interlokutore of provisionele vonnis. Die nietigheid kan in die prosedure en die vonnis self bestaan.[49]

4 GEVOLGTREKKINGS OOR DIE ROMEINS-HOLLANDSE REG

Die voorgaande hou in dat daarop gelet moet word *wanneer* 'n spesifieke standpunt ingeneem is. Indien dit voor 1622 was, kan 'n bepaalde klem verwag word. Indien dit tussen 1622 en 1766 uitgespreek is, moet verwag word dat die verwarring wat daar geheers het tussen interlokutore beslissings en namptissemente ook daardie uitsprake sou gekleur het. Standpunte wat na 1766 ingeneem is, sou vermoedelik weer 'n ander nuanse as in die vorige periodes vertoon. Die onderskeid tussen gewone interlokutore beslissings en interlokutore beslissings met die krag van *definitive sententien* het in hierdie fase 'n groot rol begin speel.

Kyk 'n mens na die weergawe van die ontwikkeling wat hierbo gegee is, is dit duidelik

- dat daar reeds voor 1582 'n behoefte aan duidelikheid oor die appelleerbaarheid van interlokutore beslissings bestaan het;

- dat daarna steeds onduidelikheid bestaan het en ongelukkig, ter wille van praktiese dienstigheid, nog groter verwarring geskep is;

- dat dit teen 1622 nodig was vir die wetgewer om pertinent in te gryp;

- dat dit teen 1766 egter geblyk het dat daardie ingreep net die verwarring nog groter gemaak het, omdat dit meegebring het dat onduidelikheid ontstaan het oor die grense tussen interlokutore beslissings en voorlopige vonnisse (namptissemente), en tussen interlokutore beslissings met die krag van *definitive sententien* en gewone interlokutore beslissings;

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48 *Form van procedeeren* I 325, met verwysing na Boey *Woorden-tolk sv interloqueeren* en *incident*. Dié bron was nie beskikbaar nie.

49 *Form van Procedeeren* I 325.

- dat die definisie van interlokutore beslissings en *definitive sententien* deur Gail[50] ten minste tot met die beëindiging van Hollandse beheer aan die Kaap bly geld het;
- dat Merula[51] se weergawe van die besonderhede ook na 1766 steeds as betroubaar ervaar is; en
- dat die weergawes van Gail, Merula en Van der Linden[52] die stand van die reg weergee soos dit teen die Britse besettings van 1795 en 1806 aan die Kaap toegepas is.

5 DIE POSISIE NA 1806

5 1 Algemeen

Dit is goed bekend dat na die Britse besetting besluit is dat die reg soos dit in daardie stadium gegeld het aan die Kaap sou bly geld.[53] Dit het nie net die materiële reg behels nie, maar ook die verskillende aspekte van die regspleging is (voorlopig) behou soos dit voorheen was. Baie wye jurisdiksie is aan die goewerneur verleen, waaronder appèlbevoegdheid in geval van 'n "decree or judgment", eers na die goewerneur en daarna na die Britse Geheime Raad – appèlle na Batavia was immers nie meer aangewese nie.[54] 'n *Court of Appeal* is later deur goewerneur Caledon ingestel.[55]

Verwysings na appelleerbaarheid en appèlle het voorgekom in 'n *Proclamation* van 1811,[56] maar sonder dat iewers enige ander kriteria daarvoor as wat voorheen toegepas is, genoem is.

Dit was egter nie lank nie of daar het stemme begin opgaan teen die onveranderde behoud van die reg en regspleging.[57] Veral die verslag van Bigge aan

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50 *Observatien van de Keyserlyke Kamer* (1656) 1 9.

51 *Manier van procederen.*

52 In sy *Verhandeling over de judicieele practijcq, of form van procedeeren, voor de hoven van justitie in Holland gebruikelijk* (1794) en *Rechtsgeleerd, practicaal, en koopmans handboek.*

53 Bv volgens die *Proclamation* van Clarke, Elphinstone en Craig van 1795-10-15 (*Theal's records of the Cape Colony from February 1793 (to 1828)* (1897 – 1905) (hierna *Records*) I 199); en die herinstelling van die Raad van Justisie (dit is in 1784 ingestel in die plek van die Burgher Raaden wat in 1657 daargestel is en in 1658 siviele jurisdiksie gekry het, is hervorm in 1792 en dus heringestel in 1795 (*Records* XXVII 390 – 391)) deur dieselfde here in 'n *Proclamation* van 1795-10-07 (*Records* I 181 187); 'n brief van Clarke aan die president en lede van die Raad van Justisie van 1795-11-07 (*Records* I 220); *Instructions* van 1796-12-30 aan goewerneur Macartney (*Records* II 5 – 6).

54 Brief van Craig aan die president en lede van die Raad van Justisie van 1795-11-07 (*Records* I 220); *Instructions* van 1796-12-30 (*Records* II 10 – 11); brief van Januarie 1797 aan goewerneur Macartney (*Records* II 25); proklamasie van goewerneur Macartney van 1979-07-24 (*Records* II 128).

55 Op 1807-05-29 (*Records* XXVI 27).

56 Deur Caledon en Alexander uitgevaardig op 1811-05-16 (*Records* XXIV 461), waar in par 58 gepraat word van appèl teen "a sentence"; in par 59 van "sentences", hetsy dit siviel- of strafregtelik was, "which admit of appeal . . .", sonder om enige kriteria vir appelleerbaarheid te verskaf; en in par 2(b) (459) van "appealable civil cases . . . which, after sentence has been pronounced, . . . may be appealed from . . ." – weer eens sonder om kriteria daarvoor te gee.

57 Hervormingsplanne is reeds genoem in 'n brief van die War Office aan Yonge van 1800-07-28 (*Records* III 206); gebreke in regsadministrasie is genoem maar die behoud van die bestaande stelsel, totdat 'n omvattende hervorming kon plaasvind, is bevestig in 'n brief van Hobart aan Dundas van 1801-05-01 (*Records* III 480).

Graaf Bathurst[58] het baie opsigte waarin die geldende reg en regspleging as onhoudbaar beskou moes word, na vore gebring. Daarvoor kon baie redes aangevoer word, sommige waarvan die volgende was:

(a) Die feit dat die Engelse goewerneur Engelse hofuitsprake en regsboeke gelees, Engels gepraat en toenemend Engelse denkbeelde die reg ingedra het as hy appèlle moes oorweeg.[59]

(b) Die feit dat die oorgelewerde prosesreg wat sedert 1796 en 1803 onveranderd gelaat is, ervaar is as 'n stelsel wat tot groot vertraging, onsekerheid en disrespek vir die reg gelei het.[60]

(c) Die persepsie dat die reg soos dit toe gegeld het, en uitgedruk was in Romeins-Hollandse geskrifte, Plakkate en uitsprake van die Hooge Raad, ontoereikend en slegs geskik was vir 'n relatief onontwikkelde samelewing wat hoofsaaklik agraries was. Die reg was dus nie in staat om die eise van 'n meer ontwikkelde ekonomiese en gemeenskapslewe te orden nie, en moes daarom deur die Engelse reg vervang word.[61]

(d) Die oogmerk om die hele lewe aan die Kaap te verengels deur die invoer van Engels as pleitstuk- en voertaal in die howe, Engelsregtelike prosedures, Engelse, Ierse en Skotse regsgeleerdes ensovoorts.[62]

(e) Die oortuiging dat daar te min geskikte mense onder die bestaande amptenare was om behoorlike regspleging te verseker.

(f) Die gevoel dat die bestaande stelsel te veel vertragings en te lang gedingvoering moontlik gemaak het, veral weens die wye diskresie wat ingevolge die Romeins-Hollandse reg aan die regter toegesê is.[63] Dit het die behoefte laat posvat aan spoediger afhandeling van geskille; anders gestel, finaliteit het die slagspreuk geword.

5 2 Die Kaapse *Charters of Justice* van 1832 en 1864

Die voorgaande het uitgeloop op die *Charter of Justice* van 1832-05-04,[64] ingevolge waarvan aan die nuwe *Supreme Court* die bevoegdheid verleen is om beslissings en verrigtinge van laerhowe te "review";[65] dit het ook beteken dat hulle verrigtinge tersyde gestel of gekorrigeer kon word.[66] Ingevolge artikel 50 van die *Charter of Justice* kon teen enige "(f)inal judgment, decree or sentence . . . or against any rule or order . . . having the effect of a final or definitive sentence" na die *Privy Council* geappelleer word deur "[t]he person or persons feeling aggrieved by any such judgment, decree, order or sentence of the Supreme Court". Hiermee het die terminologie wat in die Bigge-verslag en aanbevelings gebruik is en wat in die Engelse reg gebruiklik was, toegang gekry tot die Suid-Afrikaanse reg. Dit het gebeur sonder dat iets gesê is oor die maatstawwe wat

58 Van 1826-09-06 (*Records* XXVIII 1 – 111).
59 Bigge-verslag 2 – 3.
60 *Idem* 5 – 7.
61 *Idem* 12 – 13.
62 *Idem* 13 15 – 17 17 26 – 27.
63 *Idem* 13 – 14.
64 Wat op 1834-03-01 in werking getree het kragtens 'n proklamasie van goewerneur D'Urban van 1834-02-13. Dit was die sg "2nd Charter" omdat dit die sg "1st Charter" van 1827-08-24 vervang het.
65 A 32.
66 Dit was dus eintlik 'n appèlbevoegdheid ook en nie blote hersiening in vandag se terme nie.

gebruik moet word om uit te maak of 'n appelleerbare beslissing voorhande is of nie. In die Engelse reg self het daaroor nie duidelikheid bestaan nie terwyl die vastigheid wat teen daardie tyd in die Romeins-Hollandse reg bestaan het, weens die invoer van die nuwe prosesregtelike reëlings, Engelsregtelike uitdrukkings, Engels as pleitstuk- en voertaal in die howe en Engelsgeoriënteerde prokureurs, advokate en regters[67] vir die Suid-Afrikaanse reg eintlik in die niet verdwyn het. Die Administration of Justice Act 21 van 1864 bevat nog die uitdrukking "(a)gainst any final judgment, decree or sentence . . . or against any rule or order . . . having the effect of a final or definitive sentence",[68] maar in die wetgewing wat daarop gevolg het,[69] is slegs die terme "(final) judgment, decree or order" gebruik.[70]

5 3 Ander voor-Uniale wetgewing

In die Natalse Supreme Court Act 39 van 1896 word die terme "verdict, decision, rule, order, judgment, decree or proceeding" gebruik.[71] Geen maatstaf word gebied waarvolgens bepaal kan word wanneer watter een van die gemelde soorte beslissings voorhande sou wees nie.[72]

In die Zuid-Afrikaanse Republiek se Wet 3 van 1883 het artikel 9 dit oor appèl teen 'n "finale uitspraak of vonnis". Hierdie formulering kom enigsins vreemd voor as in gedagte gehou word dat die Volksraad op 5 Mei 1859 besluit het dat die reg van die republiek sou wees soos dit was volgens Van der Linden, Van Leeuwen en De Groot – in daardie volgorde – en verder soos in artikel 31 van die *33-Artikelen* uiteengesit is. Artikel 31 van die *33-Artikelen* het bepaal dat waar 'n leemte in die reg aan die lig gekom het, die reg van Holland sou geld soos dit volgens die Suid-Afrikaanse gewoontereg aangepas is, op so 'n wyse dat dit 'n "gematigde stylvorm" openbaar en tot nut en welvaart van die gemeenskap kon strek. Die gebruik van die term "finaal/finale" moet dan seker beskou word as die wyse waarop die Romeins-Hollandse reg teen daardie tyd reeds onder invloed van die Engelsregtelike benadering wat in die Kaap en Natal ingevoer is, vertolk en toegepas is "tot nut en welvaart van die gemeenskap"![73]

In die Oranje-Vrystaat is in die Verdrag van 23 Februarie 1854 met Engeland melding gemaak van "alle beslissingen" van sekere howe wat vir appèl of hersiening vatbaar is.[74] Die posisie in die Oranje-Vrystaat was nog duideliker as in die Zuid-Afrikaanse Republiek, deurdat daar bepaal is dat die reg wat daar moet geld, daardie reg is wat in die Kaapkolonie gegeld het voordat begin is met die aanstel van Engelse regters in die plek van die Raad van Justisie, en spesifiek volgens die geskrifte van Voet, Van Leeuwen, Grotius, die *Papegaaij*,

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67 Bv die Bigge-verslag 2 – 3 12 15 – 17 17 26 – 27; brief van Plaskett aan Hay van 1827-02-03 (*Records* XXX 344); a 17 19 en 32 van die *Charter of Justice* 1832.
68 A 25.
69 Bv die Administration of Justice Act 5 van 1879 en die Better Administration of Justice Act 35 van 1896.
70 Bv in a 11 14 16 en 20 van die 1879-wet en a 21 22 24 26 en 27 van die 1896-wet.
71 A 57 tot 63.
72 A 57 bepaal (en in hierdie konteks klink dit selfs lakonies) dat die hof appèl mag toelaat ook waar dit "proper" sal wees.
73 Kotze HR het dan ook in sy vertaling van Van Leeuwen se werk 5 24 8 die begrip *definitive sententie* vertaal met "final (order)".
74 Hfst IX a LXXIV.

Merula, Lijbrecht, Van der Linden en Van der Keessel en die gesag deur hulle aangehaal.[75]

5 4 Die Zuid-Afrika Wet 1909

Breedweg kan gesê word dat in artikel 103 van die Zuid-Afrika Wet van 20 September 1909 neergelê is dat daar geappelleer kon word in elke siviele saak waarin daar volgens die stand van die reg by die totstandkoming van die Unie geappelleer sou kon word. Geen maatstaf is daargestel waarvolgens bepaal kon word wanneer 'n spesifieke soort hofbeslissing wel by die totstandkoming van die Unie appelleerbaar was nie. Daarvoor moes steeds gekyk word na die posisie soos dit was voor die totstandkoming van die Unie.

In die Afdeling van Appèl Verdere Jurisdiktie Wet 1 van 1911 is die uitdrukkings "judgment or order"/"vonnis of order" gebruik. In artikel 3(b) daarvan is bepaal dat geen appèl moontlik is teen interlokutore bevele as die hof wat dit toegestaan het nie toestemming tot appèl verleen het nie. Geen maatstaf is neergelê om te bepaal wanneer 'n interlokutore bevel voorhande is nie. Hierdie werkswyse is voortgesit in die Magistraatshoven Wet 32 van 1917 en die Wet op Landdroshowe 32 van 1944, asook in die Wet op die Hooggeregshof 59 van 1959 soos reeds aangetoon is in die bespreking waarna ten aanvang verwys is.

6 SLOT

Sonder vrees vir teëspraak kan gesê word dat in die Romeins-Hollandse reg 'n hanteerbare, duidelike maatstaf vir die appelleerbaarheid van interlokutore hofbeslissings gegeld het toe na 1795 begin is om hoofsaaklik Engelsregtelike begrippe en denkbeelde hier in te dra – nie dat alles teen 1800 in die Romeins-Hollandse geskrifte ewe suiwer was nie, as maar net gedink word aan die nawerking wat die *Ordonnantie van 1622* verkeerdelik steeds gehad het.

Met die verwarring wat gevolg het op die byeenbring van regsgeleerdes uit die verskillende regskulture, het ongelukkig 'n stramheid in verband met die kwessie van appelleerbaarheid in ons reg ingeburger geraak wat nou weer uitgeloog moet word. Dat ons howe ernstig met hierdie proses besig is, blyk uit die aandag wat dit tans van die appèlafdeling ontvang. Die vordering wat daar reeds gemaak is en nog gemaak word om groter ewewig en regsekerheid op hierdie terrein te bring, moet deur aktiewe debat ondersteun[76] en begelei word.

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75 *Wetten* hfst 1 *ad* a 57 van die Constitutie 1854.

76 In die resente uitspraak in *Zweni v Minister of Law and Order* 1993 1 SA 523 (A) gaan Harms WAR ver om die ontwikkelings op hierdie gebied saam te vat en in 'n duidelike en hanteerbare resultaat weer te gee.

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind immitation of the past (*per* Holmes *The path of the law. Collected papers* 187).

The "year and a day rule" in South African law: do our courts have a discretion to order damages instead of removal in the case of structural encroachments on neighbouring land?

JB Cilliers
BA LLB HDip Co Law
Senior Lecturer in Mercantile Law, University of South Africa

CG van der Merwe
BA Hons BCL LLD
Professor in Private Law, University of Stellenbosch

OPSOMMING

Die "jaar en 'n dag-reël" in die Suid-Afrikaanse reg: Het ons howe 'n diskresie om skadevergoeding te gelas in plaas van verwydering in die geval van strukturele oorskryding op buurgrond?

Eiendomsreg omvat onder andere die reg van 'n grondeienaar om aan te dring op verwydering van 'n oorskrydende bouwerk op sy grond. Hierdie reg word egter getemper deur die sogenaamde "jaar en 'n dag-reël", ingevolge waarvan die eienaar sy reg kwyt is indien hy bewus is van die oorskryding en vir 'n tydperk van 'n jaar en 'n dag nie aandring op verwydering nie.

Die skrywers deel nie die algemeen aanvaarde mening dat die "jaar en 'n dag-reël" deel van die Suid-Afrikaanse reg is nie. Na 'n ondersoek van Romeins-Hollandse bronne word tot die gevolgtrekking gekom dat die "jaar en 'n dag-reël" nooit as 'n algemene reël van die Romeins-Hollandse reg beskou is nie, maar dat dit 'n buitengewone reël was wat net in uitsonderlike omstandighede gegeld het. Dit is gevolglik nooit in die Suid-Afrikaanse reg geresipieer nie.

Indien die reël nie deel van ons reg is nie, ontstaan die vraag of ons howe 'n diskresie het om skadevergoeding in plaas van verwydering van die oorskryding te gelas. Alhoewel die hof nog nie pertinent daaroor beslis het nie, word in die meeste gevalle aangeneem dat so 'n diskresie wel bestaan. Soms word geen redes verskaf vir hierdie aanname nie, terwyl in ander gevalle op die Engelsregtelike begrip van "equity" gesteun word. Hierdie begrip is egter nie deel van ons reg nie.

Aangesien 'n ontkenning van die howe se diskresie onbillike gevolge kan meebring, word aangevoer dat die Engelsregtelike begrip "equity" soortgelyk is aan die Suid-Afrikaanse beginsel van redelikheid. Volgens hierdie beginsel het die howe inderdaad 'n diskresie om skadevergoeding toe te staan in plaas daarvan om verwydering te gelas waar die verskil tussen die belange van die partye dit regverdig.

One of the so-called "traditional" rules of neighbour law which has been received in modern South African law, is that every landowner owes a duty to his adjoining neighbour to ensure that structures and buildings erected on his land should

not encroach upon his neighbour's land.[1] Like all the other casuistic rules of neighbour law, for example the rules with regard to lateral support and the non-disturbance of the natural flow of water, the rule against encroachments has its own particular field of application, characteristics, and remedies.[2]

Where a landowner breaches this rule by erecting a building encroaching upon his neighbour's property, the owner of the land encroached upon may approach the court for an order compelling his neighbour to remove the encroaching building or structure.[3] The right to insist on the removal of the encroachment is consistent with the concept of ownership, which is potentially the most extensive real right which a person can have in respect of an object, whether movable or immovable.[4] This all-embracing right has in the instant case, however, been mitigated by the so-called "year and a day rule". In terms of this rule, the right to insist on removal of the encroachment is lost "if the owner 'stands by' and, in the full knowledge of all relevant facts, does not insist on removal for one year and one day".[5] In such a case the plaintiff can no longer request removal but is restricted to a claim for damages.[6]

Although it is generally accepted that the "year and a day rule" is part of South African law, we are of the opinion that the historical foundations of this rule were not properly investigated before it was received into South African law. For the reasons enumerated below, we submit that the Appellate Division would be free to reject this rule as part of our law if it is requested to adjudicate on the matter.

The origin of this rule can be traced back to Roman-Dutch authorities, where it found application in the context of the acquisition of praedial servitudes by way of prescription. When dealing with the acquisition of praedial servitudes Grotius, for example, states that "ghetimmert dat jaer ende dag onbeklaegt heeft ghestaen is daar mede genoeg *verjaert*" ("structures which remained unopposed for a year and a day are thereby sufficiently prescribed").[7] Voet,[8] as well as a number of other old authorities,[9] also refers to the "year and a day rule" in the context of the prescription of praedial servitudes.

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1 *Smith v Basson* 1979 1 SA 559 (W) 560G – H.

2 See in general Van der Merwe *Sakereg* (1992) 197 – 213; Van der Merwe and De Waal *The law of things & servitudes* 110 – 115; Kleyn and Boraine *Silberberg and Schoeman's The law of property* (1992) 177 – 191.

3 *Pike v Hamilton, Ross & Co* (1855) 2 Searle 191 200; *Starke v Broomberg* 1904 CTR 135; *Wade v Paruk* (1904) 25 NLR 219 225; *Smith v Basson supra* 561G; Kleyn and Boraine 180; Van der Merwe *Sakereg* 201; Milton "Encroachments" 1969 *Acta Juridica* 237; D van der Merwe *Oorlas in die Suid-Afrikaanse reg* (LLD thesis UP 1982) 490.

4 Van der Merwe *Sakereg* 170 *et seq*; Kleyn and Boraine 161 *et seq*; Hosten *et al Introduction to South African law and legal theory* (1983) 337; cf *Gien v Gien* 1979 2 SA 1113 (T) 1120C *et seq*.

5 Kleyn and Boraine 180 – 181.

6 De Groot 2 36 5.

7 *Ibid*.

8 8 4 6.

9 Other authorities in support of the contention that the "year and a day rule" was discussed in the context of the acquisition of praedial servitudes by prescription, are: Groenewegen *De Leg Abr ad C* 3 34 2; Antonius Matthaeus II *Paroemiae* 9 19; Van Leeuwen *RHR* 2 19 3, 4 (with notes by Decker in Kotze's translation); Van der Linden *ad Voet* 8 4 6; De Groot 2 36 5.

From the above-mentioned authorities it appears that the fact that an *opus factum* or structure erected on land can be acquired in terms of the "year and a day rule" is an exception to the usual rule by which servitudes are acquired by prescription. The manner in which the rule is discussed clearly indicates that the "year and a day rule" was not considered a general rule of Roman-Dutch law, but a special rule which applied in exceptional circumstances only. This can be deduced from the fact that the old authorities usually state the general rule with regard to the acquisition of praedial servitudes by prescription and then continue with words such as "however" or "but", to signify that an exceptional right is created in terms of the "year and a day rule".[10] This, in our submission, already indicates that it was a special rule which did not find general application in Roman-Dutch law. Furthermore, all the Roman-Dutch authorities except Grotius[11] seem to indicate that the "year and a day rule" with regard to the acquisition of erected structures by prescription was not based on sources derived from Roman law but on local statutes[12] of various towns. These authorities show that it is incorrect to regard the rule as part of the *ius generale* and that it should rather be regarded as an exception which was applicable to the particular locality for which it was enacted.[13]

Voet[14] introduces the general rule with regard to the acquisition of servitudes by prescription by the phrase *mores nostros quod attinet* ("according to our rules which find general application"), which phrase always refers to the Dutch legal principles which had been received as part of Roman-Dutch law. It is significant that when he deals with the "year and a day rule", he does not use this phrase, but introduces it with a different phrase: *sed quis tamen . . . variorum locorum statutis et consuetudinibus obtinuit* ("which was, however, applicable according to the statutes and customs of various places"). He therefore clearly distinguishes between the principles of Dutch law which had been received into Roman-Dutch law and the "year and a day rule", which was only applied by particular communities and could be regarded as local custom in such communities only.[15]

Further support for the view that the "year and a day rule" was not generally applied, is found in *Observationes tumultuariae* of Van Bynkershoek. In a decision handed down on 19 and 20 January 1720, the author makes the following remark on the text of Grotius which discusses the rule in question:

> "The doctrine of Grotius found its origin in the statutes of certain cities as Groenewegen notes on Grotius from which it cannot be deduced that a general rule was constituted but merely a special rule which was perhaps familiar to Grotius."[16]

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10 See De Groot 2 36 5: "*Maar*, een ghetimmert . . ."; Voet 8 4 6: "si quis *tamen*"; Van Leeuwen *RHR* 2 19 4: "En is daar een bysonder regt, dat een ghetimmert dan . . ."

11 2 36 5.

12 *Coustumen* and *keuren*.

13 Groenewegen *ad Gr* 2 36 5 states: "According to the Keuren of Delft and other towns. See Christin. LL Mech art 14.45." Antonius Matthaeus II *Paroemiae* 9 19 mentions the Statute of Utrecht 27 2, Deventer 3.9 par 2, Ommelanden 4 par 18, 21 and Britagne Argentraeus a 371. Van Leeuwen *RHR* 2 19 4 refers to the Keuren van Leyden a 13.

14 8 4 6.

15 As to the validity and applicability of the enactments of towns in Holland, see Hahlo and Kahn *The South African legal system and its background* (1968) 414 *et seq*; Van Zyl *Geskiedenis van die Romeins-Hollandse reg* (1979) 68 *et seq*.

16 *Obs Tum III* 1695 (discussed in Van Oosten *Systematisch compendium* (1652) 56–57).

Scheltinga[17] also confirms that the rule was followed in many localities and that it applied in some places even if the structures had not stood for a year and a day.[18] In *Rechtsgeleerde Observatien*,[19] the following is said about the rule as formulated by Grotius:[20]

> "This doctrine of Grotius has its basis in some of the enactments (*keuren*) of Dutch cities especially those which dealt with the subdivision of land."[21]

While Schorer[22] states that several local customs of other localities are discussed in *Rechtsgeleerd observatien*, it appears also from Van der Keessel[23] that the "year and a day rule" was enacted by certain local authorities. Although Van der Keessel declares that most of the *keuren* mentioned in *Rechtsgeleerd observatien* date from a later time than the work of Grotius, he speculates that Grotius might have had the old *keuren* of Delft in mind when he formulated the rule.[24] Van der Linden[25] states that real servitudes can be acquired by prescription, even of a year and a day, according to the local statutes of various locations. The later jurist Fockema Andreae, who was a professor at Leiden from 1877 to 1915, writes in his notes on the *Inleidingen* of Grotius:[26]

> "De H.R. verwierp 19 en 20 Jan 1720 (v. Bynkershoek Observ. II, no. 1695) deze leer van de Groot, omdat zij, volgens dit college, enkel staande op het locale recht van sommige Hollandsche steden en ten onrechte doort de Groot als 'ius generale' word voorgesteld."

Another reason why the "year and a day rule" could not have been a *ius generale* in Roman-Dutch law is that there was disagreement among the authorities about whether the time period concerned was exactly a year and a day. Scheltinga[27] mentions that this rule applied in certain localities even although the building had not stood for a year and a day. Schorer,[28] however, mentions a period of a year and six weeks in discussing wrongful building on a common wall. In *Rechtsgeleerd observatien*[29] the time periods referred to range from less than a year, to a year and six weeks, and even a year and a day. This demonstrates that the time period of the rule depended upon the specific provisions of the particular enactment concerned. Van der Keessel's remark that absentees are accorded more than a year in terms of the statute of Leyden and that the year and a day only commences after termination of incapacity in the case of minors and persons of unsound mind,[30] lends further support to the view that there was no consensus about the exact duration of the time period required for the rule to operate.

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17 *Dictata ad Gr* 2 36 5.
18 "Dit obtineer *volgens costume van veele plaatsen*; ja zelfs zyn er plaatsen alwaar dit stand grypt, schoon het getimmerde noch geen Jaar en dag gestaan hadde" (own emphasis).
19 3 *obs* 57.
20 2 36 5.
21 "Deze leer van De Groot . . . heeft haaren grondslag in eenige Keuren der Hollandsche Steden voornamelyk op 't stuk der Erfscheiding geëmaneert."
22 *Ad Gr* 2 36 5 and 2 34 5.
23 *Praelectiones ad Gr* 2 36 5.
24 Van der Keessel also refers to the *Keur* of Rijswyjk, but states that this enactment is more recent than the work of De Groot.
25 *Koopmans handboek* 2 11 4.
26 2 36 5.
27 *Ad Gr* 2 36 5.
28 *Ad Gr* 2 34 4.
29 3 *obs* 57.
30 *Praelectiones ad Gr* 2 36 5.

Furthermore, the Roman-Dutch authorities do not agree among themselves about the ambit and scope of the "year and a day rule". Some authorities[31] simply state that the building must have stood without complaint for a year and a day, while others[32] require knowledge of the encroachment before the rule applies. Moreover, the old authorities are not very clear about the effect of the rule. None of the old authorities goes so far as to state that the land encroached upon becomes the property of the encroacher by way of prescription. Some of the authorities[33] seem to be of the opinion that only the work[34] (and not the land underneath it)[35] is acquired by prescription and that it must remain until it perishes, without being maintained or strengthened. Most authorities merely state that a person does not have the right to claim demolition of the encroachment after a year and a day has lapsed.

Finally, it should be noted that none of the Roman law institutions to which the Roman-Dutch authorities refer as justification for the "year and a day rule", has been received in modern South African law in this context. These institutions are the *interdictum uti possidetis*[36] and the *interdictum quod vi aut clam*.[37] The *interdictum uti possidetis*, a remedy for the protection of possession, has been superseded by the modern interdict and the *mandament van spolie*, while the *interdictum quod vi aut clam* finds application in the South African law dealing with the disturbance of the natural flow of surface water.

In view of the exposition above, it appears that the "year and a day rule" has never been received in Roman-Dutch law as *ius generale* and was therefore not received from Roman-Dutch law into modern South African law.[38] In any event, this rule was based on acquisitive prescription ("korte verjaring" or "annaalbezit"), developed from the possessory remedy of "complainte".[39] Accordingly, if our courts decline to abolish this rule on the ground that it has been applied in a number of South African cases, especially in the Cape Provincial Division,[40] it is submitted that the Prescription Act[41] which contains

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31 Eg De Groot 2 36 5.
32 Eg Groenewegen *ad C* 3 34 2.
33 Eg De Groot 2 36 5; Van Bynkershoek *Obs tum* 3 1695.
34 *Opus factum* or *ghetimmert*.
35 De Groot 2 36 5; Groenewegen *De leg abr ad C* 3 34 2.
36 See Groenewegen *ad Gr* 2 36 5; Van Leeuwen *RHR* 2 19 4.
37 Antonius Matthaeus II *Paroemiae* 9 19; Van der Keessel *Praelectiones ad Gr* 2 36 5.
38 For a general discussion, see Van der Merwe *Sakereg* 117 *et seq* 204 *et seq*; Kleyn and Boraine 181; Milton 1969 *Acta Juridica* 238; Van der Merwe *Oorlas* 495; De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* (1987) 100 234.
39 Price *The possessory remedies in Roman-Dutch law* (1947) 5–8 19–23 26 56 61; Van der Merwe *Sakereg* 202 272; Erasmus *et al Lee and Honoré: Family, things and succession* (2ed) 265.
40 The so-called "year and a day rule" has been referred to in our law in a few cases: *Frank & Co v Duveen* 1919 CPD 299 300; *Wade v Paruk supra* 224; *Higher Mission School Trustees v Grahamstown Town Council supra* 363; *Cape Town Municipality v Fletcher & Cartwrights Ltd* 1936 CPD 347 352; *Naude v Bredenkamp* 1956 2 SA 448 (O) 451. However, it is submitted that in none of these cases was it decided that such rule forms part of the South African law.
41 68 of 1969.

specific provisions governing the acquisition of servitudes by prescription, has superseded it.[42]

The question now arises whether, in the absence of the "year and a day rule", our courts have a discretion to order damages instead of the removal of the encroaching structures. From case law it appears as though our courts have assumed that they do have a discretion, without deciding the point. Either no reasons are given for the assumption, or it is based on English law. In English law there is a rule of equity in terms of which the court has a discretion to award damages instead of ordering removal where the costs of removal would be excessive in comparison with the advantage that the injured party may obtain as a result of the removal.[43] However, there is no authority in Roman-Dutch law for the view that the court may refuse an order for removal on the grounds of equity.[44] As this question has not yet formed the *ratio decidendi* of any reported South African decision, the position in our law remains uncertain.[45]

In some cases the court assumed that it had a discretion to order damages instead of removal. Although the court examined the position in English law in *Hornby v Municipality of Roodepoort*,[46] it did not decide whether our courts have a discretion to order damages in lieu of removal. The court gave an indication that it was vested with a discretion in this regard, but Innes CJ did not commit himself and said *obiter* that a court "would be slow to order removal of these buildings if the justice of the case could be met by an award

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42 The abovementioned original basis for the "year and a day rule" is not recognised in the Prescription Act. Accordingly, even if it is accepted that the rule was received in South African law, it must be taken to have lapsed: Erasmus *et al* 265; De Vos 234; Milton 1969 *Acta Juridica* 239.

43 The origin of this principle is Lord Cairn's Act (21 & 22 Vict C 27), Chancery Amendment Act 1858. No similar provision exists in either our statutory or common law (see *Naude v Bredenkamp supra* 448F – G).

44 De Groot 2 1 23, 2 34 8; Groenewegen *ad C* 3 34 1 – 2; Van Leeuwen *RHR* 2 20 6; Huber *HR* 4 36 17; Voet 8 2 4, 17; 8 5 5; Van Warmelo "*Interdictum quod vi aut clam*" 1962 *Acta Juridica* 15. Although certain writers rely on Van Bynkershoek as authority for the view that the court indeed had a discretion in Roman-Dutch law in this regard, it is submitted that this is incorrect. Van Bynkershoek *Obs tum* no 1695, as discussed by Van Oosten in *Systematisch compendium* 56 – 57, does not appear to be authority for this view because, in the reference of Van Bynkershoek, *D* 8 5 10 is relied on. However, Van Oosten (*loc cit*) shows that this part of the *Digesta* deals with the acquisition of servitudes through use (see also Hahlo "Encroachment: damages instead of removal" 1956 *SALJ* 241; Scholtens "Encroachment: damages instead of removal" 1957 *SALJ* 84; Van der Merwe *Oorlas* 491 – 498).

45 *Van Boom v Visser* (1904) 21 SC 360; *Hornby v Municipality of Roodepoort-Maraisburg* 1918 AD 278; *Higher Mission School Trustees v Grahamstown Town Council* 1924 EDL 354; *De Villiers v Kalson* 1928 EDL 217; *Town Council of Roodepoort-Maraisburg v Posse Property (Pty) Ltd* 1932 WLD 79; *Naude v Bredenkamp supra*; *Johannesburg Consolidated Investment Co Ltd v Mitchmor Investments (Pty) Ltd* 1971 2 SA 397 (W). The most recent reported South African decision involving an encroachment is *Meyer v Keiser* 1980 3 SA 504 (D), which leaves open the question of discretion. Cf *Wassung v Simmons* 1980 4 SA 753 (N). Milton 1969 *Acta Juridica* 234 – 235 expresses himself on this issue as follows: "This portion of the law (ie encroachments) is in a very unsatisfactory state. The South African law has drawn remedies from the common law which would be applicable to the situation, yet refuses to employ them and develops parallel remedies drawn from Civil law sources. Two sets of remedies exist side by side in uneasy contemporaneity, uncertain of whether they will be called upon or not."

46 *Supra*.

of damages".[47] In *Naude v Bredenkamp*[48] this question was again raised. Van Blerk JP (as he then was) did not give a definite answer, but suggested that either the English approach or the *exceptio doli* should be applied.[49] In *De Villiers v Kalson*[50] Graham JP said that he could not find any authority in our law to the effect that under no circumstances could the court exercise such a discretion. He reasoned as follows:

> "It is quite true that for the reasons stated in so many of the English cases, the wrongdoer who encroaches on another's rights cannot be heard to say, unless there are some very special circumstances, that a monetary compensation is sufficient, for that would be tantamount to compelling the plaintiff to consent to expropriation, but on the other hand it would be equally inequitable to place the plaintiff in a position to extort wholly excessive compensation from the defendant by granting an order for the removal of the buildings in cases in which the facts disclose that a remedy in damages would fully meet the justice of the case."

The court held that, by analogy to the position with regard to specific performance, it had the same discretion in the case of encroachment on contractual rights.[51]

On occasion the court was of the view that it had no discretion in this regard. After referring to English authority,[52] Sampson J in *Higher Mission School v Grahamstown Town Council*[53] came to the conclusion that he had no discretion to award damages in lieu of removal of a building. He stated:

> "I can see no ground on which the court could deprive the plaintiffs of their common law right to have the obstruction on their property removed."[54]

However, Van der Riet J, who agreed with the decision, thought it necessary to state:

> "I wish specially to safeguard myself from being understood to hold without further argument that in a case where an extensive building has been erected at great expense partly upon land of little value belonging to a third party, the Court will be bound to order the removal of the encroachment even if it be established that the encroachment was made in ignorance."[55]

In other cases the court merely assumed that the English rule of equity applies in our law and that our courts have an inherent discretion to order damages instead of demolition.[56] In *Johannesburg Consolidated Investment Co Ltd v Mitchmor Investments (Pty) Ltd*,[57] Franklin AJ relied on the *Hornby* case[58] and stated:[59]

> "[E]ven where the substantive relief sought at the trial is a demolition order, there is authority for the view that the court has a discretion to refuse such an order and to confine the plaintiff to a claim for damages in a proper case."

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47 290.
48 *Supra*.
49 452A – B.
50 *Supra* 231.
51 *Ibid*.
52 He observed that the English courts were vested with a discretion only when a building was erected with the acquiescence of the owner of the land.
53 *Supra*.
54 366.
55 *Ibid*.
56 Eg *Town Council of Roodepoort-Maraisburg v Posse Property (Pty) Ltd supra* 87.
57 *Supra*.
58 *Supra*. It was not decided in this case that the English rule of equity is applicable.
59 405D – F.

On the one hand, it can be argued that our courts are not vested with a discretion in this regard as there is no basis for holding that the English law rule of equity is part of South African law.[60] This is so because the principles of English law and the system of equity must be in accordance with the principles of Roman-Dutch law to be applied in our law.[61] In *Weinerlein v Goch Buildings Ltd*[62] Kotzé JA stressed that this qualification is important because equity cannot and does not override a clear provision of our law:

> "Our common law, based to a great extent on the civil law, contains many an equitable principle; but equity, as distinct from and opposed to the law, does not prevail with us. Equitable principles are only of force in so far as they have become authoritatively incorporated and recognised as rules of positive law."

Very recently this view was also reflected in *Bank of Lisbon and South Africa Ltd v De Ornelas*[63] where Joubert JA stated:

> "In administering the law the Dutch courts paid due regard to considerations of equity but only where equity was not inconsistent with the principles of law. Equity could not override a clear rule of law. That is also the position of our courts as regards their equitable jurisdiction."[64]

The reason why English law affords the court a discretion[65] is because they deal with an encroachment as a "trespass". On occasion our courts have also classified an encroachment as a trespass, giving rise to the action for removal of such encroachment.[66] However, the South African equivalent of trespass is quite different from the English concept of "trespass", which, it is submitted, has no place in our law. In English law, the concepts of ownership and possession are intertwined to a large extent and accordingly an equivalent to the *rei vindicatio* (or *actio negatoria*)[67] is unknown.[68] The Appellate Division in *Hefer v Van Greuning*[69] made it clear that even though an owner has given up his right to possession, he may institute the *rei vindicatio* against a third party without showing that his reversionary right to possession has been affected.

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60 Cf *Weinerlein v Goch Buildings Ltd* 1925 AD 295.

61 *Wade v Paruk supra* 225 – 226. As long ago as 1876 De Villiers CJ stated in *Mills v Benjamin's Trustees* 6 Buch 115 121: "Now it is quite true that this Court is a Court of Equity as well as of Common Law, but it can administer equity only so far as it is consistent with the principles of the Roman-Dutch law."

62 *Supra* 295.

63 1988 3 SA 580 (A) 605A – B.

64 In *Kent v Transvaalsche Bank* 1907 TS 765 774, Innes CJ expressed his view on this issue as follows: "The court has again and again had occasion to point out that it does not administer a system of equity, as distinct from a system of law. Using the word 'equity' in its broad sense, we are always desirous to administer equity; but we can only do so in accordance with the principles of the Roman-Dutch law. If we cannot do so in accordance with those principles, we cannot do so at all."

65 *City of London Brewer Co v Tennant* 9 Ch Ap 219.

66 See also *Smith v Basson supra* 561G. With regard to encroachments and trespass, see also *Wade v Paruk supra, Christie v Haarhoff* (1886) 4 HCG 349 353 and *Hofmeyr v Hofmeyr* 1875 B 141.

67 The remedy of a landowner on whose property an encroachment has been made, is the *actio negatoria*. This action can be instituted against any person who claims that he has a servitude on the property of his neighbour. The fact that the "year and a day rule" had not been accepted as *ius generale* in the Roman-Dutch law and was therefore never received into our law, means that the encroaching landowner cannot appeal to a servitude of encroachment which he acquired by virtue of "korte verjaring" (the "year and a day rule").

68 Carey Miller *The acquisition and protection of ownership* (1986) 258 fn 24.

69 1979 4 SA 952 (A) 959D – E 960F – H.

To hold otherwise would be to import the English concept of "trespass", where the owner's remedies are completely different. Jansen JA has pointed out[70] that certain *dicta* that appear in our case law

> "berus op 'n ongeregverdigde verplasing van ons eie beginsels deur 'n enge Engelse begrip van 'trespass' op die vordering van 'n eienaar toe te pas. So is daar al ten onregte gesê dat 'n eienaar nie sy saak van 'n ander kan opeis as hy reeds self besit aan enigiemand afgestaan het nie, tensy 'he can show that his reversionary right to possession is injured by the trespass' . . . die ware posisie is dat 'n eienaar op grond van sy eiendomsreg bevoeg is om met die *rei vindicatio* sy saak van enigeen op te eis wat hom nie op 'n reg, wat teen die eienaar geld, kan beroep om die saak te hou nie".[71]

The *rei vindicatio* is available in respect of both movable and immovable property, wherever it may be found.[72] The Appellate Division in *Chetty v Naidoo*[73] expressed itself as follows on the subject:

> "It may be difficult to define *dominium* comprehensively . . . but there can be little doubt . . . that one of its incidents is the right of exclusive possession of the *res*, with the necessary corollary that the owner may claim his property wherever found, from whosoever holding it."[74]

Indeed, as Milton states:[75]

> "The right of an owner to demand removal would, in theory, seem to be absolute for he is vindicating the freedom of his property from an unlawful interference."

On the other hand, it may be argued that our courts are indeed in appropriate circumstances vested with a discretion to order damages instead of removal in cases of encroachment. Not to accept this, because no theoretically justifiable basis exists for it, may clearly yield unfair results. This is especially appropriate where the encroaching party was *bona fide* and the encroachment is negligible compared to the cost incurred in removing the encroachment. Take, for example, the case where the owner of a stand seeks the removal of a building erected on adjoining land where the building encroaches to the extent of six inches underneath the ground level upon the plaintiff's stand.[76] In support of the view that the court should, in such a case, be able to order the defendant to pay damages instead of ordering the removal of the encroachment, it may be argued that the English concept of equity resembles the South African principle of reasonableness in terms of which our courts have a discretion to order damages instead of an interdict[77] for removal where the discrepancy between the interests of the parties is too great.[78] In the above case the cost of removing the underground encroachment would be disproportionate to the benefit gained by the plaintiff in having the encroachment removed.

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70 In *Hefer v Van Greuning supra* 959E.
71 959D – H.
72 Voet 6 1 26. After the reception of Roman law, Roman-Dutch law also recognised the universal right of an owner to vindicate his property wherever he may find it (Voet 6 1 1; De Groot 2 3 4; see Scholtens "*Praescriptio – jus possidendi* and *rei vindicatio*" 1972 *SALJ* 383 393 – 394).
73 1974 3 SA 13 (A).
74 20A; see also *Vulcan Rubber Works (Pty) Ltd v SAR & H* 1958 3 SA 285 (A) 289B; *Akbar v Patel* 1974 4 SA 104 (T) 109G.
75 *Supra* 241.
76 See the facts of *Naude v Bredenkamp supra*.
77 The *actio negatoria*.
78 *Gien v Gien supra*.

Die invloed van artikel 2(3) van die Wet op Testamente 7 van 1953 op die erkende beginsels van rektifikasie en interpretasie van testamente*

J Jamneck
BLC LLB
Senior Lektrise in die Privaatreg, Universiteit van Suid-Afrika

SUMMARY

The influence of section 2(3) of the Wills Act 7 of 1953 on the avowed principles of rectification and interpretation of wills

Section 2(3) of the Wills Act 7 of 1953, as introduced by the Law of Succession Amendment Act 43 of 1992, empowers the court to order the Master to accept a document as a valid will if the court is satisfied that a person who has died in the meantime, intended that document to be his will, although it does not comply with all the formalities for the execution of wills. This condonation of more informal documents opens the way for evidence of statements made by the testator himself regarding the contents of his will and his intentions, to be accepted by the court when interpreting a will in contrast to the previous position. This, in turn, limits the necessity for the application of rectification as most problems can now be solved by interpretation alone. The reason for the refusal to accept this kind of evidence in the past, namely that informal statements cannot be allowed to supersede formal documents, have been effectively erased by section 2(3), simplifying matters surrounding evidence and interpretation of wills.

1 KONDONASIEBEVOEGDHEID INGEVOLGE ARTIKEL 2(3)

Die Wet tot Wysiging van die Erfreg 43 van 1992 wat op 1 Oktober 1992 in werking getree het, het 'n baie belangrike en welkome bepaling in die Wet op Testamente 7 van 1953 ingevoeg in die vorm van artikel 2(3). Dié artikel lui soos volg:

> "Indien 'n hof oortuig is dat 'n dokument of die wysiging van 'n dokument wat opgestel of verly is deur 'n persoon wat sedert die opstel of verlyding daarvan oorlede is, bedoel was om sy testament of 'n wysiging van sy testament te wees, gelas die hof die Meester om daardie dokument, of die dokument soos gewysig, vir die doeleindes van die Boedelwet, 1965 (Wet No 66 van 1965), as testament te aanvaar ofskoon dit nie aan al die vormvereistes vir die verlyding of wysiging van testamente bedoel in subartikel (1) voldoen nie."

Daar word dus 'n kondonasiebevoegdheid aan die hof verleen ten opsigte van twee aspekte van testamente wat vroeër heelwat probleme opgelewer het, te wete verlydingsformaliteite en formaliteite by wysiging van testamente.

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* Referaat gelewer by die Kongres van die Vereniging van Universiteitsdosente in die Regte, 1993, Universiteit van Stellenbosch.

2 KONDONASIEBEVOEGDHEID TEN OPSIGTE VAN FORMALITEITE

Ten eerste magtig artikel 2(3) die hof om die Meester te gelas om 'n dokument wat deur die opsteller daarvan as testament bedoel was, as testament te aanvaar ten spyte daarvan dat dit nie aan al die formaliteitsvereistes voldoen nie. Die streng formalistiese benadering wat in die verlede veroorsaak het dat testamente ongeldig verklaar is weens die een of ander fout in die formaliteite, word nou deur hierdie bepaling ondervang. 'n Goeie voorbeeld van die probleme wat deur die toepassing van artikel 2(3) uitgeskakel kan word, word in *Kidwell v The Master*[1] gevind. In dié saak het die testateur sy testament, wat uit twee bladsye bestaan het, op die tweede bladsy sowat 13cm onder die handtekening van die tweede getuie en 17cm onder the attestasieklousule geteken. Die hof beslis dat die testament ongeldig is omdat dit nie "aan die end", soos vereis deur artikel 2(1)(a)(i), onderteken is nie. Ten spyte van die feit dat die hof bevind dat geen bedrog gepleeg is nie, is die testament nogtans ongeldig verklaar weens die moontlikheid dat bedrog kon plaasvind.[2] Hierdie probleem word nou ondervang deurdat die hof die Meester kan gelas om die testament te aanvaar ten spyte daarvan dat die testateur se handtekening nie "aan die end", dit wil sê aan die einde van die laaste paragraaf van die testament, verskyn nie. Die hof sal natuurlik hierdie bevoegdheid met omsigtigheid uitoefen en steeds allereers bepaal of bedrog moontlik plaasgevind het al dan nie.

Talle ander voorbeelde van gevalle waar testamente ongeldig verklaar is vanweë gebrekkige formaliteitsvereistes kan uit ons positiewe reg aangehaal word.[3] Al hierdie probleme word nou ondervang deurdat die hof die gebrek kan kondoneer en die Meester kan gelas om die testament te aanvaar.

3 KONDONASIEBEVOEGDHEID TEN OPSIGTE VAN WYSIGINGS

Die tweede aspek ten aansien waarvan artikel 2(3) 'n kondonasiebevoegdheid aan die hof verleen, is wysigings[4] wat in 'n testament aangebring is na die verlyding daarvan.[5] Artikel 2(1)(b) vereis dat enige wysiging van 'n testament aan dieselfde formaliteite moet voldoen as wat vir die verlyding van 'n testament

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1 1983 1 SA 509 (OK).

2 Sien Sonnekus 1983 *TSAR* 188 en Cronjé 1983 *THRHR* 345 vir kritiek op hierdie beslissing.

3 Sien bv *Tshabalala v Tshabalala* 1980 1 SA 134 (O) waar die eerste bladsy van die testament die hele substantiewe inhoud van die testament bevat het, terwyl die tweede bladsy slegs die sertifikaat kragtens a 2(1)(a)(v) bevat het; *Philip v The Master* 1980 2 SA 934 (D) waar die sertifikaat voor die testateur se merk verskyn het; *Gantsho v Gantsho* 1986 2 SA 321 (TR) waar die linkerkantste kantlyn nie as die end van die testament beskou is nie; *Radley v Stopforth* 1977 2 SA 516 (A) en *Jeffrey v The Master* 1990 4 SA 759 (N) waar probleme rondom die vermelding van die amp van die sertifiserende beampte ontstaan het.

4 "Wysiging" word omskryf as "'n skrapping, byvoeging, verandering of tussenskrif", en "skrapping" as "'n skrapping, deurhaling of uitwissing op welke wyse ook al bewerkstellig, uitgesonderd 'n skrapping, deurhaling of uitwissing wat die herroeping van die hele testament beoog" – a 1.

5 Let daarop dat enige wysiging vermoed word aangebring te gewees het na verlyding van die testament – a 2(2).

vereis word. Artikel 2(3) verskaf nou aan die hof die bevoegdheid om die Meester te gelas om 'n wysiging wat nie aan al die formaliteite voldoen nie, te aanvaar.[6]

4 BEWOORDING VAN ARTIKEL 2(3)

Twee aspekte van die bewoording van artikel 2(3) behoef nadere beskouing. Die eerste hiervan is: "Indien die hof oortuig is dat 'n dokument . . . bedoel was om sy testament . . . te wees", en die tweede: "Ofskoon dit nie aan al die vormvereistes vir die verlyding . . . voldoen nie." Uit die tweede gedeelte is dit duidelik dat minstens aan sommige formaliteite voldoen sal moet word alvorens die hof oorweging sal skenk aan die vraag of die dokument inderdaad as testament bedoel is al dan nie. Die dokument sal sekerlik minstens op een of ander manier, hetsy by wyse van 'n handtekening[7] of by wyse van 'n merk,[8] as die wilsbeskikking van die testateur geïdentifiseer moet kan word alvorens die hof 'n ondersoek sal doen na die vraag of die dokument inderdaad as testament bedoel is.[9]

Die beantwoording van hierdie vraag hang natuurlik saam met 'n bewysprobleem, naamlik: Hoe gaan 'n mens te werk om te bewys dat 'n bepaalde dokument as testament bedoel is? Hier moet gekyk word na die tipe getuienis wat as toelaatbaar beskou sal word. Aangesien die bewysregtelike reëls wat hieronder ten aansien van rektifikasie en interpretasie bespreek word, waarskynlik ook by die oplossing van hierdie probleem gebruik sal word, word vir die oomblik daarmee volstaan en eers aandag geskenk aan die probleme rondom die interpretasie en rektifikasie van dokumente wat wel deur die hof as testamente aanvaar word.

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6 Sien bv *Gow v The Master* 1936 CPD 296 waar die hof die gebrek aan alle formaliteite omseil deur te bevind dat 'n gedeelte van die testament herroep is aangesien geen formaliteite vir herroeping vereis word nie. A 2(3) doen nou weg met so 'n gekunstelde benadering.

7 Oor wat presies met "handtekening" bedoel word, was daar vroeër ook verskeie probleme – sien bv *Ex parte Goldman and Kalmer* 1965 1 SA 464 (W); *Dempers v The Master* 1977 4 SA 44 (SWA); *Ex parte Singh* 1981 1 SA 793 (W); *Melvill v The Master* 1984 3 SA 387 (K); *Jhajbhai v Master* 1971 2 SA 370 (D); *Ex parte Jackson: In re Estate Miller* 1991 2 SA 586 (W); *Govindamall v Munsamy* 1992 1 SA 676 (D). Heelwat van hierdie probleme word nou ondervang deurdat die Wet op Testamente soos gewysig deur Wet 43 van 1992 bepaal dat "onderteken" ook die maak van 'n paraaf insluit. Voorts skakel die toepassing van a 2(3) hierdie probleme ook grootliks uit.

8 A 2(1)(a)(v) vereis die aanhegting van 'n sertifikaat deur 'n kommissaris van ede wanneer die erflater sy testament by wyse van 'n merk onderteken. Vir die probleme wat in die verlede rondom hierdie sertifikaat ontstaan het, sien *Gantsho v Gantsho* 1986 2 SA 321 (TR); *In re Jennett* 1976 1 SA 580 (A); *Radley v Stopforth* 1977 2 SA 516 (A); *Jeffrey v The Master* 1990 4 SA 759 (N); *Philip v The Master* 1980 2 SA 934 (D). Buiten die feit dat baie van die ou probleme rondom die sertifikaat nou deur ander bepalings van Wet 43 van 1992 uitgeskakel word, kan die hof enige gebrek in formaliteite tov die sertifikaat kragtens a 2(3) kondoneer. 'n Interessante vraag is of die hof 'n algehele gebrek aan 'n sertifikaat sal kondoneer. Mi behoort die antwoord positief te wees mits aan die vereistes van a 2(3) voldoen word, nl dat aan sommige formaliteite voldoen word en dat die hof oortuig is dat die dokument as testament bedoel is.

9 Dit is jammer dat die wetgewer nie sy weg oopgesien het om kondonasie van 'n testament in 'n ander vorm as 'n dokument toe te laat nie. 'n Wyer definisie as die normale betekenis van die woord "dokument" kon die vrae rondom die aanvaarbaarheid van video- of klankopnames as testamente opgeklaar het. Huidig sal die testateur se wense egter steeds in 'n skriftelike dokument beliggaam moet wees alvorens dit as testament oorweeg kan word.

5 ARTIKEL 2(3), REKTIFIKASIE EN INTERPRETASIE

Die invloed van artikel 2(3) op die erkende beginsels van rektifikasie en interpretasie van testamente word vervolgens van naderby beskou.

5 1 Die onderskeid tussen rektifikasie en interpretasie

Daar is 'n baie dun skeidslyn tussen rektifikasie en interpretasie en soos uit hierdie bespreking sal blyk, lê die enigste werklike verskil in die getuienis wat by elk as toelaatbaar beskou word.

Wiechers en Schoeman[10] definieer rektifikasie as

> "die regstelling van 'n fout in 'n testament, deurdat getuienis aangebied word oor verklarings gemaak deur die testateur met betrekking tot die inhoud van die testament welke getuienis aantoon dat daar 'n fout in die testament is, wat die aard daarvan is en hoe dit reggestel kan word".

Interpretasie daarenteen word deur Van der Merwe en Rowland[11] omskryf as

> "die vasstelling van die betekenis waarin die testateur die woorde in sy testament gebruik het, uit die woorde in sy testament, gesien ook in die lig van (a) die omringende omstandighede, (b) die verklarings van die testateur wat lig werp op sy persoonlike individuele taalgebruik (met uitsluiting van sy verklarings aangaande die testament self) en (c) met inagneming van toepaslike vermoedens".

Uit hierdie definisies blyk duidelik dat die vraag na die toelaatbaarheid van getuienis nou verwant is aan die toepaslikheid van rektifikasie.[12] Die omgekeerde is natuurlik ewe waar, maar hieroor later meer.

5 2 Eers rektifikasie of eers interpretasie?

Daar is al baie geskryf en gepraat oor die vraag wat eerste moet plaasvind: rektifikasie of interpretasie. Die algemene standpunt is dat rektifikasie voor interpretasie moet geskied.[13]

Dié stelling kan egter nie ongekwalifiseerd aanvaar word nie aangesien interpretasie en rektifikasie onlosmaaklik aan mekaar verbind is. So verklaar Wiechers en Schoeman[14] tereg dat

> "[r]ektifikasie slegs ter sprake kom indien die bedoeling van die testateur nie deur middel van interpretasie vasgestel kan word nie".

'n Poging tot interpretasie moet dus allereers aangewend word waartydens vasgestel sal kan word of rektifikasie inderdaad nodig is omdat iets per abuis in die testament ingevoeg of weggelaat is. Eers wanneer die testament dan gerektifiseer is, kan (werklike) interpretasie van die gerektifiseerde testament plaasvind.

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10 1986 *De Jure* 379. Van der Merwe en Rowland *Die Suid-Afrikaanse erfreg* (1990) 484 definieer rektifikasie as "die verbetering van foute in 'n testament, van watter aard hulle ook al mag wees". Aangesien hierdie definisie nie 'n verwysing na die kwessie rondom getuienis bevat nie, word die definisie van Wiechers en Schoeman verkies. Sien ook *Aubrey-Smith v Hofmeyr* 1973 1 SA 655 (K); Corbett, Hahlo, Hofmeyr en Kahn *The law of succession in South Africa* (1980) 499; Cronjé en Roos *Erfreg vonnisbundel* (1988) 440.

11 Van der Merwe en Rowland 485.

12 Sien *Aubrey-Smith v Hofmeyr* 1973 1 SA 655 (K).

13 Sien bv Scholtens "Wills – rectification and interpretation" 1959 *SALJ* 382–385; Van der Merwe en Rowland 484 ev; Corbett, Hahlo, Hofmeyr en Kahn 511.

14 1986 *De Jure* 379.

Hierdie benadering blyk ook uit die algemeen aanvaarde[15] vereistes vir rektifikasie soos uiteengesit in *Jarvis v Hawken*:[16]

> "First, 'Does the will as it stands express the testator's intention, or does it contain an error?', and secondly, 'If such an error exists, what is its nature and how, if at all, can it be corrected?'"

In die onlangser *Will v The Master*[17] word hierdie vereistes soos volg hergeformuleer:

> "The applicant for such rectification must establish (a) that the alleged discrepancy between expression and intention was due to a mistake and (b) what the testator really meant to provide."

Uit vereiste (a) blyk dit duidelik dat 'n poging tot interpretasie aangewend moet word alvorens daar vasgestel kan word dat 'n "alleged discrepancy" bestaan. Dié vereiste impliseer voorts dat die persoon wat poog om die testament te interpreteer kennis moet dra van wat die testateur se bedoeling was. Wat hierdie aspek betref, kom bewysregtelike reëls, wat later bespreek sal word, ter sprake.[18]

'n Poging tot interpretasie moet dus rektifikasie voorafgaan ten einde vas te stel of rektifikasie inderdaad nodig is en, indien wel, sal interpretasie van die testament *soos gerektifiseer* daarop volg.

Wat hierdie aangeleentheid betref, kan volstaan word met die volgende aanhaling uit Cronjé en Roos:[19]

> "Logieserwys moet rektifikasie dus interpretasie [van die gerektifiseerde testament[20]] voorafgaan, daar dit eers moet vasstaan watter woorde die testateur in sy testament wou hê voordat die betekenis van die woorde vasgestel kan word."[21]

5 3 Bewysregtelike aspekte rondom rektifikasie en interpretasie

Hoewel rektifikasie altyd voor interpretasie sal plaasvind, blyk dit tog 'n proses te wees wat eers as laaste uitweg aangewend word. So merk Van der Merwe en Rowland[22] op:

> "As die testateur se bedoeling uit die woorde in sy testament met inagneming van bogenoemde faktore[23] vasgestel word, dan vind *interpretasie* plaas. As dit in die loop van hierdie interpretasieproses blyk dat 'n woord of woorde per abuis ingesluip het of weggelaat is, en hoe die testament behoort te lui, dan is rektifikasie as afsonderlike proses nie nodig nie, want die bedoeling van die testateur word steeds uit die woorde in sy testament in die lig van bogenoemde faktore vasgestel. Verbetering van so 'n

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15 *Jarvis v Hawken* 1959 2 SA 594 (FC) soos nagevolg in *Estate Levitas v Levitas' Minors* 1962 4 SA 385 (T); *Ex Parte Van der Spuy* 1966 3 SA 169 (T); *Aubrey-Smith v Hofmeyr* 1973 1 SA 655 (K); *Welldon v Andrews* 1982 2 SA 44 (N); *Will v The Master* 1991 1 SA 206 (K).

16 1959 2 SA 594 (FC) 597.

17 1991 1 SA 206 (K) 213.

18 Sien die bespreking tov getuienis oor verklarings deur die testateur gemaak hieronder.

19 440.

20 My invoeging.

21 Sien ook Van der Merwe en Rowland 494 vn 22; Corbett, Hahlo, Hofmeyr en Kahn 511.

22 485.

23 Met verwysing na die faktore genoem in hulle definisie van interpretasie (485), nl (a) die omringende omstandighede, (b) die verklarings van die testateur wat lig werp op sy persoonlike individuele taalgebruik (met uitsluiting van sy verklarings aangaande die inhoud van die testament), en (c) met inagneming van toepaslike vermoedens.

> fout kan wel plaasvind, maar sodanige verbetering is oortollig en dra nie by tot die uitlegproses nie, want die testateur se bedoeling is reeds, *ex hypothesi*, vasgestel voordat die verbetering plaasvind."[24]

Die vraag wat nou beantwoord moet word, is welke getuienis toelaatbaar is ten einde die testateur se bedoeling te bepaal en hoe dit verskil van getuienis wat toelaatbaar is wanneer rektifikasie ter sprake is.

Opsommenderwys kan die volgende indeling gemaak word:

5 3 1 Die testament self

Die hoofbeginsel by die vertolking van testamente is die vasstelling van die testateur se bedoeling soos dit blyk uit die woorde wat hy in sy testament gebruik het.[25] Die nou reeds bekende reël uit *Robertson v Robertson's Executors*[26] word dus telkens aangewend:

> "Now the golden rule for the interpretation of testaments is to ascertain the wishes of the testator from the language used."[27]

Die primêre bron van die testateur se bedoeling is dus die testament self.[28]

5 3 2 Getuienis oor feite wat deur die testament geraak word

Getuienis oor mense, omstandighede of feite wat deur 'n testament geraak word, is altyd toelaatbaar.[29]

5 3 3 Leunstoelgetuienis

Die hof is geregtig om hom in die posisie te plaas waarin die testateur hom bevind het ten tyde van die maak van die testament deur te let op alle relevante feite en omstandighede wat aan die testateur bekend was. Die hof plaas hom dus

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24 Uit hierdie aanhaling blyk dit weer eens baie duidelik dat eers 'n poging tot interpretasie aangewend moet word ten einde vas te stel of rektifikasie hoegenaamd nodig is. Vgl ook *Aubrey-Smith v Hofmeyr* 1973 1 SA 655 (K) 658 – 659; *Breytenbach v De Villiers* 1959 4 SA 560 (T) waar by wyse van *interpretasie* beslis is dat "vruggebruik" ook *dominium* ingesluit het; *Wilz v Gouws* 1961 4 SA 222 (T) waar by wyse van interpretasie beslis is dat "each" as "both" gelees moet word; *Ex parte Estate Wienand* 1965 1 SA 576 (K) waar by wyse van interpretasie beslis is dat "children" ook verdere desendente ingesluit het. Daar word ook aan die hand gedoen dat die hof die vraag in *Will v The Master* 1991 1 SA 206 (K) aan die hand van interpretasie kon oplos sonder om van rektifikasie gebruik te maak (sien bespreking hieronder).

25 Cronjé en Roos 413; Van der Merwe en Rowland 498; *Cuming v Cuming* 1945 AD 201; *Ex parte Swanepoel* 1948 1 SA 1141 (O); *Ex parte Senekal* 1949 4 SA 283 (O); *Campbell v Daly* 1988 4 SA 714 (T); *Crookes v Watson* 1956 1 SA 277 (A); *Will v The Master* 1991 1 SA 206 (K).

26 1914 AD 503 507.

27 Hierby word 'n aantal bekende beginsels toegepas, soos dat die testament in sy geheel gelees moet word (*Kemp's Estate v MacDonald's Trustee* 1915 AD 491; *Ex parte Williams* 1958 4 SA 707 (W)), dat woorde in die gewone grammatikale betekenis verstaan moet word (*Troitz v Trotsky's Executrix* 1924 WLD 53; *In re Estate Madore* 1936 NPD 215) en vele ander (sien Van der Merwe en Rowland 521 ev; Corbett, Hahlo, Hofmeyr en Kahn 466 ev).

28 Van der Merwe en Rowland 498; Cronjé en Roos 414.

29 *Allen v Estate Bloch* 1970 2 SA 376 (K); *Ex parte Froy: In re Estate Brodie* 1954 2 SA 366 (K); *Aubrey-Smith v Hofmeyr* 1973 1 SA 655 (K); *Will v The Master* 1991 1 SA 206 (K).

as 't ware in die stoel van die testateur.[30] Dié tipe getuienis is altyd toelaatbaar ongeag of 'n bepaling vaag of dubbelsinnig is.[31]

5 3 4 Getuienis oor verklarings deur die testateur gemaak met betrekking tot die inhoud van sy testament

Uit die staanspoor blyk dit dat die grootste verskil tussen interpretasie en rektifikasie lê in die bewysreëls oor verklarings wat die testateur oor die inhoud van sy testament gemaak het. Wat interpretasie betref, is die basiese beginsel dat getuienis oor verklarings van die testateur aangaande die onderwerp van sy bemakings uitgesluit moet word.[32] 'n Uitsondering op hierdie reël word slegs in geval van "equivocation", die sogenaamde volkome dubbelsinnigheid, toegelaat.[33] "Equivocation" is dubbelsinnigheid wat net by wyse van latente dubbelsinnigheid kan ontstaan en wat slegs na vore kom wanneer die bepalings van 'n testament wat op die oog af duidelik en ondubbelsinnig is, op die werklikheid toegepas moet word. By die toepassing van so 'n testament word gevind dat 'n beskrywing byvoorbeeld nie die begunstigde of die nagelate voordeel ondubbelsinnig beskryf nie. 'n Baie goeie voorbeeld van sogenaamde "equivocation" word deur regter Van Winsen in *Ex parte Eksekuteure Boedel Malherbe*[34] verskaf:

Die erflater laat sy plaas "Graskop waarop ek tans woon" aan sy seun na. Getuienis is altyd toelaatbaar om die plaas Graskop, waarop die erflater ten tyde van die opstel van die testament gewoon het, te identifiseer. Bewys getuienis vir identifikasiedoeleindes egter dat die erflater twee plase, naamlik Graskloof en Graskop, ten tyde van die opstel van die testament besit het, en dat hy inderdaad op Graskloof en nie op Graskop gewoon het nie, is die vraag of addisionele getuienis gelei kan word om aan te toon dat hy ten spyte van die uitdruklike verwysing in sy testament na Graskop, inderdaad bedoel het om die plaas Graskloof aan sy seun te bemaak. Volgens die hof skyn gesaghebbende skrywers en die howe dit eens te wees dat addisionele getuienis in hierdie geval wel toelaatbaar is om aan te toon wat die erflater met die woorde in sy testament bedoel het, aangesien hy hom op 'n gebrekkige wyse uitgedruk het. Omdat 'n latente dubbelsinnigheid hier ontstaan wanneer gepoog word om die in die testament uitgesproke bedoeling op die eksterne feite toe te pas, is addisionele getuienis toelaatbaar. Ook is getuienis aangaande verklarings van die testateur by interpretasie van die testament toelaatbaar aangesien dié latente dubbelsinnigheid

30 *Ex parte Froy: In re Estate Brodie* 1954 2 SA 366 (K); *Dison v Hoffmann* 1979 4 SA 1004 (A).

31 *Cuming v Cuming* 1945 AD 201; *Bell v Swan* 1954 3 SA 543 (W); *Ex parte Eksekuteure Boedel Malherbe* 1957 4 SA 704 (K); *Dison v Hoffmann* 1979 4 SA 1004 (A); *Allen v Estate Bloch* 1970 2 SA 376 (K); *Will v The Master* 1991 1 SA 206 (K). Sien Van der Merwe en Rowland 501 ev vir 'n bespreking van die sg "clear meaning"-reël.

32 Van der Merwe en Rowland 517; Schmidt *Bewysreg* (1982) 612; *Aubrey-Smith v Hofmeyr* 1973 1 SA 655 (K); *Ex parte Rossouw* 1960 1 SA 403 (GW); *Ex parte Eksekuteure Boedel Malherbe* 1957 4 SA 704 (K); *Allen v Estate Bloch* 1970 2 SA 376 (K); *Barrie v Ferris* 1987 2 SA 709 (K).

33 Van der Merwe en Rowland 518; Cronjé en Roos 428; Schmidt 613; *Ex parte Van Broembsen* 1948 3 SA 1040 (O); *Ex parte Rossouw* 1960 1 SA 403 (GW); *Allen v Estate Bloch* 1970 2 SA 376 (K); *Will v The Master* 1991 1 SA 206 (K).

34 1957 4 SA 704 (K) 710–711.

inpas in die definisie van "equivocation" of volkome dubbelsinnigheid. Die hof definieer dit soos volg:

> "'n 'Equivocation' . . . ontstaan waar die woorde van die testament op twee of meer voorwerpe ewe toepaslik is."[35]

Van die Merwe en Rowland[36] voer drie redes aan waarom getuienis oor verklarings van die testateur aangaande die inhoud van die testament nie toegelaat word nie. Die eerste hiervan is

> "omdat 'n testament 'n hoogs formele dokument is en informele verklarings deur die testateur wat op die inhoud daarvan betrekking het, nie aan hierdie formele vereistes voldoen nie".[37]

Regter Wessels kom in *Ex parte Rossouw*[38] tot dieselfde gevolgtrekking

> "omdat die toelating daarvan 'n wesenlike gevaar skep dat die vertolker dan die spoor kan byster raak en hom laat mislei om die feite buite die dokument om verklaarde bedoeling te aanvaar as die werklike bedoeling in die dokument sonder dat die woorde dit inderdaad regverdig, m.a.w. in die proses van vertolking verdring die e.g. bedoeling dan die in die dokument gestelde bedoeling".

Omdat hierdie gevaar nie in geval van "equivocation" ontstaan nie, verklaar regter Wessels dat hy bereid sou gewees het om hierdie tipe getuienis toe te laat ten einde "equivocation" op te klaar. Hy sou selfs bereid gewees het om die toelaatbaarheid van sodanige getuienis uit te brei na alle gevalle waar ander getuienis nie interpretasieprobleme kan oplos nie, mits die gevaar waarna hy verwys (naamlik dat informele verklarings bo die formele dokument verkies word), nie bestaan nie. Voorts maak hy die volgende stelling (hoewel volgens homself *obiter*):[39]

> "'n Mens sou verwag het dat die bedoelde getuienis in alle gevalle van latente dubbelsinnigheid wat nie anders opgeklaar kan word nie toegelaat behoort te word mits dit blyk – soos in die geval van s.g. 'equivocation' – dat die gevaar waarteen gewaak moet word, (nl., dat die bedoeling waarna die getuienis verwys moontlik met die in die testament gestelde bedoeling mag meeding en dit verdring) nie bestaan nie."

Sowel Van der Merwe en Rowland[40] as Cronjé en Roos[41] is van mening dat hierdie *obiter*-benadering te verkies is. In die lig van die bepalings van artikel 2(3) word aan die hand gedoen dat die weg nou oop is vir die toelating van getuienis oor verklarings van die testateur aangaande die inhoud van sy testament aangesien die wetgewer nou die aanvaarding van 'n dokument wat nie aan al die testamentsformaliteite voldoen nie, kondoneer en die hoofbeswaar teen die aanvaarding van sodanige getuienis, naamlik dat informele verklarings nie aan die testamentsformaliteite voldoen nie, dus verval. Aangesien die hof nou, kragtens artikel 2(3), die Meester kan gelas om 'n meer informele dokument as testament te aanvaar, behoort die beswaar teen die aanvaarding van getuienis van informele verklarings by die interpretasie van 'n testament ook te verval.

Wat die ander twee redes betref (wat deur Van der Merwe en Rowland[42] aangevoer word in verband met die ontoelaatbaarheid van hierdie tipe getuienis),

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35 *Ex parte Eksekuteure Boedel Malherbe* 1957 4 SA 704 (K) 711.
36 517–518.
37 *Idem* 517.
38 1960 1 SA 403 (GW) 409.
39 410.
40 520.
41 428.
42 517–518.

word aan die hand gedoen dat hulle steeds in gedagte gehou moet word, maar nie in die pad behoort te staan van toelating van sodanige getuienis nie. Die moontlikheid vir bedrog bestaan nie net by die toelaatbaarheid van getuienis nie, maar kan by enige aspek van 'n testament ter sprake kom. Ons howe is terdeë daarvan bewus en hanteer enige kwessie rondom testamente met die uiterste omsigtigheid ten einde die moontlikheid van bedrog uit te skakel.[43] Dié beswaar gaan dus nie op nie.

Die laaste beswaar wat deur Van der Merwe en Rowland[44] genoem word, is dat dié getuienis die moontlikheid kan skep dat teleurgestelde persone onbehoorlike druk op begunstigdes uitoefen deur met 'n duur hofgeding te dreig. Versigtige hantering van hierdie tipe getuienis deur die howe kan ook hierdie beswaar teenwerk.

Wat rektifikasie betref, word getuienis oor verklarings deur die testateur aangaande die inhoud van sy testament wel toegelaat. Hierdie reël word by wyse van analogie vanaf die kontraktereg deurgetrek.[45] So verklaar regter Corbett in *Aubrey-Smith v Hofmeyr*:[46]

> "Normally evidence of the antecedent verbal agreement or of the intention of the parties would not be admissible to vary or add to the written contract but in cases of rectification the parol evidence rule is tempered to allow of such proof of contractual intention . . . It was submitted that by analogy evidence of declarations of intention by a testator should be admitted where application is made for the rectification of a will. The question of the admissibility of the evidence in dispute is, therefore, closely linked to the applicability of the doctrine of rectification to wills."

In die *Aubrey-Smith*-saak word die kwessie rondom die toelaatbaarheid van getuienis ook bespreek met verwysing na die twee tipes rektifikasie wat vroeër deur ons howe onderskei is, naamlik rektifikasie by wyse van skrapping van woorde en rektifikasie by wyse van invoeging van woorde. Volgens regter Corbett behels rektifikasie by wyse van skrapping van woorde die vasstelling van watter gedeeltes van die testament die testateur se *animus testandi* weergee en word die hof nie deur die *parol evidence*-reël gehinder nie.[47] Die hof weier egter om die testament deur die invoeging van woorde te rektifiseer:

> "Our Courts would appear to have adhered to the general view that, save when this can be done as a matter of construction, a will cannot be rectified by the insertion of words. The reasons for this would seem to be that such an insertion would amount to remaking the testator's will for him and that it could not be said that in respect of the words inserted the necessary testamentary formalities, as laid down by law (see sec 2(1) of the Wills Act, 7 of 1953, as amended, and more particularly subsec (b) which

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43 Sien bv *Tshabalala v Tshabalala* 1980 1 SA 134 (O) 136 – 137 waar Flemming R ook aangedui het dat die kwessie van bedrog nie oorbeklemtoon moet word nie. Sien ook *Philip v The Master* 1980 2 SA 934 (D); *Gantsho v Gantsho* 1986 2 SA 321 (TR); *Kidwell v The Master* 1983 1 SA 509 (OK). Lg beslissing toon duidelik die gevare van 'n oorbeklemtoning van die bedrog-gevaar aan.

44 518.

45 Sien *Weinerlein v Goch Buildings Ltd* 1925 AD 282; *Von Ziegler v Superior Furniture Manufacturers (Pty) Ltd* 1962 3 SA 399 (T); *Delmas Milling Co Ltd v Du Plessis* 1955 3 SA 447 (A); *Mouton v Hanekom* 1959 3 SA 35 (A).

46 1973 1 SA 655 (K) 658.

47 Sien ook *Ex parte Botha* 1943 OPD 171; *Rens v Esselen* 1957 4 SA 8 (T); *Ex parte Van der Spuy* 1966 3 SA 169 (T); *Ex parte Olfsen* 1976 1 SA 205 (W); *Taylor v The Master* 1980 4 SA 414 (T); *Van Rooyen v Die Meester* 1982 3 SA 486 (W) ivm skrapping.

> lays down the formalities relating to a 'deletion, addition, alteration or interlineation' made in a will), had been observed."[48]

Afgesien van die feit dat die hof se beswaar nou in die lig van artikel 2(3) van Wet 43 van 1992 nie meer geld nie (soos hierbo aangedui is), het die howe gelukkig in daaropvolgende sake rektifikasie by wyse van invoeging van woorde wel toegelaat. So is die invoeging van woorde, met verwysing na getuienis oor verklarings van die testateurs self, telkens toegelaat in *Botha v The Master*,[49] *Ex parte Blasberg*,[50] *Welldon v Andrews*[51] en *Van Rooyen v Die Meester*.[52] In *Van Zyl v Esterhuyse*[53] en *Will v The Master*[54] is die hele aangeleentheid weer heroorweeg en is beslis dat die standpunt in die *Botha*- en *Blasberg*-saak te verkies is. In die *Van Zyl*-saak, wat met goedkeuring in die *Will*-saak aangehaal is, beskou die hof die opmerkings van regter Corbett in die *Aubrey-Smith*-saak as *obiter* en ag homself gevolglik nie daaraan gebonde nie.

Dit is egter belangrik om sekere van hierdie sake van naderby te beskou ten einde vas te stel of artikel 2(3) nou 'n eenvoudiger oplossing bied.

(a) *Aubrey-Smith v Hofmeyr*[55]

Hoewel die hof weier om die testament deur die invoeging van woorde te rektifiseer, word dieselfde (billike) resultaat as wat deur rektifikasie bereik sou word, uiteindelik bereik. Die testatrise het in klousule 1 van haar testament bepaal:

> "I nominate, constitute and appoint my . . . husband to be the executor of this my will, guardian of my minor children, administrator of my estate of whatsoever kind and wheresoever situate."

Klousule 2 het gelui:

> "However, in the event of my said husband and I perishing simultaneously or within three months of each other but in that event only, I do devise as follows . . ."

Hierop het bemakings aan haar kinders gevolg. Die testatrise is egter voor haar man oorlede en aangesien daar geen bepaling was aangaande vererwing van die boedel indien sy voor haar eggenoot te sterwe sou kom nie, was daar nie 'n effektiewe beskikking oor haar boedel nie. Die testatrise se eggenoot het aansoek gedoen dat die testament gerektifiseer word deur die woorde "sole heir of my estate and" in te voeg onmiddellik na "to be" in klousule 1. Die prokureur wat die testament opgestel het, het 'n beëdigde verklaring afgelê ten einde aan te toon dat die testatrise se bedoeling as gevolg van 'n fout wat ingesluip het, nie deur die testament weerspieël is nie.[56]

Die hof beslis dat die probleem by wyse van interpretasie opgelos kan word; dat die testatrise nie haar wil heeltemal uitgedruk het deur die woorde wat sy gebruik het nie; dat daar 'n weglating was maar dat die testatrise se bedoeling duidelik is. Die hof vermy dus deur die omweg van interpretasie sonder die gebruikmaking van verklarings van die testatrise, rektifikasie by wyse van invoeging van woorde. So 'n benadering lyk egter gekunsteld.

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48 1973 1 SA 655 (K) 663.
49 1976 3 SA 597 (OK).
50 1979 2 SA 589 (SWA).
51 1982 2 SA 44 (N).
52 1982 3 SA 486 (W).
53 1985 4 SA 726 (K).
54 1991 1 SA 206 (K) 215.
55 1973 1 SA 655 (K).
56 Sien Cronjé en Roos 449 vir 'n bespreking van die relevante beginsels.

Hoewel 'n benadering te verkies is waarvolgens 'n probleem deur middel van interpretasie eerder as deur middel van rektifikasie opgelos word, wil dit lyk of die hof agteroorbuig om die testament so uit te lê dat aan die testatrise se bedoeling uitvoering gegee kon word sonder om van rektifikasie deur invoeging van woorde gebruik te maak.

Hoewel toegegee moet word dat daar wel aanduidings in die testament was dat dit die testatrise se bedoeling was dat haar eggenoot die boedel moet erf indien sy eerste te sterwe sou kom, kan 'n mens nie anders as om te dink dat die hof se taak aansienlik vergemaklik sou gewees het indien getuienis oor verklarings deur die testatrise self (in hierdie geval in die vorm van instruksies aan die prokureur) toegelaat is nie. In die lig van artikel 2(3) word aan die hand gedoen dat dié tipe getuienis wel in 'n feitestel soos die onderhawige toegelaat mag word en dat gevolglik weggedoen kan word met enige vraag na rektifikasie. Die hof se benadering, naamlik om die probleem by wyse van interpretasie eerder as by wyse van rektifikasie op te los, is dus te verkies. Dié proses kan hedendaags egter heelwat vergemaklik word deur toelating van getuienis oor verklarings van die testateur.

(b) *Botha v The Master*[57]

Die testateur het in sy testament 'n trust geskep en in klousule 3(C) bepaal dat daar vir die opleiding, insluitende universitêre opleiding, van sy neefs uit die trustinkomste betaal moet word. Hierdie neefs was almal reeds ses en dertig jaar of ouer ten tyde van die verlyding van die testament en die testateur was daarvan bewus dat hulle reeds hulle opleiding voltooi het. Hulle het aansoek gedoen om rektifikasie van die testament deur invoeging van die woorde "the sons of" voor die woorde "my nephews" in klousule 3(C) van die testament. 'n Brief wat die testateur geskryf het en waaruit geblyk het dat dit sy bedoeling was om hulle kinders te bevoordeel, is as getuienis aangebied. Die hof het die aansoek toegestaan.[58]

Word hierdie uitspraak ondersoek, blyk dit weer eens dat rektifikasie onnodig was (en ook hedendaags sal wees) en dat die probleem by wyse van interpretasie opgelos kon word. Die eerste punt van kritiek teen die uitspraak is dat die hof bevind dat daar geen "latent ambiguity" in die testament is nie, terwyl die hof self sê:

> "While the words of a will may in themselves be unambiguous and open to no doubt as to their application, they may when read in the light of external circumstances which were known to the testator at the time he made his will, reveal a 'latent ambiguity' as to their true intent . . ."[59]

Hoewel die dubbelsinnigheid nie uit die testament self blyk nie, blyk dit tog baie duidelik wanneer gepoog word om die bepalings op die werklikheid toe te pas.

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57 1976 3 SA 597 (OK).
58 Sien ook die aantekening by hierdie saak in Cronjé en Roos 449.
59 1976 3 SA 497 (OK) 599–600.

Hoe dit ook al sy, selfs al was daar geen latente dubbelsinnigheid nie, sê die hof verder dat leunstoelgetuienis slegs in geval van dubbelsinnigheid toelaatbaar is:

> "The external or 'armchair' evidence of facts known to the testator when he made his will, does not create or reveal ambiguity when the words are applied to the facts."[60]

Dit is natuurlik, soos reeds vroeër aangedui is, nie die geval nie.[61] Leunstoelgetuienis is altyd toelaatbaar ongeag van die bestaan van dubbelsinnigheid. Die hof kon die probleem met ander woorde bloot deur die gebruik van leunstoelgetuienis opgelos het. Dit wil egter voorkom of die hof rektifikasie en die gevolglike toelating van die testateur se brief gebruik ten einde baie seker te maak dat hy die korrekte beslissing bereik. Dat die korrekte beslissing wel bereik is, lei geen twyfel nie, maar weer eens moet aan die hand gedoen word dat dieselfde resultaat by wyse van interpetasie bereik kon word indien getuienis oor verklarings van die testateur in beginsel by interpretasie toegelaat is. Hedendaags ruim artikel 2(3) die besware teen die toelating van hierdie getuienis uit die weg (soos reeds aangedui is) en sou die weg in die *Botha*-saak dus oop gewees het vir oplossing deur interpretasie alleen.

(c) *Will v The Master*[62]

In 'n gesamentlike testament het 'n man en vrou bepaal dat

> "[o]ur joint estates, or the estate of the survivor of us, as the case may be, shall devolve upon *our children*, or their issue by representation *per stirpes*".

Die testateur en testatrise het saam ses kinders gehad en die testateur twee uit 'n vorige huwelik. Uit die feite blyk dit dat die testateur nooit oor sy vorige huwelik of sy kinders uit dié huwelik gepraat het nie, dat hy vir baie jare geen kontak met hulle gehad het nie en dat hy selfs nie eens geweet het waar hulle hul bevind nie. Die vraag wat deur die hof beantwoord moes word, was of die woorde "our children" ook laasgenoemde twee kinders insluit.

Die hof beslis dat die woorde "our children" nie duidelik en ondubbelsinnig "all our children of whatever marriages" beteken nie en dat getuienis van omringende omstandighede gevolglik toelaatbaar is. Die hof sê dan dat die aangeleentheid uit die testateur se leunstoel benader moet word, maar gaan nie verder op die aangeleentheid in nie. In stede daarvan gaan die hof oor tot 'n bespreking van rektifikasie en keur die sake soos hierbo genoem, asook die beginsel goed dat getuienis oor verklarings van die testateur aangaande die inhoud van sy testament toelaatbaar is. Wanneer die hof terugkeer na 'n bespreking van die feite, volg hy die leunstoelbenadering en bevind dat die testateur, in die lig van die omstandighede, nooit bedoel het om sy kinders uit sy vorige huwelik te bevoordeel nie. Desnieteenstaande neem die hof getuienis in ag oor instruksies wat deur die testateur en testatrise aan die testamentopseller gegee is en beveel dat die testament gerektifiseer moet word deur invoeging van die name van die ses kinders van die testateur en testatrise. Dit wil dus voorkom of die

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60 *Idem* 601.

61 *Cuming v Cuming* 1945 AD 201; *Allen v Estate Bloch* 1970 2 SA 376 (K); *Ex parte Eksekuteure Boedel Malherbe* 1957 4 SA 704 (K); *Ex parte Froy: In re Estate Brodie* 1954 2 SA 366 (K); Van der Merwe en Rowland 500 ev.

62 1991 1 SA 206 (K). Dié beslissing is bekragtig en nagevolg in *Hotz v Goodman* 1994 2 SA 186 (K).

hof rektifikasie inbring ten einde genoemde getuienis te kan gebruik en wel net om dubbel seker te maak dat die korrekte beslissing bereik word. Myns insiens was die laaste stap oorbodig en kon volstaan gewees het met 'n interpretasie van die testament met behulp van leunstoelgetuienis.

Selfs al is dit nie moontlik om die bedoeling by wyse van leunstoel- of ander ekstrinsieke getuienis vas te stel nie, word aan die hand gedoen dat so 'n probleem by wyse van interpretasie opgelos kan word indien getuienis oor verklarings van die testateur in die lig van artikel 2(3), soos hierbo aanbeveel is, toegelaat word.

6 GEVOLGTREKKING

Hoewel artikel 2(3) van Wet 43 van 1992 slegs voorsiening maak vir die kondonasie van 'n gebrek by testamentsformaliteite, open dit ook op indirekte wyse die deur vir makliker interpretasie van testamente deurdat getuienis oor informele verklarings deur die testateur wat gemaak is aangaande die inhoud van die testament, by interpretasie toegelaat kan word. Die rede hiervoor is dat die beswaar teen die aanvaarding van dié verklarings nou deur artikel 2(3) uit die weg geruim word omdat die hof die bevoegdheid het om 'n informeler dokument as testament te aanvaar. Die aanwendingsgebied van rektifikasie word gevolglik verklein (omdat die meeste probleme by wyse van interpretasie opgelos kan word). Daar word aan die hand gedoen dat rektifikasie slegs gebruik hoef te word in gevalle van werklike administratiewe foute, soos waar 'n erfnommer, die grootte van 'n plaas of van 'n som geld as gevolg van 'n tikfout verkeerd aangedui is.[63]

63 Sien Corbett, Hahlo, Hofmeyr en Kahn 500 vir vbe.

AANTEKENINGE

DIFFERENT APPROACHES TO THE INTERPRETATION OF CONTRACTS IN THE SAME CASE. THE *EXCEPTIO NON ADIMPLETI CONTRACTUS* WHERE THERE ARE TWO OR MORE LINKED OBLIGATIONS

1 Different approaches to the interpretation of contracts in the same case

Two distinct and contradictory tendencies have for long been apparent in cases on the interpretation of contracts.

(a) The primary rule "is to ascertain and to follow the intention of the parties", per Innes JA in *Joubert v Enslin* 1910 AD 6 37–38. This has been followed in other cases (to those mentioned in my *The principles of the law of contract* (1989) 300–301 (*Contract*) add – as I mentioned in 1994 *THRHR* 87 – *Atteridgeville Town Council v Livanos t/a Livanos Brothers Electrical* 1992 1 SA 296 (A) 305J–306A; *Concord Insurance Co Ltd v Oelofsen* 1992 4 SA 669 (A) 672E–G).

(b) "The law does not concern itself with the working of the minds of parties to a contract, but with the external manifestation of their minds", per Wessels JA in *South African Railways & Harbours v National Bank of South Africa Ltd* 1924 AD 704 715–716 (see also the other cases mentioned in *Contract* 18–19). Note that in *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* 1992 3 SA 234 (A) 240D–E Harms AJA offered a softened interpretation of the passage in the *South African Railways & Harbours* case, saying (238I–J): "The law, as a general rule, concerns itself with the external manifestations, and not the workings, of the minds of parties to a contract." With respect, if this had read "begins by considering" instead of "concerns itself with" there would be no objection to the proposition (see 1994 *THRHR* 87); but when one is dealing with the "general rule", actual intention takes precedence over the appearance of intentions (*Contract* 3ff).

Sometimes, as in *Union Government v Smith* 1935 AD 232 (followed in other cases mentioned in *Contract* 312 fn 100), a court says that it can adopt both these contradictory approaches at the same time. With respect, although the controversy is not discussed, the court in *Chubb Fire Security (Pty) Ltd v Greaves* 1993 4 SA 358 (W) (Du Plessis J) seems to have adopted first one of these approaches and then the other.

The facts, in so far as they had to be accepted for the purpose of the case (359F–J), were that on 1 March 1989 a company, RT Greaves Appliances (Pty) Ltd (the company), which carried on business as Automatic and Manual Fire Appliances (AMFA) and was effectively controlled by the respondent, had sold,

by means of a tripartite agreement (350B – C 364H), AMFA to the applicant as a going concern for R385 000, of which R75 800 was allocated as the price of the goodwill of the business. On the same day, as required by a *pactum de contrahendo* in the sale, the respondent entered into a separate employment contract with the applicant. There were restraint of trade clauses in both the contract of sale and the employment contract (360D – G). The respondent was given less responsibility and fewer executive powers than he had been given to understand would be the case. This led to conflict and unpleasantness which in turn led to respondent's wife, who was also employed by the applicant and had been employed by AMFA, resigning and going to work for Coin Security Group (Pty) Ltd (Coin), a direct competitor of the applicant. (For the above facts see 360A – 361B.)

In October 1989, in the words of Du Plessis J

> "Boje [managing director of the applicant] on behalf of the applicant summarily dismissed the respondent during one of a number of altercations between them about the employment of the respondent's wife.
>
> On the facts . . . the applicant was in law not entitled to summarily dismiss the respondent. The purported dismissal therefore amounted to a repudiation of the employment contract by the applicant which the respondent accepted. [This last phrase should not be used: *Contract* 435 – 437]. It follows that the employment contract was terminated as a result of the applicant's breach of contract" (361D – E).

The respondent then entered the employment of Coin, whereupon (359F – G) the applicant sought

> "an order interdicting and restraining the respondent from being in employment with any firm, business, company, undertaking or association of persons which carries on the business of manufacturing, selling, installing and/or servicing fire-fighting equipment and other security systems for a period of two years".

In doing so, the applicant relied "solely on the restraint contained in the terminated contract of employment" (per Du Plessis J 361E – F). Hence it was that contract that needed to be interpreted.

The restraint operated in the Transvaal and Orange Free State for two years "from the date of termination of (respondent's) employment for whatever reason" (360F – G). It was argued by counsel for the respondent that the words "for whatever reason" should be interpreted "to refer only to the grounds for termination of the contract enumerated in the contract itself" (per Du Plessis J 361G – H). As the grounds referred to are not disclosed in the report, readers cannot tell how specific they may have been. Nor can one tell why it was not argued that the parties meant "for whatever reason other than a breach by the employer", a proposition for which strong authority could have been found in *Galloon v Modern Burglar Alarms (Pty) Ltd* 1973 3 SA 647 (C) (see *Contract* 325 – 326).

Without any enquiry into what the parties themselves meant by the phrase, the court said (361H – I) that the words "for whatever reason" "have a very wide meaning". For this proposition the court cited authorities on similar words in other contracts in other cases, the first of which (*Jayber (Pty) Ltd v Miller* 1981 2 SA 403 (W)) dealt with suretyship; the second (*Heerman's Supermarket (Pty) Ltd v Mona Road Investments (Pty) Ltd* 1975 4 SA 391 (D)) with lease; and the third (*Biografic (Pvt) Ltd v Wilson* 1974 2 SA 342 (R)) contained a statement that the words were not to be given a restricted meaning, but the clause was held to be unreasonable (349D) and unenforceable (350pr). In the *Heerman's*

Supermarket case (395C – H) reliance was placed on *Joseph Travers & Sons Ltd v Cooper* 1915 1 KB 73 (CA) and *AE Farr Ltd v The Admiralty* 1953 2 All ER 512 (QB). In the first of these cases the relevant words related to damage which could be covered by insurance and the second followed the first, although insurance was not mentioned. With respect, the fact that parties who have insurance in mind may contract out of liability for their own negligence does not mean that when parties to the contracts use words such as "for whatever reason", they must be held to have intended the meaning given by those whose attention is on insurance (*Contract* 325 – 327).

Later (362I – J 363G – H), for different purposes, the court referred to *Capecan (Pty) Ltd t/a Canon Western Cape v Van Nimwegen* 1988 2 SA 454 (C). In this case Van den Heever J said that

> "[a] restraint clause is usually better classified as a collateral agreement since in cases such as we are dealing with it is intended to have an existence independent of the contract of employment and to continue to be operative after the latter has ceased" (460D).

With respect, this fails to take into account the better view expressed by Harker, quoted in *Contract* 549 – 550 (see also 379), and supported by Van Deventer *The law of construction contracts* (1993) par 7.59 – 7.75. The better view has been approved in the *Atteridgeville Town Council* case above 304E; hence the proposition in the *Capecan* case quoted above must be regarded as having been impliedly overruled.

It is highly unlikely that the respondent in the *Chubb Fire Security* case above agreed that he could be debarred from following his chosen career for two years *by the fault of the applicant* who, in addition, according to the court's statement (360J – 361A), had not given him the responsibility and executive powers he had been given to understand would be his. (He was, in the court's words (363I), "a man with a considerable reputation in the fire protection industry".) If the court had considered what *the parties to this contract* had meant, it is likely that it would have come to the conclusion either that both parties, or at least the respondent, intended to refer to any reason other than breach by the employer. If the court thought that the applicant had meant to include breaches by itself but the respondent did not so intend, the situation would have been that there was no *common* intention of the parties and the rules for such situations, such as the *contra proferentem* one, would have required consideration. As there is no reference in the report to what the applicant thought the words meant or to their origin, the point cannot be taken further.

Another argument on behalf of the respondent was that the court should not enforce the restraint because that would be to allow the applicant to profit from its own wrong (362A). The court held that it is competent for parties to contract that an advantage may accrue to a party from its own breach of contract (362D – F) and said (362G – H) that the words "for whatever reason" bore "their plain and unrestricted meaning" and were "unambiguous". In coming to this conclusion, the court adopted the second approach referred to in the opening paragraph of this note which, with respect, is open to all the criticisms referred to in *Contract* 18 – 19 308 – 313.

Having come to the conclusion that the contract allowed the applicant to rely on the restraint and having referred (362F – G) to *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A), the court turned to the question whether

the restraint should be enforced (362J – 363A). For this purpose it discussed *Drewtons (Pty) Ltd v Carlee* 1981 4 SA 305 (C); Du Plessis J said in this regard:

> "On behalf of the respondent it was argued that the restraint is unreasonable because it would come into operation if the respondent's employment was terminated for 'any reason whatever', including unlawful dismissal by the applicant. Watermeyer JP, with whom Tebbutt J concurred, found that the restraint was not unreasonable for that reason because the employer could in any event not rely on the restraint where he himself had breached the employment contract. The reason given by the learned Judge President for this latter finding is that '(a)n employer cannot repudiate his obligations under the contract of employment and at the same time claim to enforce the restraint clause (*vide General Billposting Co Ltd v Atkinson* [1909] AC 118)'. With due respect to the learned Judge-President, it seems as if his *ratio* may be rephrased thus: the restraint in that case was a reciprocal obligation to the employer's obligation to provide employment, and the employer would therefore have been met with an *exceptio non adimpleti contractus* if he endeavoured to enforce the restraint without performing his obligations under the contract. (See Van den Heever J in [*Capecan (Pty) Ltd t/a Canon Western Cape v Van Nimwegen* 1988 2 SA 454 (C)] 459I – J.)" (363D – G).

Du Plessis J then distinguished *Drewtons*' case, saying:

> "Although the present restraint clause is also contained in an employment agreement, it must be taken into account that the employment agreement forms part of a large transaction in terms of which the applicant bought the business, including the goodwill, from the company. It is also necessary to take into account that the respondent, a man with a considerable reputation in the fire protection industry, is in a position, by competing with the applicant, in effect to take back the goodwill sold if not restrained. In ascertaining the purpose and scope of the restraint, this factual setting of the contract must be taken cognisance of. (See *Swart v Cape Fabrix (Pty) Ltd* 1979 1 SA 195 (A) at 202; *Melmoth Town Board v Marius Mostert (Pty) Ltd* 1984 3 SA 718 (A) at 728G – I.)
>
> In *Drewtons*' case therefore it could be said that the restraint was an obligation of the employee which was reciprocal to that of the employer to provide employment. In the present case that is not the position at all. In view of the fact that the employment forms part of the larger transaction (although there are two separate agreements), the present restraint was imposed not only as a *quid pro quo* for the providing of employment, but equally if not primarily, in order to protect the goodwill bought by the applicant. Under such circumstances, the considerations in the *Drewtons*' case do not arise" (363H – 364B).

The court then held that it would not be contrary to public policy to enforce the restraint (364D).

The applicability of the *exceptio non adimpleti contractus* will be considered in the next section of this note. Here it may be noted that the penultimate sentence of the first paragraph of the above quotation and the references given in the last sentence of that paragraph show that on this part of its decision the court adopted the first of the approaches referred to in the first paragraph of this note above. Had it adopted the second approach, as it did in regard to the words "for whatever reason", it could, I suggest with respect, with as much justification as it had for its interpretation of the words "for whatever reason", have said that the words of the clause were "unambiguous" and that, carrying "their plain . . . meaning" (cf 362G – H) they did not refer to anything more than the respondent's employment. The fact that the court did not say these things, is an additional reason for concluding that it was applying the first approach on this question. This approach is indeed the correct one; but in addition to being adopted at this stage it should, with respect, have been adopted in regard to the words "for whatever reason" and then the outcome of the enquiry into their meaning might have been different (see above).

There is a further point. If the court had endeavoured to find out what *the parties* meant by the words "for whatever reason" instead of adopting the meaning given by other authorities in other contexts, and if the court had then concluded that the restraint in the employment contract had not been brought into operation, the respondent would have been free of that restraint and so, in the absence of reliance on the restraint in the contract of sale, could have obtained some of the custom that would otherwise have gone to the applicant. However, the significant causal factors of the applicant being in that position would have been recognised to be (1) its own conduct and (2) its decision not to rely on the restraint in the contract of sale. (One assumes – little is said on it in the report – that the restraint in the contract of sale protected the goodwill bought.) The applicant's position would in such circumstances, I suggest, have been recognised to be the consequence of its own fault.

2 The *exceptio non adimpleti contractus* where there are two or more linked obligations

Accepting the proposition that the employment contract formed "part of a large transaction" (363H), what was the overall benefit to the respondent in return for which he agreed not to compete with the applicant for two years? It was, as the court recognised (364B), receipt of the price of the sale of the business, including the goodwill, plus employment. The reciprocal obligations on the applicant were to pay the price and to provide the employment. The court pointed out (363E – G, quoted above) that the opinion of Watermeyer JP in *Drewtons'* case (308E) could be interpreted as acknowledging that an employer who is in breach of his obligation to provide employment can be met with an *exceptio non adimpleti contractus* if he seeks to enforce a restraint clause reciprocal to the provision of the employment. The court sought to distinguish *Drewtons'* case on the ground that in the case then before it (*Chubb Fire Security*) the object of the restraint included the protection of the goodwill sold (363H – 364B, quoted above). In so doing the court appears to have implied that it is the law that if an overall transaction includes two distinct obligations resting on one of the parties (to pay the price and to provide employment) and there is another obligation resting on the other party (the restraint) which obligation was originally reciprocally related to both the obligations referred to above (364B, quoted above) the party on whom the restraint rests is not entitled to raise the *exceptio* if the other party, being in breach of one of his obligations, claims that the reciprocity must be considered as attaching separately to the other of his obligations which he has not breached. With due respect, this does not seem to be the law. The restraint in the employment contract could only be considered as protecting the goodwill sold because the overall transaction was considered to be a unity ("the larger transaction" per Du Plessis J 364A – B, quoted above). Because it was considered as a unity the applicant's failure to provide employment was a failure to fulfil a major part (note the word "equally" at 364B) of his combined obligations. Hence I suggest, with respect, that the respondent was entitled to raise the *exceptio non adimpleti contractus*.

The court felt that the restraint was to be enforced because

> "[i]f the restraint is not enforced, the court would be placing the respondent in a position to in effect take back or at least jeopardise a substantial portion of the business that had been sold to the applicant. If it is correct that the respondent had been unlawfully

dismissed, he has adequate remedies at his disposal to recover such damages as he may suffer" (364C – D).

With respect, if one considers that "[t]he applicant put the respondent in a post with less responsibility and executive powers than the respondent had been given to understand during the negotiations preceding the conclusion of the agreement" (360J – 361A), and that the responsibility for the position was the applicant's (see the last paragraph of section 1 of this note above), it appears that if one or other of the parties had to be left with a claim for damages it should have been the applicant.

AJ KERR
Rhodes University

SEKERHEIDSTELLING DEUR MIDDEL VAN ROERENDE GOED – NOG STEEDS ONSEKERHEID!

1 Inleiding

Die Wet op Sekerheidstelling deur middel van Roerende Goed 57 van 1993 is op 7 Mei 1993 in werking gestel. Die haas waarmee hierdie wet die lig gesien het, is toe te skryf aan die uitspraak in *Cooper NO v Die Meester* 1992 3 SA 60 (A), waar die appèlafdeling by monde van appèlregter Joubert die geykte regsposisie wat sedert die uitspraak in *Vrede Koöperatiewe Landboumaatskappy (Bpk) v Uys* 1964 2 SA 283 (O) gevolg is, omvergewerp het. (Sien hieroor veral die vonnisbesprekings deur Cilliers "Bondholders beware – protect your bonds before insolvency" 1992 *THRHR* 682 – 687; Février-Breed "The end of the common-law special notarial bond" 1993 *THRHR* 144 – 149; Sonnekus "Die notariële verband, 'n bekostigbare figuur teen heimlike sekerheidstelling vir 'n nuwe Suid-Afrika" 1993 *TSAR* 110 – 138.) Volgens die *Vrede Koöperatiewe Landboumaatskappy*-beslissing verleen 'n spesiale notariële verband ten opsigte van omskrewe roerende goed ingevolge artikel 102 van die Insolvensiewet 24 van 1936 by insolvensie voorrang aan die eis van die verbandhouer teen die vrye oorskot van die verbandgewer se boedel indien die verband ingevolge die *prior in tempore potior in iure*-beginsel voor enige ander vorm van sekerheidstelling waarvoor artikel 102 voorsiening maak, geregistreer is. Dit is nie 'n vereiste dat die omskrewe roerende goed aan die verbandhouer gelewer hoef te word nie. Hierdie spesiale notariële verband het selfs aan die verbandhouer voorrang verleen bo 'n algemene notariële verband oor die verbandgewer (skuldenaar) se roerende goed in die algemeen.

Die gevolg van die *Cooper*-beslissing was dat die voorrang verleen deur artikel 102 van die Insolvensiewet nie op spesiale notariële verbande van toepassing is nie, aangesien die appèlafdeling beslis het dat die verwysing na "spesiale verband" in artikel 102 in die lig van die woordomskrywing van die wet slegs op spesiale verbande op onroerende goed dui. Die verwysing na "algemene verband" in artikel 102 is slegs op gemeenregtelike algemene verbande van

toepassing en sluit nie spesiale notariële verbande op roerende goed in nie. Dit het dus meegebring dat geregistreerde spesiale notariële verbande (uitgesonderd in Natal ingevolge die voorskrifte van die Wet op Notariële Verbande (Natal) 18 van 1932) by gebrek aan lewering van die omskrewe sekuriteitsvoorwerp(e) geen voorrang ten opsigte van die vrye oorskot van die skuldenaar se boedel by insolvensie aan die verbandhouer verleen nie (vgl 85F – G), maar slegs 'n konkurrente eis teen die vrye oorskot tot gevolg het. Daar word verder beslis dat artikels 96 – 102 van die Insolvensiewet 'n geslote lys bevat van die rangorde van statutêre preferensies en dat daar geen ruimte is om een daarin op te neem wat nie uitdruklik vermeld word nie.

In die besondere omstandighede van die *Cooper*-beslissing het dit meegebring dat 'n geregistreerde algemene notariële verband ingevolge artikel 102 van die Insolvensiewet wel voorrang geniet bo die eise van konkurrente skuldeisers teen die vrye oorskot van 'n insolvente boedel, maar dat spesiale notariële verbande uitgesluit word van die voorkeurorde ingevolge artikel 102. Dit het dus tot gevolg gehad dat 'n groot aantal geregistreerde spesiale notariële verbande geen voorkeur aan die verbandhouers daarvan ten opsigte van die vrye oorskot van die insolvente boedel van die verbandgewer verleen het nie weens die nie-lewering van die sekuriteitsvoorwerp(e).

2 Voorstelle van die Suid-Afrikaanse Regskommissie

Alhoewel die haas waarmee die wet ingevoer is in die lig van bogemelde omstandighede verklaarbaar is, is dit nie duidelik waarom die wet nie beter deurdink is nie. Die wet is immers die gevolg van 'n ondersoek deur die Suid-Afrikaanse Regskommissie na "Sekerheidstelling deur middel van roerende goed" (Werkstuk 23 Projek 46) wat alreeds gedurende 1987 vir kommentaar gepubliseer is. Die regskommissie het nie die voorstel aanvaar dat besitlose pandreg in Suid-Afrika ingestel behoort te word nie. Daar is wel oorweging geskenk aan die voorstel dat geregistreerde spesiale notariële verbande vir sekerheidstellingsdoeleindes voorkeur bo ander reghebbendes verleen, maar die vraag of dit sonder lewering van die sekerheidsvoorwerp(e) 'n beperkte saaklike reg aan die verbandhouer verleen, het omstrede gebly. Die volgende probleme bestaan nog steeds na inwerkingstelling van die wet:

(a) Waarom is die sekerheidsvoorwerp tot *liggaamlike* roerende goed beperk?

(b) Is die sekuriteit ingevolge die wet voldoende in die lig van die voorbehoudsbepaling ingevolge artikel 5 wat voorkeur aan die regte van die staat, staatsondersteunde instellings en landboukredietmaatreëls verleen?

(c) Verleen 'n spesiale notariële verband 'n beperkte saaklike reg aan die verbandhouer?

(d) Moet 'n notariële verbandhouer bydra tot die sekwestrasiekoste van die insolvent?

(e) Wat is die regsposisie van notariële verbande wat voor die inwerkingstelling van die wet ingevolge die Wet op Notariële Verbande (Natal) 18 van 1932 geregistreer is?

3 Onliggaamlike sake

Gemeenregtelik word daar tussen *res corporales* (stoflike of liggaamlike sake) en *res incorporales* (onstoflike of onliggaamlike sake) onderskei. Hierdie onderskeid

kom veral uit die Romeinse reg wat die reg indeel in kategorieë met betrekking tot persone, aksies en sake. Alles wat nie onder persone en aksies tuisgebring kan word nie, word as sake omskryf. Dit het meegebring dat talle regte wat tans onder subjektiewe regte tuisgebring word, in die Romeinse reg as *res incorporales* geklassifiseer word vanweë die feit dat geen regte in die Romeinse reg omskryf word nie (Van der Merwe *Sakereg* (1989) 40 – 41; Olivier, Pienaar en Van der Walt *Sakereg studentehandboek* (1992) 14 – 15). Die onderskeid tussen roerende en onroerende goed afkomstig uit die Germaanse reg het voorts meegebring dat in die Romeins-Hollandse en Suid-Afrikaanse reg onderskei word tussen liggaamlike en onliggaamlike roerende en onroerende goed.

In die handelsverkeer word veral die klandisiewaarde of werfkrag van 'n besigheidsonderneming (*Torf's Estate v Minister of Finance* 1948 2 SA 283 (N)), boekskulde (*Reinhardt v Ricker & David* 1905 TS 179), aandele in 'n maatskappy (a 91 van die Maatskappywet 61 van 1973), 'n aandeleblok in 'n aandeleblokmaatskappy (*Britz NO v Sniegocki* 1989 4 SA 372 (D)) en dranklisensies (*Receiver of Revenue, Cape v Cavanagh* 1912 AD 459) as onliggaamlike roerende sake bestempel. Alhoewel daar dikwels uit 'n regsistematiese oogpunt besware geopper word teen die gebruik van die term "onliggaamlike sake", veral met betrekking tot die feit dat die objek van 'n saaklike reg dan 'n ander (subjektiewe) reg is (wat moeilik met die sistematiek van die subjektiewe reg-teorie versoenbaar is), is dit ewe waar dat verkeersmaatstawwe en regsontwikkeling die onderskeid tussen liggaamlike en onliggaamlike sake noodsaak (sien ook Kleyn "Dogmatiese probleme rakende die rol van onstoflike sake in die sakereg" 1993 *De Jure* 1 – 13). In hierdie verband kan veral verwys word na eiendomstyddelingbelange op 'n aandeleblok- of klubgrondslag (wat slegs aan die reghebbende 'n vorderingsreg verskaf), asook rekenaarprogrammatuur wat as onliggaamlike roerende goed beskou en hanteer word.

Aangesien onliggaamlike roerende goed onteenseglik in die handelsverkeer as 'n deel van verhandelbare vermoënsgoedere beskou word, is dit bepaald stremmend dat slegs liggaamlike roerende sake as sekerheidsvoorwerpe kan dien. Dit bring mee dat onliggaamlike sake wat deel van 'n lopende bedryf vorm aan die skuldeiser gesedeer moet word indien dit bykomend tot liggaamlike sake van die bedryf (wat as sekerheidsvoorwerpe van 'n spesiale notariële verband dien) as sekuriteit aangewend word. Bykomende koste moet gevolglik aangegaan word en dit plaas ook weer die problematiek van sekuriteit ingevolge sessie *in securitatem debiti* op die voorgrond (sien veral Scott "The question of *locus standi* in revolving security cessions" 1991 *THRHR* 839 – 840): toekomstige boekskulde of ander toekomstige regte kan byvoorbeeld nie gesedeer word nie (*Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A)); daar bestaan onsekerheid oor die vraag of 'n skriftelike stuk vereis word; ingelyks is dit onseker of lewering van sodanige dokument as geldigheidsvereiste gestel word en wat die posisie met betrekking tot die leweringsvereiste is indien daar geen sessiedokument bestaan nie (Scott *The law of cession* (1980) 27 – 29; SA Regskommissie *Verslag oor sekerheidstelling deur middel van roerende goed* (1991) 88 – 90; sien in die algemeen McLennan "Becoming a surety through cession" 1993 *SALJ* 195 – 199).

Onliggaamlike roerende goed kon voor die inwerkingstelling van die nuwe wet wel as sekerheidsvoorwerpe dien (sien veral die gesag aangehaal deur Kleyn en Boraine *Silberberg and Schoeman's law of property* (1992) 452 vn 58; Van der Merwe *Sakereg* 668). Daar word geen aanduiding in die regskommissie se *Verslag oor sekerheidstelling deur middel van roerende goed* gegee waarom die

sekerheidsvoorwerp tot liggaamlike roerende goed beperk word nie, nieteenstaande bevestiging dat dit voor die inwerkingstelling van die wet moontlik was om ook onliggaamlike sake as sekerheidsvoorwerp te gebruik (40).

Die beswaar kan wel geopper word dat onliggaamlike sake dikwels nie na behore in 'n spesiale notariële verband omskryf sal kan word nie. Tog is daar wel onliggaamlike roerende sake wat sodanig omskryf sal kan word dat dit in alle opsigte aan die vereiste voldoen dat dit "in die verbandakte gespesifiseer en beskryf word op 'n wyse wat dit geredelik kenbaar maak" (a 1(1)). In hierdie verband word veral gedink aan 'n dranklisensie, 'n eiendomstyddelingbelang, die aandele in 'n maatskappy of die boekskuld van 'n bepaalde besigheid of bedryf.

4 Voorbehoudsbepaling ingevolge artikel 5

Die voorbehoudsbepaling ingevolge artikel 5 hou in dat enige verband, hipoteek, pand, regshipoteek, reg van voorkeur of retensiereg ten gunste van die staat of enige statutêre regspersoon of vereniging van persone wat uit openbare fondse ondersteun word, asook enige reg wat kragtens die Wet op Landboukrediet 28 van 1966 verkry word, voorkeur geniet bo 'n geregistreerde spesiale notariële verband. Dit beperk nie slegs die voorkeur van spesiale notariële verbande in die geval van landboukrediet nie (insluitend landbanklenings, wat ongetwyfeld binne die omskrywing van a 5(a) val), maar ook in die geval van algemene sakeondernemings in die lig van die feit dat talle statutêre regspersone of verenigings van persone binne die omskrywing van artikel 5 tuisgebring kan word. Hierdie reëling verlaag ongetwyfeld die sekuriteitswaarde van sekerheidstelling deur middel van spesiale notariële verbande.

5 Verleen 'n spesiale notariële verband 'n beperkte saaklike reg?

In 'n aantekening (Van der Walt "Aspekte van die reg insake notariële verbande" 1983 *THRHR* 332) is vyf vrae aan die orde gestel, te wete:

(a) Is 'n notariële verbandhouer 'n preferente skuldeiser of nie?

(b) Moet 'n notariële verbandhouer beheer van die goed verkry om 'n versekerde skuldeiser te word?

(c) Tree die notariële verbandhouer wat beheer oor die goed verkry, werklik in die skoene van 'n pandhouer?

(d) Hoe moet 'n notariële verbandhouer in beheer van die betrokke goed met betrekking tot sy plig om tot sekwestrasiekoste by te dra, behandel word?

(e) Is daar 'n leemte in artikel 106 van die Insolvensiewet met betrekking tot notariële verbandhouers?

Daar word vervolgens oorweeg of van daardie vrae deur die Wet op Sekerheidstelling deur middel van Roerende Goed uit die weg geruim is.

5 1 Rangorde van skuldeisers

Artikel 1(3), saamgelees met artikel 1(1) en 1(4), bepaal dat 'n notariële verband ten opsigte van *gespesifiseerde, liggaamlike, roerende goed*, wat voor die inwerkingtreding van die wet geregistreer is (behalwe dié ingevolge die Wet op Notariële Verbande (Natal) 18 van 1932, of tensy enige deel van die vrye oorskot voor die inwerkingtreding volgens bekragtigde rekenings aan die konkurrente skuldeisers uitbetaal is), by insolvensie dieselfde voorrang ten opsigte van

die geheel van die vrye oorskot (dws ook die opbrengs van die tegeldemaking van die insolvent se onroerende en onliggaamlike goed – en nie net ten opsigte van die opbrengs van die gespesifiseerde goed nie) geniet as wat die houer van 'n algemene verband ingevolge artikel 102 van die Insolvensiewet het. Hiermee word gepoog om die kwessie van die voorrang wat deur 'n geregistreerde notariële verband oor roerende goed verleen word, duidelik te stel. Die notariële verbandhouer geniet dus voorrang ten opsigte van die hele vrye oorskot, en wel bo die gewone skuldeisers (dws skuldeisers wat onverseker is of andersins nie voorrang ingevolge a 103(1) van die Insolvensiewet geniet nie).

'n Vraag wat in hierdie verband ontstaan, is of dit wys was om die voorrang van die notariële verbandhouer oor gespesifiseerde goed te beskryf met verwysing na die posisie van die houer van 'n algemene verband. *Algemene verband* word nie in die woordbepalingsartikel (a 2 van die Insolvensiewet) omskryf nie. Uit die omskrywing van *spesiale verband* in laasgenoemde artikel is dit duidelik dat 'n algemene verband nie 'n spesiale verband is nie, terwyl 'n notariële verband ingevolge die Natalse wet van 1932 wel 'n spesiale verband is. Afgesien daarvan of dit die wetgewer se bedoeling met die onderhawige wet was om die notariële verbandhouer se posisie landswyd gelyk te stel met die posisie volgens die Natalse wet (wat 'n vraag op sy eie is), laat hierdie stelwyse die vraag ontstaan wat die posisie sal wees waar sowel 'n algemene notariële verband (of 'n algemene bepaling in 'n notariële verband) as 'n notariële verband waarin goed gespesifiseer is, ter sprake is. Aangesien hulle glo gelyke voorrang verleen, sal daar vermoedelik volgens die *qui prior est tempore potior est iure*-benadering voorrang verleen moet word aan die een wat eerste geregistreer is. Indien dit onmoontlik sou wees, ding albei verbandhouers mee om betaling uit die vrye oorskot en moet hulle seker gelyk behandel word.

Maar is dit die korrekte benadering? Daar is immers 'n belangrike verskil tussen hulle posisies. Die notariële verbandhouer met 'n algemene verband se voorrang geld net ten opsigte van *die opbrengs van die insolvent se roerende goed vir sover dit in die vrye oorskot val*, terwyl die verbandhouer ten opsigte van gespesifiseerde goed se voorrang geld ten opsigte van *die hele vrye oorskot*, dit wil sê met insluiting van die opbrengs van die insolvent se onroerende en onliggaamlike goed. Hoe kan hulle dan gelyk behandel word? Behoort laasgenoemde verbandhouer nie op sy beurt weer voorrang bo eersgenoemde te geniet nie? Uit die voorgaande blyk laasgenoemde benadering die korrekte te wees. Waarom kon dit nie so in die wet gestel gewees het nie, in plaas daarvan om die twee gevalle met mekaar gelyk te probeer stel sonder om al die konsekwensies daarvan in ag te neem?

5 2 Pandreg sonder lewering?

Artikel 1(1) van die wet maak dit duidelik dat lewering aan die notariële verbandhouer nie nodig is om die verband tot stand te laat kom nie. Daarbenewens lui die subartikel dat die goed *geag word verpand te wees* sonder dat lewering nodig is. 'n Mens kan dus sê dat die vraag wat in 1983 *THRHR* 332 geopper is, naamlik of 'n notariële verbandhouer regmatige beheer moet verkry om 'n versekerde skuldeiser te wees, beantwoord word deur te sê dat hy geag moet word 'n pandhouer te wees – sonder dat lewering nodig is. Waarom dit hier nodig was om verband en pand so met mekaar te vermeng, is onseker. 'n Pandhouer is immers 'n versekerde skuldeiser met 'n beperkte saaklike reg en die notariële verbandhouer nie. Daar is geen aanduiding dat dié onderskeid

tussen pand en notariële verband nou wegval, en dat al wat oorbly die aspek is dat beheer oor die goed in die een geval oorgedra moet word en in die ander geval nie. Watter implikasies hou die verlies van beheer in vir die notariële verbandhouer teenoor die posisie van die pandhouer? Op die oog af lyk dit of beheersverlies die pandhouer se posisie wesenlik raak, maar nie die verbandhouer s'n nie – en dit ten spyte daarvan dat laasgenoemde *geag word* 'n pandhouer te wees! Voorheen (1983 *THRHR* 335–336) is daarop gewys dat 'n notariële verbandhouer voor en na insolvensie in 'n gunstiger posisie verkeer as 'n pandhouer, veral waar die verbandhouer beheer oor die goed verkry het. Dit is klaarblyklik steeds die geval ten spyte daarvan dat die betrokke goed ingevolge die wet *geag word* aan die notariële verbandhouer verpand te wees.

Wat verder in elk geval duideliker gemaak kon gewees het, is of regmatige beheer vereis word. Uit die feit dat hier na verpanding verwys word, kan afgelei word dat dit oor *die oordrag van beheer* gaan (dit sou immers genoeg wees om pand daar te stel). Terloops kan daarop gewys word dat die opstellers van standaardbedinge wys sal wees as hulle voorgestelde bedinge voortaan sou lui dat net *beheer* oorgedra moet word.

'n Belangriker vraag in hierdie verband is of die invoeging van sodanige standaardbedinge na die inwerkingtreding van hierdie wet nog enige sin het. Anders gestel: watter implikasies het die reëling ingevolge artikel 1(1) vir die standaardbeding dat die verbandhouer in sekere omstandighede beheer oor die goed kan verkry (sonder 'n hofbevel), waardeur hy dan volgens die geldende reg in die posisie van 'n pandhouer kom – dit wil sê 'n versekerde skuldeiser met 'n hoë voorrang word? Maak dit byvoorbeeld so 'n beding oorbodig omdat die subartikel lui dat die goed geag word verpand en gelewer te wees as die verband net geregistreer is? Laasgenoemde vraag moet waarskynlik bevestigend beantwoord word indien die resultaat beskou word as een ingevolge waarvan die verbandhouer 'n versekerde skuldeiser word by registrasie van die verband sonder dat lewering vereis word. 'n Mens het dan hier te make met 'n vorm van sekerheidstelling ten opsigte van roerende goed waarvoor lewering nie nodig is nie, maar wat dieselfde krag as pandgewing het. Dat daaraan 'n behoefte bestaan in die handelsverkeer, ly geen twyfel nie. Die vraag is egter of dit wel die bedoeling van die wetgewer met artikel 1(1) was. Indien wel, moet dit as 'n baie lomp manier beskou word om 'n nuwe vorm van saaklike sekerheidstelling tot stand te laat kom. Indien nie, sal dit steeds sinvol wees om die geykte standaardbeding te behou, en seker te maak dat dit verwys na die verkryging van beheer oor die betrokke goed sonder 'n hofbevel indien die ooreengekome omstandighede hulle sou voordoen.

Wat die verhouding met 'n verhuurder se stilswyende hipoteek betref, is in 1983 *THRHR* 336 opgemerk dat die Natalse wet die notariële verbandhouer in 'n nadeliger posisie plaas as wat 'n pandhouer sou wees, deurdat die verbandhouer nie voorrang bo die verhuurder se stilswyende hipoteek geniet nie. Deur in artikel 2 te bepaal dat sodanig beswaarde goed nie aan die verhuurder se hipoteek onderworpe is nie, word die notariële verbandhouer nader gebring aan dit wat hy fiktief is, te wete 'n pandhouer.

5 3 Bydrae tot sekwestrasiekoste

Daar is steeds geen reëling getref om notariële verbandhouers wat wel beheer oor die betrokke goed verkry het, se bydraeplig ten opsigte van die sekwestrasiekoste

duidelik te stel nie. In 1983 *THRHR* 336–338 is daarop gewys dat notariële verbandhouers, buiten dié ingevolge die Natalse wet van 1932, se bydraeplig 'n leemte in die Insolvensiewet aan die lig bring. Enersyds is dit so dat 'n notariële verbandhouer as onversekerde skuldeiser by insolvensie *'n algemene bydraeplig* ten opsigte van die sekwestrasiekoste het. Andersyds is dit egter so dat die notariële verbandhouer wat beheer oor die goed verkry het, in die posisie van 'n versekerde skuldeiser (nl 'n pandhouer) kom wat as sodanig *geen algemene bydraeplig het nie*. So 'n notariële verbandhouer kan dan (as versekerde skuldeiser) sy eventuele bydraeplig verder beperk deur ingevolge artikel 89(2) van die Insolvensiewet by die bewys van sy vordering te verklaar dat hy hom vir die voldoening van sy skuld slegs op sy sekuriteit (dws op die gespesifiseerde goed waaroor hy beheer verkry het) verlaat. Mits hy dan nie die applikant in die insolvensieverrigtinge is nie, beperk hy daardeur sy bydraeplig tot die koste van tegeldemaking van daardie goed en 'n eweredige bydrae tot die koste in die uitsonderingsgevalle waarna artikel 106(a) en (b) verwys.

Indien so 'n notariële verbandhouer voor die inwerkingtreding van die wet en voor die skuldenaar se insolvensie beheer oor die betrokke goed sou verloor het, sou hy weer net in die posisie van 'n onversekerde skuldeiser gekom het en sou hy daardie soort skuldeiser se algemene bydraeplig moes nakom. Nou bepaal die wet dat die notariële verbandhouer in die posisie is asof die goed aan hom verpand is sonder dat beheer hoegenaamd nodig is. Beteken dit dat die notariële verbandhouer altyd die bydraeplig en voorregte van 'n versekerde skuldeiser sal hê, of hou dit in dat die notariële verbandhouer altyd die algemene bydraeplig sal hê, ongeag of hy werklik beheer verkry het of nie? Die vraag is dus steeds of artikel 89(1) van die Insolvensiewet nie gewysig moet word nie om ruimte te skep vir notariële verbandhouers wat wel beheer oor die gespesifiseerde goed verkry het, of wat geag word sodanige beheer te verkry het.

5 4 Interpretasie van artikel 106 van die Insolvensiewet

Voorheen (1983 *THRHR* 338) is daarop gewys dat notariële verbandhouers, omdat hulle wel voorrang geniet maar nie versekerde skuldeisers is nie (as hulle nie beheer oor die gespesifiseerde goed verkry het nie), nie ingevolge artikel 106 van die Insolvensiewet tot 'n bydrae verplig is nie. Dit is wel so dat artikel 106 bepaal dat alle skuldeisers wat eise teen die boedel bewys het in die besondere geval sal moet bydra – en dit kan die indruk wek dat hier 'n skynprobleem aan die orde gestel is – maar aangesien verder bepaal word dat die nie-voorrang skuldeisers sús en die versekerde skuldeisers só sal moet bydra, is dit duidelik dat daar nie voorsiening gemaak is vir die notariële verbandhouer nie. Die vraag is of hierdie probleem nou opgelos is deur te bepaal dat die notariële verbandhouer (eintlik in soveel woorde) geag moet word 'n pandhouer – en dus 'n versekerde skuldeiser – te wees. Indien nie, bestaan die leemte in artikel 106 steeds en behoort dit opgelos te word. Indien wel, is die vraag of dit nie maar duidelik en direk gedoen kon gewees het nie. Dit sou tog die maklikste gewees het om eenvoudig te bepaal dat die notariële verbandhouer oor gespesifiseerde goed dieselfde bydraeplig as 'n pandhouer oploop.

6 Die posisie in Natal

6 1 Voor inwerkingtreding van Wet 57 van 1993

In Natal is die posisie ten aansien van notariële verbande gereël deur die Wet op Notariële Verbande (Natal) 18 van 1932. Artikel 1 van die wet het bepaal

dat dit slegs van toepassing is op roerende goed binne die provinsie Natal; dat die roerende goed spesifiek genoem en omskryf moet word (die verband kon nie oor roerende goed in die algemeen geregistreer word nie); en dat hoewel notariële verbande in Natal geregistreer moet word (en wel in die registrasiekantoor te Pietermaritzburg) die verbande afdwingbaar in die hele Republiek was.

6 2 Werking van notariële verbande in Natal

Artikel 2 van die Wet op Notariële Verbande (Natal) het bepaal dat die verbandskuldeiser dieselfde regte as 'n pandhouer verkry. Die goed word egter nie gelewer soos in die geval van 'n vuispand nie. Die pandhouer beskik oor 'n beperkte saaklike reg met al die bevoegdhede verbonde aan so 'n reg (Sonnekus 1993 *TSAR* 110). Artikel 4 van hierdie wet het voorgeskryf dat roerende goed wat spesiaal deur 'n notariële verband verhipotekeer was, nie deel uitmaak van die vrye oorskot van 'n pandgewer se insolvente boedel nie. Die opbrengs word behandel asof dit die opbrengs van 'n spesiale verband is waardeur onroerende goed verhipotekeer is, behalwe dat die verhuurder se hipoteek voorrang geniet bo die sekerheid van die houer van 'n notariële verband.

Die belangrikste effek van die Natal-wet is nie te vinde in die wet self nie, maar wel in die werking van die Insolvensiewet. Artikel 2 van dié wet omskryf spesiale verband soos volg:

> "'*Spesiale verband*' beteken 'n verband wat enige onroerende goed verhipotekeer of 'n notariële verband wat losgoed spesiaal daarin beskryf verhipotekeer ingevolge artikel *een* van die Wet op Notariële Verbande (Natal) 1932 (Wet No. 18 van 1932), maar sluit nie in enige ander verband wat losgoed verhipotekeer nie."

Artikel 95 saamgelees met artikels 89, 96 en 103 van die Insolvensiewet maak voorsiening daarvoor dat die opbrengs van 'n saak beswaar deur 'n spesiale verband aangewend moet word om aan die eise van die versekerde skuldeisers te voldoen onderworpe aan die normale kostes, fooie en sterfte-uitgawes. Ingevolge die Insolvensiewet word aan die Natalse verbandhouer sekuriteit op twee gronde verskaf, naamlik as verbandhouer *per se* maar ook as pandhouer (Sacks "Notarial bonds in South African Law" 1982 *SALJ* 610).

Die posisie in Natal is in *Cooper NO v Die Meester* 1991 3 SA 158 (O) ondersoek en soos volg opgesom (171B):

> "Die effek van dié wetgewing is dat ten opsigte van só 'n geregistreerde verband wat die verhipotekeerde roerendes spesifiek omskryf, dit geag word dieselfde effek te hê as wat 'n pand oor gelewerde goedere het. Dit volg dat by insolvensie die opbrengs van die verhipotekeerde goed nie in die vrye oorskot val nie. Dit vorm dus afgesonderde sekuriteit vir die vordering van die verbandhouer net soos in die geval van 'n verband oor 'n bepaalde onroerende saak, maar onderhewig aan die verhuurder se hipoteek ten aansien van die *invecta et illata*, en net solank die goed in Natal bly. Die verbandhouer kry dus saaklike sekerheid."

Die posisie in Natal het dus na die *Cooper*-uitspraak wesenlik verskil van die res van die Republiek. Buite Natal het 'n spesiale notariële verband geen voorkeur aan die verbandhouer verskaf ten aansien van die vrye oorskot nie (*Cooper NO v Die Meester* 1992 3 SA 60 (A)). Die reghebbende van 'n spesiale notariële verband oor bepaalde roerende goed was in dieselfde posisie as die konkurrente skuldeisers (Sonnekus 1993 *TSAR* 133).

6 3 Na inwerkingtreding van Wet 57 van 1993

Artikel 3 herroep die Wet op Notariële Verbande (Natal) in die geheel. In artikel 1(3) word vir 'n oorgangsbepaling voorsiening gemaak ten aansien van

spesiale notariële verbande geregistreer buite Natal voor die inwerkingtreding van die wet. Die subartikel sluit egter Natal uit en lui soos volg:

> "'n In subartikel (1) beoogde notariële verband uitgesonderd 'n notariële verband beoog in artikel 1 van die Wet op Notariële Verbande (Natal), 1932 (Wet No. 18 van 1932), wat voor die inwerkingtreding van hierdie Wet geregistreer is, verleen behoudens die bepalings van subartikel (4) by die insolvensie van die verbandgewer, hetsy voor of na sodanige inwerkingtreding, aan die verbandhouer dieselfde voorrang ten aansien van die geheel van die vrye oorskot van die insolvente boedel as wat deur 'n algemene verband aan 'n verbandhouer ingevolge artikel 102 van die Insolvensiewet, 1936 (Wet No. 24 van 1936), verleen word."

Die vraag ontstaan wat die huidige regsposisie is ten aansien van spesiale notariële verbande geregistreer in Natal ingevolge artikel 1 van die Wet op Notariële Verbande (Natal) voor inwerkingtreding van Wet 57 van 1993 (wat eersgenoemde wet herroep).

Dit is duidelik dat die wetgewer met hierdie artikel beoog het om die onsekerheid na die *Cooper*-beslissing uit die weg te ruim betreffende die effek van 'n spesiale notariële verband buite Natal. Indien die *Cooper*-beslissing gevolg moes word, sou baie verbandhouers skielik sonder enige voorkeureis in geval van insolvensie van die verbandgewer wees (Sonnekus 1993 *TSAR* 133). Artikel 1(3) bepaal nou uitdruklik dat hierdie verbandhouers 'n voorkeureis ten aansien van die vrye oorskot het.

Die posisie in Natal ten aansien van spesiale notariële verbande, geregistreer voor die inwerkingtreding van die Wet op Sekerheidstelling deur middel van Roerende Goed, word uitgesluit van die werking van artikel 1(3). Volgens Steyn *Die uitleg van wette* (1981) 82 bestaan daar 'n vermoede dat, tensy die teendeel blyk, die wetgewer alleen toekomstige aangeleenthede wil tref. Alle transaksies wat reeds afgehandel was met inwerkingtreding van die herroepende wet behou dus hul regskrag.

Die posisie in Natal voor inwerkingtreding van die Wet op Sekerheidstelling deur middel van Roerende Goed verskil van die posisie daarna. Artikel 4 van die Wet op Notariële Verbande (Natal) het bepaal dat die reghebbende van 'n spesiale notariële verband se eis, in geval van insolvensie van die verbandgewer, ondergeskik is aan die verhuurder se stilswyende hipoteek. Artikel 2 van die Wet op Sekerheidstelling deur middel van Roerende Goed verander die posisie en bepaal dat

> "roerende goed wat, terwyl dit met 'n notariële verband vermeld in artikel 1(1) beswaar is, in die besit van iemand anders as die verbandhouer is nie aan die stilswyende hipoteek van 'n verhuurder onderworpe is nie".

Volgens Steyn 101 word verder vermoed dat die wetgewer nie onbillike, onregverdige of onredelike resultate beoog nie. Dié beginsel word bevestig in *Vrystaat Ko-operasie Bpk v Minister van Landbou-ekonomie en -bemarking* 1965 3 SA 377 (O) waar verklaar word:

> "Dit is 'n bekende beginsel by die uitleg van wette dat 'n duidelike bepaling nodig is om 'n bestaande reg weg te neem."

In die lig van bogenoemde beskik persone wat 'n beperkte saaklike reg ingevolge artikel 1 van die Wet op Notariële Verbande (Natal) verkry het voordat dié wet afgeskryf is, steeds oor sodanige reg. Die aard van die reg wat sodanig verkry is, sal verskil van 'n reg verkry ingevolge van artikel 1 van die Wet op Sekerheidstelling deur middel van Roerende Goed met betrekking tot die rangorde van die verbandhouer se eis teenoor 'n verhuurder se stilswyende hipoteek in geval van insolvensie van die verbandgewer.

7 Slot

Alhoewel dit verwelkom word dat die onsekere sekuriteitsposisie van houers van spesiale notariële verbande na die *Cooper*-uitspraak deur middel van die Wet op Sekerheidstelling deur middel van Roerende Goed enigsins verbeter is, is dit jammer dat daar nog soveel onopgeloste vraagstukke na die inwerkingstelling van die wet bestaan. 'n Mens het nie 'n besonder profetiese insig nodig om te vermoed dat daar in die toekoms nog heelwat litigasie en moontlike wetswysigings gaan plaasvind nie. Die meeste van hierdie probleme kon ondervang gewees het deur weldeurdagte wetgewing.

CHRIS VAN DER WALT
GERRIT PIENAAR
CORNELIUS LOUW
Potchefstroomse Universiteit vir CHO

DEPRIVATION OF LIBERTY: THE APPLICABLE PRINCIPLES AND THE EXTENT OF LIABILITY

Introduction

The essential difference, at present, between wrongful and malicious deprivation of liberty lies not in the presence or absence of malice, but in the interposition of a judicial act between the defendant's act and the arrest which makes the restraint the act of the law and not the act of the defendant (*Newman v Prinsloo* 1973 1 SA 125 (W) 127H – 128A; *Tödt v Ipser* 1993 3 SA 577 (A) 585B – E; *Isaacs v Minister van Wet en Orde* 1993-11-11 case no 1347/89 (E) 46 47; McKerron *The law of delict* (1971) 260). If a judicial act is interposed, liability arises only if the defendant acted maliciously, while in the other instance intention in an attenuated form suffices. To compound matters, our courts have recently delivered conflicting judgments concerning the extent of liability in some of these instances.

This note arises out of the decisions in three recently-reported cases and one which is as yet unreported. In *Thandani v Minister of Law and Order* 1991 1 SA 702 (E) the South African Police unlawfully arrested the plaintiff and detained him for a short period before unlawfully handing him over to the Ciskei Police who detained him for a further two months in terms of Ciskeian security legislation. The plaintiff sued the South African Minister of Law and Order and was compensated for the entire period of his detention. The judgment was upheld on appeal on different grounds (*Minister of Law and Order v Thandani* 1989 2 SA 862 (A)). Unless indicated otherwise this note, however, refers to the decision in the court *a quo*.

Ebrahim v Minister of Law and Order 1993 2 SA 559 (T) (hereinafter referred to as *Ebrahim*) is a mirror image of the *Thandani* case. Unknown persons abducted the plaintiff from Swaziland and brought him to South Africa. The

police associated themselves with the abduction and plaintiff was later arrested and detained for five months. Immediately upon release he was arrested on a charge of high treason and was brought before a magistrate. Seventeen months later the plaintiff was found guilty and sentenced to a lengthy term of imprisonment, but a further two years later the Appellate Division set aside the sentence (*S v Ebrahim* 1991 2 SA 553 (A)). He remained in custody throughout the entire proceedings. After his release the plaintiff sued for compensation and the police were held liable in damages for the full period of incarceration.

There were no grounds for suspecting that the plaintiffs in *Mthimkhulu v Minister of Law and Order* 1993 3 SA 432 (E) had committed a crime, but they were arrested and detained for three days. Then charges were deliberately and falsely laid against them and they were taken to court according to the usual procedure whereupon the magistrate ordered that they be detained further for the purposes of trial. Four months later they were acquitted. They, too, succeeded in claiming damages from the police for the full period of detention, as well as for malicious prosecution.

The fourth case, *Isaacs v Minister van Wet en Orde supra*, stands in contrast to the previous cases. Isaacs had been arrested and detained at the police station for just over a day prior to being taken to court and thereafter for almost six months in terms of a number of court orders. The court found that although the policeman who arrested Isaacs had not been activated by malice, he none the less did not harbour a reasonable suspicion that Isaacs had committed a crime (16). It awarded damages for wrongful arrest and for the period of detention prior to Isaacs's first appearance in court, but not for the subsequent period. (On his second appearance in court, a week after his first, the charge was withdrawn against Isaacs. Isaacs went home, but returned later to face a different, but related charge, upon which he was then remanded (4). However, this break in the period of detention appears not to have influenced the court's reasoning.)

In the first two cases the courts reasoned along lines similar to the following: The plaintiff's personality right had been unlawfully infringed and the extended period of detention was clearly a factual result of that infringement. What remained to be determined was whether "the requisite causation was present to give rise to legal responsibility" (*Thandani supra* 705A 706F – G; *Ebrahim supra* 564G – H). The lawfulness or unlawfulness of the judicial process subsequent to arrest was not considered. In *Ebrahim* the court merely applied general principles applicable to legal causation in rejecting counsel's contention that the plaintiff's further detention, ordered first by the magistrate and later by the judge who passed sentence, did not constitute a *novus actus interveniens* (564H – 566H). In coming to this conclusion, the court referred, amongst other things, to the *Thandani* approach (706G – H):

> "Whether or not the plaintiff was lawfully detained in Ciskei seems to me to be irrelevant. The point is that his detention in Ciskei arose out of an unlawful arrest and detention in the Republic of South Africa followed by an unlawful handing over to the Ciskei Security Police, but for which handing over the plaintiff would not have been detained in Ciskei."

The *Mthimkhulu* decision did not expressly follow the legal causation approach, although it is susceptible to such an interpretation. In this case the court seemed more concerned with the extent of liability than with the extent of responsibility. In other words, its focus seemed to be on determining the extent of the period of unlawful arrest, which in turn affects the question of quantum. The

validity of the magistrate's order which extended the detention was therefore of vital importance. The court found that the lawfulness of the further detention depended upon the lawfulness of the prior arrest and that whatever occurred pursuant to the invalid arrest was also rendered unlawful (438C – G). (Since the lawfulness or unlawfulness of the magistrate's order was in issue, one assumes that if the court found that the subsequent detention was lawful the award would have been substantially less.)

In *Isaacs* the court was similarly concerned with determining the period of unlawful detention which flowed from the arrest, but, contrary to the *Mthimkhulu* case, the court found that the plaintiff's detention on the strength of the magistrate's order was lawful (21 – 32). Unlike the detention by the arresting officer, the magistrate's order did not follow automatically upon the arrest:

> "Die onregmatigheid van die aanvanklike inhegtenisneming is nie *per se* rede vir die hof om 'n aansoek om die beskuldigde se verdere aanhouding te weier nie. Bevind die hof dat die beskuldigde se verdere aanhouding wel vir doeleindes van sy verhoor nodig is, móét die hof die verdere aanhouding gelas. Dit volg dat dié bevinding die *causa* van die lasgewing is" (31).

And:

> "'Geldige judisiële proses' kan per definisie nie wederregtelik wees nie. Ek weet ook van geen regswerking waardeur 'n verweerder se skuld die regmatigheid van 'n judisiële handeling kan affekteer nie" (50).

The finding allowed the court to eschew the causation approach and to limit damages to detention which was in fact unlawful (51).

The relevant categories of *iniuria*

The underlying principles were set out in *Cole's Estate v Olivier* 1938 CPD 464 468:

> "I apprehend the law to be (1) that acts done in excess of and without judicial process give rise to an action for damages without requiring proof of malice, but (2) that acts done under the sanction of judicial process improperly obtained do not give rise to an action for damages unless done maliciously and without reasonable and probable cause."

For the purposes of this note three accepted categories of *iniuria* are relevant: wrongful deprivation of liberty (wrongful arrest or false imprisonment), malicious deprivation of liberty (malicious arrest and detention), and malicious prosecution. Deprivation of liberty amounts to an infringement of a person's bodily integrity, while malicious prosecution infringes a plaintiff's right to reputation (Neethling *Persoonlikheidsreg* (1991) 110 184).

Wrongful deprivation of liberty consists in the unjustifiable and intentional infliction of a restraint upon the plaintiff's personal freedom by the defendant or by a person for whose conduct the defendant is vicariously liable (*Newman v Prinsloo supra* 127H – 128A; *Minister of Justice v Hofmeyr* 1993 3 SA 131 (A); *Tödt v Ipser supra*; Neethling, Potgieter and Visser *Law of delict* (1994) 317). Intention has an attenuated meaning in these instances, namely the intention to arrest without necessarily knowing that the conduct is wrongful (*Hofmeyr supra* 154E – J; *Tödt supra* 586F – H). Malicious deprivation of liberty occurs where the defendant or a person for whose conduct the defendant is vicariously liable unjustifiably, intentionally and with improper motive (maliciously) causes a restraint upon a person's liberty to be inflicted through or under the guise of an act of law (*Newman v Prinsloo supra*; cf Neethling, Potgieter and

Visser *op cit* 318), or in circumstances where another person exercises an independent discretion (Fleming *The law of torts* (1987) 29). There is authority for limiting this type of case to judicial, as opposed to administrative, conduct (*Austin v Dowling* (1870) LR 5 CP 534 540), but this appears to be too restrictive. One is here concerned with the unlawful and intentional use of the ordinary legal process or the machinery of state to bring about the plaintiff's confinement (Neethling, Potgieter and Visser *op cit* 318). It concerns the wrongful use of the correct process, unlike cases involving unlawful arrest, where the proper substantive requirements or procedural formalities, that is, the correct legal processes, have not been adhered to (Brazier *Street on torts* (1988) 433; American Law Institute *Restatement of the law, Second, Torts* 2d (1965) vol 1 par 35 comment (a); Keeton (ed) *Prosser and Keeton on torts* (1984) 54). The distinction has important consequences, first, in respect of the wrongfulness question and, secondly, as regards the extent of liability. In *Isaacs* the court noted that in malicious deprivation-of-liberty cases it is not the unlawfulness of the deprivation which is at issue but the unlawfulness of the defendant's prior conduct, such as laying a false charge or a malicious arrest, which caused the deprivation. The defendant will be liable for all causally-related results of that unlawful conduct (such as a period of detention), regardless of whether the result itself was lawful or unlawful (50). However, in false imprisonment cases the deprivation of liberty needs to be wrongful and since the gist of the action is the mere imprisonment (*Halsbury's laws of England* (1985) vol 45 par 1325), no liability arises in respect of subsequent deprivation of liberty which does not form part of a continuum initiated by the original deprivation (51).

Where an arrest leads to the instigation of criminal proceedings, the plaintiff must have been found not guilty if the claim for malicious detention is to succeed (*Thompson v Minister of Police* 1971 1 SA 371 (E) 375A – D; Neethling *op cit* 119; Neethling, Potgieter and Visser *op cit* 318 – 319). This is also a requirement for a claim for malicious prosecution, which occurs when legal proceedings – criminal and civil (Neethling *op cit* 185; Heuston and Buckley *Salmond & Heuston on the law of torts* (1992) 404 – 407; Rogers *Winfield & Jolowicz on tort* (1989) 552; *Halsbury op cit* par 1349 – 1350) – are unjustifiably and intentionally (maliciously) instigated against a person in whose favour the proceedings ultimately terminate (Neethling, Potgieter and Visser *op cit* 329 – 331). In malicious prosecution cases deprivation of liberty is not an essential element.

The approach of common-law countries

Since the principles applicable in these cases are derived from English law, a review of how common-law countries deal with similar issues is not inappropriate. These countries recognise the wrong of false imprisonment, with principles similar to those in our law (Brazier *Street on torts* (1988) 27 – 33; *Halsbury op cit* par 1325; Heuston and Buckley *op cit* 128 ff). So, too, is malicious arrest recognised where someone procures the arrest of the plaintiff by means of judicial process, whether civil or criminal, maliciously and without reasonable cause (*Halsbury op cit* par 1375; Heuston and Buckley *op cit* 128). An arrest constitutes sufficient damage (*ibid*), for every arrest implies a confinement, and the tendency is to talk of a composite claim for arrest and imprisonment (see Heuston and Buckley *op cit* 406). However, confinement does not necessarily depend upon someone having arrested, or having intended to arrest, another.

If a person goes further and institutes legal proceedings against another, then an action for malicious prosecution may be instituted. This action arises where someone maliciously and without reasonable and probable cause initiates judicial proceedings against a person which later terminate in favour of that person and which result in damage to the latter's reputation, person, freedom or property (Brazier *op cit* 433, McGregor *McGregor on damages* (1988) par 1627; *Halsbury op cit* par 1340). The term "malicious prosecution" often also includes "malicious detention" (52 *Am Jur* 2d *Malicious prosecution* par 4), since the damage may evidence itself in the form of a deprivation of liberty. It may therefore overlap with a claim for malicious arrest. For a malicious prosecution action to succeed, the defendant must have been active in instigating the case against the plaintiff and it is sufficient to "set the prosecution in motion before a body which has jurisdiction to deal with it", by charging the plaintiff (Brazier *op cit* 434; Fleming *loc cit*; *Casey v Automatic Renault Canada Ltd* (1966) 54 DLR 2d 600 (SCC)). The policeman who first lays the charge is sufficiently instrumental (Rogers *op cit* 545).

Heuston and Buckley *op cit* 131 state:

> "No action for false imprisonment will lie against a person who has procured the imprisonment of another by obtaining against him a judgment or other judicial order of a court of justice, even though that judgment or order is erroneous, irregular, or without jurisdiction. The proper remedy in such a case is an action for malicious prosecution or other malicious abuse of legal process" (see also Fleming *loc cit*).

Heuston and Buckley *op cit* 132 also point out that

> "if the plaintiff has been wrongly arrested without warrant and taken before a magistrate, who remands him in custody, he must sue in respect of his imprisonment before the remand in an action for false imprisonment, but in respect of that which is subsequent to the remand in an action for malicious prosecution".

This view, based on a number of cases since *Lock v Ashton* (1848) 12 QB 871, is reiterated in the major common-law text books. Brazier *op cit* 32, for example, states that where a

> "defendant wrongfully gives the plaintiff into custody and then the magistrate remands the plaintiff the defendant is answerable in false imprisonment for damages only up to the time of the judicial remand" (see also Fleming *loc cit*; *Halsbury op cit* par 1326 1341).

Authority for this view comes from *Diamond v Minter* [1941] 1 KB 656 where the plaintiff was wrongly arrested and subsequently remanded in custody by a stipendiary magistrate. It was held that he had a remedy for false imprisonment for the initial arrest but not for the period of confinement subsequent to the remand. The reason for this is that a discretion is interposed between the defendant's act and the plaintiff's detention (Rogers *op cit* 68).

False imprisonment and malicious prosecution leading to imprisonment cannot exist on the same facts, but they can occur in sequence:

> "[T]he fact that they follow each other in successive events does not in any way merge the wrongs inflicted, or deprive the plaintiff of his right to recover damages for each offense" (32 *Am Jur* 2d *False imprisonment* par 4).

It is a complete defence in any of the above claims to contend that the plaintiff was found guilty in the previous criminal case or had lost the previous civil case (52 *Am Jur* 2d *Malicious prosecution* par 75). Rogers *op cit* 62, for example, states that "[a] lawful sentence of imprisonment passed by a court provides a complete defence to an action for false imprisonment . . ." (see also American Law Institute *Restatement of the law, Second, Torts* 2d vol 3 (1977) par 657).

Similarly, a claim for malicious arrest or malicious prosecution requires that the case must either have been discontinued or terminated in favour of the plaintiff (Brazier *op cit* 435–436; Rogers *op cit* 545–547; *Restatement op cit* par 658).

There may be a need in our law to take a closer look at an additional category which is recognised in common-law countries, namely, abuse of process, for there are instances where a wrong has been committed even though the proceedings ultimately showed that there was a reason for apprehending or charging the plaintiff. In England it "is an actionable wrong to institute certain kinds of legal proceedings against another person maliciously and without reasonable and probable cause" (Heuston and Buckley *op cit* 404). According to Rogers *op cit* 553 "[t]his lies where a legal process, not itself without foundation, is used for an improper, collateral purpose . . ." (see also Heuston and Buckley *op cit* 407; 32 *Am Jur* 2d *False imprisonment* par 3).

Abuse of procedure is wider than malicious prosecution. The latter is in fact a sub-category of the former (Heuston and Buckley *op cit* 413; Rogers *op cit* 68; but cf the position in America: 52 *Am Jur* 2d *Malicious prosecution* par 2) and its essential elements are straight-forward – the use of legal process with an ulterior purpose (Keeton *op cit* 898; *Huggins v Winn-Dixie Greenville Inc* 27 ALR 3d 1195 (1967)). The major advantage of claiming under this head is that, unlike with malicious deprivation of liberty and malicious prosecution cases, it is not necessary to prove that proceedings terminated in the plaintiff's favour. In *Speed Seal Products Ltd v Paddington* [1986] 1 All ER 91 the English Court of Appeal, having considered *dicta* in a number of previous cases, noted that it was the purpose for which the process had been used which rendered the conduct wrongful, for example, an ulterior motive or to achieve an improper advantage (97c–98d). It was therefore unnecessary, in abuse of process cases, to show that the proceedings had terminated in favour of the plaintiff (98e; see also Heuston and Buckley *op cit* 413). The *Restatement op cit* par 682 sums up the position:

> "The gravamen of the misconduct for which the liability stated in this Section is imposed is not the wrongful procurement of legal process or the wrongful initiation of criminal or civil proceedings; it is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish. Therefore, it is immaterial that the process was properly issued, that it was obtained in the course of proceedings that were brought with probable cause and for a proper purpose, or even that the proceedings terminated in favour of the person instituting or initiating them. The subsequent misuse of the process, though properly obtained, constitutes the misconduct for which the liability is imposed . . ."

And Keeton *op cit* 897 points out:

> "Abuse of process differs from malicious prosecution in that the gist of the tort is not commencing an action or causing process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish. The purpose for which the process is used, once it is issued, is the only thing of importance."

Examples of improper motive would be to extort a debt, to attach property to coerce settlement of a suit, or to institute any action "for an end other than that of the proceeding itself" (*idem* 898). Thus if a policeman prosecutes an innocent plaintiff knowing that there are no reasonable grounds to do so, it is malicious prosecution; if he prosecutes him with such grounds in order to cover up prior improper action, then it is abuse of process.

A reassessment of the cases under review

If one applies the principles set out in the previous two rubrics to the facts of the cases under review, it seems that one would not necessarily come to similar conclusions, primarily because one would maintain the distinction between false imprisonment and malicious imprisonment (including malicious prosecution).

In *Thandani* the result would probably have been the same, but for different reasons. Two lines of argument could be used. First, damages could be awarded for false imprisonment for the period up to the purported extradition and also for malicious imprisonment, the police having procured the plaintiff's confinement in the Ciskei. It does not matter that there was no judicial act leading to the confinement, it is submitted, for the deprivation of liberty occurred as a result of someone else's exercise of an independent discretion. The legality of the detention in the Ciskei is also of no import, and even if it were, such a defence would not hold, since the Ciskei police took the plaintiff into custody using unlawful means (*S v Ebrahim supra*). It also does not matter that the detention was not in terms of a court order, for the defendant is liable for all the causally-related results of the malicious imprisonment (*Isaacs supra* 50). The second rationale extends the causation argument to the initial arrest, which must be considered to have been malicious, given that the arresting officer knew that his conduct was unlawful, that Thandani would be detained in the Ciskei and that proper extradition procedures were not followed (the AD judgment in *Thandani supra* 871E). According to the second rationale, therefore, damages would be awarded for all the consequences of the initial malicious arrest. The only point that militates against this approach is the view noted earlier that wrongful arrest and malicious arrest cannot exist on the same facts, but that statement refers to instances where there is an interposition of a judicial act between the defendant's act and the arrest. Nothing in our law prohibits a second distinguishing feature in cases where there is no such interposition, namely, the presence or absence of malice. Where no judicial act is involved, it should be possible for the actions to overlap, giving the plaintiff the right to exercise a preference.

Similar reasoning would apply to the claims in *Mthimkhulu*. The plaintiffs would receive compensation for false imprisonment up to the point of being charged in court; for malicious prosecution (including damages for malicious detention), because the policemen knew that they had no grounds for laying the charge (see comments in *Isaacs*'s case *supra* 23); or possibly for abuse of process (including damages for malicious detention), if it can be proved that they laid the charge in an attempt to give substance to their unlawful conduct in arresting the plaintiffs.

However, the result in *Ebrahim*'s case would have been different. The claim for false imprisonment would have succeeded for the period of detention under the security legislation. The only other award of damages could have been for abuse of process, but, unlike the *Mthimkhulu* case, the facts as set out in the report do not show a clear ulterior motive. The court proceedings appear to have been instituted unlawfully but not maliciously. On these principles, therefore, Ebrahim's claim would have been partially successful and he would not have received compensation for the court-ordered deprivation of liberty.

The result in *Isaacs* would have been no different.

The causation approach

In three of the cases, however, our courts followed different principles to those outlined above and the discussion thusfar has not dealt with the essence of those judgments, the causation issue. Interestingly, the traditional formulation of the criteria for liability under the *actio iniuriarum* fails to list causation as an element, stating merely that an *iniuria* consists of the wrongful and intentional infringement of a personality right (*Rex v Umfaan* 1908 TS 62 66; *Delange v Costa* 1989 2 SA 857 (A) 861C – F). However, this does not mean that causation is not an element. Being a delict, causation is implicit in *iniuria*: the defendant's conduct must have caused an infringement to the plaintiff's personality interest, in which case the damage flows naturally. Is it therefore correct to say that, since the subsequent further detention was a factual result of the wrongful arrest, the rules relating to legal causation should determine whether the damage was too remote? I suggest that for a conclusion to be sound, it should withstand alternative lines of reasoning, for whether one follows, for example, an unlawfulness approach or one based on causation, each is an acceptable method of expressing a judicial opinion. Causation rules are therefore relevant and since there appears to be a conflict, attempts should be made to reconcile the differences.

In each of the cases under review subsequent conduct led to the further infringement of the plaintiffs' interests. And there was a clear factual link between the two sets of conduct. However, since we are dealing with an ulterior harm-type situation, the flexible criterion for assessing legal causation as laid down in *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A) 701C – F needs to be applied. In *Thandani* the situation satisfied almost every recognised test: the court found the result to be a direct consequence, reasonably foreseeable and an intended consequence (705E). In *Ebrahim* the court found that the further detentions were foreseeable as likely consequences of the wrong and that such detentions therefore did not break the chain of causation (566B – C). In other words, there was no *nova causa interveniens*. In *Mthimkhulu* the further detention of the plaintiffs in terms of the Criminal Procedure Act 51 of 1977 was also held to have been "foreseeable and intended" (438G). All three courts therefore enquired into the presence of legal causation.

The essence of the *Isaacs* approach is summed up in the court's interpretation that the effect of the Appellate Division judgment in *Thandani* is that compensation for deprivation of liberty rests on two grounds (40):

> "(i) 'n bloot onregmatige (sonder onregmatigheidsbewussyn) daad wat onregmatige aanhouding veroorsaak; of
>
> (ii) 'n kwaadwillige (met onregmatigheidsbewussyn) onregmatige daad wat aanhouding veroorsaak."

As a result, the *Isaacs* judgment regarded wrongful deprivation of liberty as a special delictual species which does not render a defendant liable beyond its immediate consequences (unlike malicious deprivation of liberty (50)):

> "Bloot onregmatige vryheidsberowing daarenteen, is 'n kontinuum wat met die onregmatige opsluiting begin en voortduur totdat óf die aanhouding óf die onregmatigheid van die aanhouding beëindig word. Onregmatige vryheidsberowing word volkome deur die onregmatigheid van die aanhouding begrens . . . Onregmatige vryheidsberowing – soos die benaming aandui – is dus beperk tot aanhouding wat inderdaad onregmatig is . . . Aangesien eiser op die hekkie van onregmatigheid struikel, is dit nie vir my nodig om kousaliteit te oorweeg nie" (51).

However, the last statement is a red herring. Legal causation also serves to "begrens" and "beperk" and the criteria need not be different from those used in the wrongfulness enquiry. In fact, earlier in its judgment the court did address causation-type issues, without expressly saying so. It found that while the *causa* for the first, shorter, period of detention was the arrest (29), the subsequent detention did not automatically follow from the arrest, since the continued detention is based on the view that it is necessary for the purposes of the trial, not the unlawfulness of the original arrest and detention (31). The court's finding that the magistrate's order did not flow naturally from the initial arrest could equally have been couched in legal causation terms, for example, that the magistrate's order was a *nova causa* or, simply, that the resultant detention was too remote. The different approaches are therefore reconcilable.

American authorities apparently differ on the issue of whether the conduct of a magistrate or other officer of the law is a natural and probable consequence of the original unlawful act. Some cases say the arresting officer is liable only up to the time of handing over; others say one must look to continuity in time and circumstance and determine whether there was one continuous unlawful arrest (32 *Am Jur* 2d *False imprisonment* par 111). Similarly, in English law a "continuation by a judicial officer of an imprisonment initiated by the defendant . . . is too remote", because the independent judicial discretion relieves the defendant of liability for further damage (McGregor *op cit* par 1622).

It is suggested that a combination of the English and American approaches provides a satisfactory solution to the legal causation issue, which, in turn, is compatible with the principles applicable to the various specific *iniuriae* outlined above. One should start by presuming subsequent independent conduct to be too remote. However, liability should arise if the subsequent conduct can be classified as an integral part of the initial *iniuria* (in which case it could possibly be said to amount to a continuous delict, for example, an arrest and a detention) or, if not, if that conduct was wrongful and independently attributable to the police (in which case separate, additional, liability arises). Where the conduct was a continuation of the initial *iniuria*, the legality or otherwise of the subsequent conduct is not an issue, since it is tainted by the initial wrongful conduct. In *Thandani*, for example, both criteria were satisfied. Although the purported extradition amounted to a separate delict, the whole purpose of the initial arrest was to secure the detention in the Ciskei: it was the intended consequence of both sets of wrongful conduct. Intended consequences, the court said, can never be too remote (705F – G) and although the statement is subject to criticism (Neethling and Potgieter 1991 *TSAR* 496; McGregor *op cit* par 157), the proposition has merit in this type of case. It links the independent subsequent conduct to the initial wrongful act and courts should lean towards holding defendants liable in such instances (McGregor *loc cit*). In *Thandani*'s case all the approaches produce the same result.

In those instances where the subsequent conduct is not closely connected to the initial deprivation of liberty, the outcome should be different, primarily because the subsequent conduct is not the natural result of the initial *iniuria*. In *Ebrahim*, for example, the initial purpose was to arrest and detain the plaintiff. The subsequent court-ordered detentions, although factually connected, arose out of charges laid after investigation and presumably after the exercise of the attorney-general's discretion. The initial abduction was not perpetrated with the view to bringing the defendant to trial, even though, as the court found

(566B – C), such a consequence was foreseeable. The immediate purpose appears to have been the arrest and detention in terms of the security legislation. It is suggested, therefore, that despite being foreseeable, the link was not close enough to render the minister liable for the full period of detention. Damages should have been awarded for the shorter period only.

In *Mthimkhulu* and *Isaacs* the initiation of the court proceedings was also independent from the arrests. The further detention was not part of the unlawful detention. In *Mthimkhulu* a separate delict, malicious deprivation of liberty, had been committed, the policemen having maliciously and without justification procured the plaintiffs' detention by the appropriate authority. Damages for wrongful arrest could not be awarded for the extended period, only for malicious arrest. In *Isaacs* the prosecution had not been malicious and because the court proceedings were independent from the initial arrest, the subsequent detention was too remote.

It is suggested, therefore, that in the three last-mentioned cases the correct application of the causation approach would render the police liable in damages for wrongful arrest for the shorter period only. Additional damages would depend upon whether other delicts had also been committed. In these instances the test was satisfied in *Mthimkhulu* only.

Conclusion

One is tempted to blame the present unsatisfactory state of affairs on the wholesale incorporation of foreign principles into our law. Perhaps this is so, but this does not do away with the fact that these principles are now so well entrenched that they cannot be ignored. Unfortunately, the *Isaacs* case apart, recent cases have overlooked the important distinction between wrongful and malicious deprivation of liberty. At the same time the approach followed in those judgments is neither wrong nor irrelevant, although the conclusions may have to be adapted to comply with general principles.

There is no need for drastic judicial or legislative innovation, but some modernisation is required. First, it is suggested that the interposition of a legal act or an independent discretion between the arrest and detention should not be the only feature distinguishing wrongful and malicious deprivation of liberty: the presence of malice should also serve that purpose. Secondly, although courts should not be obliged to use the criterion where other approaches serve their purpose, legal causation should play a role in limiting liability in both categories of wrong. Fortunately, we are no longer restricted to the standard tests of foreseeability, direct consequences and *novus actus interveniens* in attempting to reach a satisfactory result. These tests are inadequate in these instances. Instead, an "intimate connection" test, which emphasises continuity in time and circumstance is suggested. This is similar to, but wider than, the approach followed in *Isaacs* and has the advantage of not treating wrongful deprivation-of-liberty cases differently from other *iniuriae*.

Many will disagree with the approach suggested in this note, for some plaintiffs, like Isaacs, will be unable to recover compensation even though they suffer violations of a fundamental right which should be jealously guarded. One is faced with the law, however, and if the suggested approach does not conform with the current values of our society, then legislative intervention is the only remedy.

JR MIDGLEY
Rhodes University

ESTOPPEL EN DIE VERKRYGING VAN EIENDOMSREG IN ROERENDE EIENDOM

1 Algemeen

Verskillende skrywers het hulle al uitgelaat oor die vraag of die geslaagde opwerping van estoppel teen 'n eienaar se *rei vindicatio* tot gevolg het dat eiendomsreg in 'n roerende saak voortaan in die estoppelopwerper setel. Die standpunt wat ek in hierdie bydrae inneem, is dat sodanige eiendomsverkryging in die algemeen wel erken behoort te word. Die vestiging van eiendomsreg hoef nie te geskied ingevolge nuwe beginsels wat eers deur byvoorbeeld wetgewing aanvaar moet word nie (sien bv die voorgestelde *bona fide*-verkryging van eiendom – Louw "Estoppel en die *rei vindicatio*" 1975 *THRHR* 218). 'n Meer gevorderde en logiese interpretasie en toepassing van die beginsels onderliggend aan die verweer van estoppel self blyk voldoende te wees.

2 Sekere bestaande standpunte

'n Aantal skrywers het al die standpunt gestel dat 'n geslaagde beroep op estoppel tot gevolg het dat die estoppelopwerper eienaar van die betrokke (roerende) saak word (bv Van Heerden "Estoppel: 'n wyse van eiendomsverkryging?" 1970 *THRHR* 21 met 'n beroep op *West v Pollak and Freemantle* 1937 TPD 64; Scholtens 1971 *Annual Survey* 201; Van der Merwe en Van Huyssteen "A perspective on the elements of estoppel by representation" 1988 *TSAR* 571; Van der Walt "Die beskerming van die *bona fide*-besitsverkryger: 'n vergelyking tussen die Suid-Afrikaanse en Nederlandse reg" in Gauntlett (red) *JC Noster: 'n Feesbundel* (1979) 96; Van der Merwe *Sakereg* (1989) 373; Louw 1975 *THRHR* 218 wat oa verwys na *Johaadien v Stanley Porter (Paarl) (Pty) Ltd* 1970 1 SA 394 (A) 409). Aan die ander kant is daar skrywers en gesag wat volhou dat estoppel in die gevalle onder bespreking slegs die gevolg het om die eienaar se *rei vindicatio* uit te sluit en dat die estoppelopwerper, die estoppelontkenner en moontlike derdes se regposisie nie verder geraak word nie (bv Rabie *The law of estoppel in South Africa* (1992) 15; Van der Merwe 1964 *THRHR* 301; Sonnekus 1993 *TSAR* 355; *Barclays Western Bank Ltd v Fourie* 1979 4 SA 157 (K)).

3 Wat is die uitwerking van estoppel?

Daar word in die algemeen aanvaar dat die uitwerking van 'n geslaagde beroep op estoppel is dat die verwekte skyn in beginsel as werklikheid tussen die partye tot die estoppel gehandhaaf word. 'n Mens kan die uitwerking negatief formuleer (die estoppelontkenner word verhinder om hom op die werklikheid te beroep) of meer positief uitdruk (die estoppelopwerper verkry sekere regte of bevoegdhede weens die ander party se voorstelling). Oor die negatiewe formulering merk Lubbe 1991 *TSAR* 18 op:

> "Hierdie formulering behels 'n fiksie en is onbevredigend vanweë die regsonsekerheid wat dit inhou. Dit is byvoorbeeld nie duidelik na watter mate, tussen watter partye en vir watter doeleindes die skyn gehandhaaf moet word nie."

Na my mening behoort ons reg as uitgangspunt te aanvaar dat die opwerping van estoppel vir alle doeleindes hoegenaamd regtens beteken dat die betrokke skyn as werklikheid gehandhaaf word. Dat so 'n beskouing (behoudens moontlike uitsonderinge in geregverdigde gevalle) korrek is, blyk reeds uit die algemene vereiste dat die handhawing van estoppel nie 'n regstrydige gevolg moet meebring nie (sien bv Rabie 105 ev; *Trust Bank Bpk v Eksteen* 1964 3 SA 402 (A); *Strydom v Die Land- en Landboubank van SA* 1972 1 SA 801 (A)). Deur hierdie vereiste word immers verseker dat die handhawing van estoppel vir die reg houdbaar is en byvoorbeeld nie onwettige of onaanvaarbare regsgevolge het nie. Waarom dan nie die knoop deurhak en die voorstelling vir alle doeleindes as waarheid postuleer nie? Die feit dat 'n mens weet dat die skyn deur die voorstelling verwek volgens ander kriteria inderdaad nie die werklikheid is nie, kan geen verskil maak nie aangesien regsreëls weens bepaalde beginsels van die bewysreg wel in sekere gevalle toegepas word op dit wat bloot vir doeleindes van die regsproses as feite of werklikheid aanvaar word. Sien byvoorbeeld die volgende opmerking in *South British Insurance Co Ltd v Glisson* 1963 1 SA 289 (D) 297:

> "There is nothing remarkable in the Court's deciding a case on facts which, although deemed to be true for the purpose of the case, are known not to be true in reality. It is inherent in the principle of estoppel, for example, that the Court will decide a case as if a certain state of affairs existed even if it is clear that it does not in fact exist."

Aanvaar 'n mens eenmaal dat 'n fiksie tussen twee partye tot werklikheid verhef word, is dit nie duidelik waarom dit nie beteken dat ook eiendomsreg geag word na 'n estoppelopwerper oor te gegaan het en waarom derdes nie ook die posisie as sodanig kan aanvaar nie.

Aan die ander kant hou byvoorbeeld Sonnekus 1993 *TSAR* 355 vas aan die idee dat "[e]stoppel as verweer . . . geen regsveranderende gevolge [het] nie". Dit is egter onrealisties om aan te neem dat die handhawing van estoppel hoogstens beteken dat 'n mens in 'n skadu-wêreld van onwaarheid beweeg. Waar 'n persoon weens estoppel byvoorbeeld nie mag ontken dat sy verteenwoordiger (of "verteenwoordiger") volmag gehad het om hom te bind nie, word aanvaar dat eersgenoemde gebonde is deur die regshandelinge wat in sy naam aangegaan is. Hier is inderdaad sprake van "regsveranderende" gevolge wat in beginsel ook ten aansien van ander regsubjekte geld en die vraag ontstaan waarom die kwessie van moontlike eiendomsverkryging van roerende sake 'n uitsondering moet wees.

4 Moontlike probleme by eiendomsverlies en -verkryging deur die gebruik van estoppel

Rabie 15 – 16 bespreek sekere probleme indien aanvaar sou word dat waar X 'n suksesvolle estoppel teen Y se *rei vindicatio* opgewerp het, X en sy opvolgers in titel as eienaars beskou moet word:

(a) Hy verwys eerstens na die sterk beskerming wat eiendomsreg tradisioneel in Suid-Afrika geniet (dit is nie duidelik of a 28 van die Grondwet van die Republiek van Suid-Afrika 200 van 1993 wat die reg om regte in eiendom te verkry as fundamentele mensereg beskou, enige verskil aan hierdie tradisionele siening maak nie). Hoe sterk eiendomsreg in die algemeen ook al beskerm mag word, dit is billik en volkome regverdigbaar dat 'n eienaar wat byvoorbeeld op 'n skuldige wyse te kenne gegee het dat 'n ander 'n vervreemdingsbevoegheid ten aansien van die betrokke eiendom het, in beginsel sy eiendomsreg deur die opwerping van estoppel behoort te verloor.

(b) Voorts vra Rabie 16, met verwysing na die reël in die Romeins-Hollandse reg dat 'n eienaar in bepaalde gevalle sy eiendom kon terugkry as hy bereid sou wees om die *bona fide*-koper daarvan se uitgawes te vergoed (sien bv *Morum Bros Ltd v Nepgen* 1916 CPD 392; *Pretorius v Loudon* 1985 3 SA 845 (A) 862), of 'n mens nie die eienaar teen wie estoppel geslaag het, se posisie moet verlig deur aan hom so 'n reg te verleen nie. In die algemeen is hierdie 'n sinvolle kwalifikasie van die beginsel dat die eienaar sy eiendomsreg weens estoppel kwyt is. Juridies sou dit beteken dat daar 'n *voorwaardelike* verlies van eiendomsreg is totdat die gewese eienaar binne 'n redelike tyd sekerheid stel om die *bona fide*-verkryger van die betrokke eiendom se redelike uitgawes (en soms sy verlies van wins?) te vergoed.

(c) Rabie 16 wys ook op die onbillikheid wat kan bestaan waar X, die eienaar van 'n saak, deur sy nalatige optrede 'n bedrieër Y in staat gestel het om die saak aan Z te vervreem teen byvoorbeeld net helfte van die waarde van die saak. Moet X nou weens estoppel die *volle waarde* van sy eiendom aan Z afstaan? Word Z dan nie in so 'n geval op onbillike wyse ten koste van X verryk nie? 'n Mens kan dalk hierdie probleme oplos deur te aanvaar dat waar X vir Y op 'n *skuldige* wyse in staat gestel het om Z te mislei om die eiendom te koop (sien bv *Kajee v HM Gough (Edms) Bpk* 1971 3 SA 99 (N)), X net homself vir sy skade te blameer het. Waar estoppel egter nie op X se skuld gebaseer is nie (sien bv *Johaadien v Stanley Porter (Paarl) (Pty) Ltd supra* 409), kan 'n mens oorweeg om die probleem ook op te los soos voorgestel in (b) hierbo. Dit sou beteken dat Z net voorwaardelik eienaar word omdat X die saak kan terugkry op die vermelde voorwaardes. Of dalk kan die posisie omgekeer word: Z se eiendomsreg word erken maar daar is 'n plig op hom om die verskil tussen sy redelike uitgawes en die waarde van die saak aan X te betaal.

5 Moontlike probleme as eiendomsverkryging deur estoppel nie erken word nie

Waar Z geslaag het om deur estoppel X se *rei vindicatio* af te weer maar nie as eienaar beskou word nie, ontstaan die vraag watter reg(te) Z ten aansien van die eiendom het. Moet die onhoudbaarheid van sy posisie verlig word deur hom as 'n tipe *bona fide possessor* te beskou sodat hy kan eis ten aansien van byvoorbeeld beskadiging van die betrokke saak? Wat is Z se posisie by onvrywillige besitsverlies? En sit Z nou met 'n saak wat hy nie aan enigiemand kan vervreem nie aangesien X met sy *rei vindicatio* teen die nuwe besitter kan optree? Hierdie vrae dui op moontlike absurde gevolge as Z se eiendomsreg ontken word en bied op sigself steun vir die standpunt dat die geslaagde opwerping van estoppel materieelregtelik tot eiendomsverlies en -verkryging lei.

Die volgende voorbeeld kan ook oorweeg word: gestel dat X deur sy nalatige optrede Y in staat stel om hom as eienaar van X se perd Kolbooi voor te doen. Hierna vervreem Y Kolbooi aan Z. X se daaropvolgende *rei vindicatio* teen Z word afgewys. Vervolgens rig Kolbooi skade van R20 000 aan ten aansien van eiendom wat aan P behoort in omstandighede waar die *actio de pauperie* tot P se beskikking is (sien Neethling, Potgieter en Visser *Law of delict* (1994) 344). As X steeds die eienaar van Kolbooi is, moet P sy aksie teen hom instel en dit is ooglopend 'n onbillike oplossing van die probleem! En gestel die staat hef 'n nuwe tipe belasting op perde-eienaars. Is dit steeds X wat aanspreeklik sou wees en nie Z nie? In die algemeen sal die aanvaarding van die beginsel dat

estoppel tot eiendomsverlies lei, minder anomaliese gevolge hê as die teenoorgestelde standpunt dat partye se regsposisie wesenlik dieselfde bly.

6 Voorgestelde oplossing van die betrokke probleem

Soos hierbo gemeld is, behoort in die algemeen aanvaar te word dat die geslaagde opwerping van estoppel (of in sekere gevalle moontlik selfs die blote bestaan van feite wat die opwerping van estoppel tussen partye sou laat slaag) beteken dat die betrokke voorstelling vir alle doeleindes regtens as waarheid gehandhaaf en aanvaar word. Uiteraard kan daar sekere kwalifikasies in bepaalde omstandighede gestel word ten einde moontlike onbillike of onwenslike gevolge te vermy. In die algemeen beteken dit dus dat eiendomsverkryging en -verlies die normale gevolg van die aanwending van estoppel sou wees. Waar X sy eiendomsreg weens Y se opwerping van estoppel verloor het, sou dit ook beteken dat Z wat die eiendom van laasgenoemde verkry, nie die vereistes van estoppel moet bevredig alvorens hy as reghebbende erken word nie. Z *se bona fides* is in so 'n geval glad nie eers ter sprake nie.

Na my mening maak die algemene beginsels van estoppel soos hulle in die Suid-Afrikaanse reg toegepas word, voldoende voorsiening vir hierdie meer gevorderde toepassing van die betrokke remedie. Dit is daarom nie noodsaaklik om eers wetgewing aan te neem om so 'n verandering deurgevoer te kry nie. Die blote feit dat estoppel gebruik word om 'n skyn of voorstelling in bepaalde gevalle en vir bepaalde doeleindes tot waarheid te verhef, impliseer nie dat estoppel slegs negatiewe werking het (deurdat die persoon wat die skyn verwek het, verhinder word om die valsheid van die voorstelling te ontken nie), of slegs beperkte positiewe werking het (deurdat die skyn slegs tussen die wanvoorsteller en die misleide as waarheid aanvaar word nie). Daar is in beginsel geen rede waarom 'n geslaagde beroep op estoppel nie kan beteken dat die voorstelling (wat die plek van feite inneem) inderdaad lei tot byvoorbeeld eiendomsoordrag, die bestaan van 'n werklike kontrak (vir sover estoppel hier nog 'n rol te speel het), die bestaan van werklike volmag, ensovoorts nie. Miskien kan 'n mens dit so formuleer dat die verweer van estoppel nie 'n remedie is wat die *reg* direk beïnvloed nie, maar dat dit die *feite*, waarop die reg toegepas word, help bepaal en sodoende regsveranderende gevolge meebring.

PJ VISSER
Universiteit van Pretoria

COMMENT ON THE MAGISTRATES' COURTS AMENDMENT ACT 120 OF 1993

Introduction

The importance to the community of a specialised efficient family court system with comprehensive jurisdiction in all matters pertaining to the family, cannot be over-estimated. With society in transition, with changing social

conditions, attitudes and customs, increasing pressure is being brought to bear, not only for reform in substantive family law, but also for reform in its administration.

It was this need for reform in the structure and functioning of the courts which led fifteen years ago to the establishment of a commission of inquiry (Commission of Inquiry into the Structure and Functioning of the Courts in South Africa *GG* 6761 of 1979 GN 286 of 1979) under the chairmanship of Hoexter JA (hereinafter the Hoexter Commission). In the fifth report (Report no RP 78 of 1983), the Hoexter Commission criticised the adversarial divorce procedure which, in its view, hampered the process of adjudication in divorce. In undefended divorce actions, the commission was of the view that a superficial and unsatisfactory approach was taken, which failed to investigate fully either whether the marriage had irretrievably broken down or whether adequate attention had been paid to the arrangements made for the custody and/or maintenance of minor children of the divorce.

The Hoexter Commission therefore recommended the establishment of a specialised family court at regional court level, but whose judicial officers were independent of the public service (s 9 2 part VII ch 9). In making these recommendations, the Hoexter Commission made detailed reference to the doctoral thesis of Schäfer titled "The concept of family courts in South Africa" (University of Natal 1981). Schäfer proposed a family court with the status of a superior court and attached to the supreme court (333). However, he suggested that attorneys should have right of appearance in this court. The judicial officers would be judges specialising in family law matters. Bodies such as the National Council for Marriage and Family Life (FAMSA) would perform the counselling services of the court.

In marked contrast to the proposals made by Schäfer, the new Magistrates' Courts Amendment Act 120 of 1993 (hereinafter the act) purports to establish a forum for the adjudication of divorce actions within the structure of the civil lower courts (s 2). Family courts are to be established to adjudicate divorce actions as defined in the Divorce Act 70 of 1979 (s 1). The proposal for the establishment of the family courts emanates largely from comments received on the Divorce Amendment Bill 1992, which proposed, first of all, the abolition of Black divorce courts, as established under section 10 of the Black Administration Act 38 of 1927, and secondly, the abolition of the jurisdiction of the supreme court in all other divorce actions. The act proposes the amendment of the Black Administration Act (s 12) by the deletion of the words "magistrate's court" wherever it occurs and the insertion of the words "family court". Any divorce court established under section 10 of the Black Administration Act shall be deemed to constitute a family division. The memorandum to the act states that "the principle that divorce actions should be adjudicated in the lower courts enjoys the support of a wide spectrum of interested parties". The reasons given in the memorandum are first, that the work load of the supreme court will be significantly relieved and that accessibility to the courts will be increased as a result. Secondly, the memorandum proposes that "experienced and competent" civil magistrates, who at present aspire to appointment as regional magistrates, should be retained for the civil administration of justice: a more proficient civil adjudication is envisaged, ranking with the regional courts' criminal jurisdiction. Provision is therefore made for the creation and appointment of "family magistrates", who are required to be in possession of an LLB degree (s 9). An

advisory board is proposed to advise the Minister of Justice from time to time about the suitability of persons for appointment as family magistrates (s 8). Legal practitioners qualify for appointment, but only in an acting capacity (*ibid*). This is in marked contrast to the proposals made by the Hoexter Commission, which stressed that family court judicial officers should be independent of the public service (s 9 2 ch 9 part VII).

The position of the family advocates in relation to the family court

It is important, when assessing this new act and the comments of the Hoexter Commission, to stress the changes affected since then by the implementation of the Mediation in Certain Divorce Matters Act 24 of 1987. This act regulates the appointment of persons as family advocates. Such persons must be suitable for appointment by reason of their involvement in family matters (s 2). Generally, persons appointed as family advocates are appointed on a full-time basis as public servants. Since 1991, however, it has been possible for persons who are not members of the public service to be appointed for the duration of a specific proceeding or more than one proceeding (Mediation in Certain Divorce Matters Amendment Act 121 of 1991).

The main function of the family advocate is to safeguard the interests of the minor or dependent childen of divorce and to assist the court in discharging its duty in terms of the Divorce Act 70 of 1979 (s 6). Accordingly, the family advocate may institute inquiries where minor children are involved or applications for variations in custody or guardianship orders are heard. The court may order an inquiry or either of the parties may request one (s 4(1) Act 24 of 1987). The family advocate also has the power to apply to court at any stage of the proceedings where s/he deems it to be in the interests of any minor child for permission to hold an inquiry. Every copy of a deed of settlement involving children has to be given to the family advocate to ensure that the agreement is in the best interests of the children. The regulations to Act 24 of 1987 require that a prescribed form be completed by either or both of the parties in every case where children are involved. This form must indicate where the children are presently living, who is looking after them, and what arrangements have been made or proposed in respect of the custody of or access to and guardianship of the children (see Annexure A or B of the regulations to Act 24 of 1987).

If the family advocate decides to institute an inquiry, it will be carried out in a fairly informal way with reference to all relevant details and information (reg 6). After a full investigation, the family advocate submits a report and recommendations to court (reg 5(3)). The court is not obliged to follow these recommendations: the institution of the family advocate was not designed to usurp the authority or role of the supreme court in any way. However, the family advocates have continued to gain increasing respect as their recommendations are relied on by overburdened supreme courts. The specialised nature of their work ensures that full-time family advocates are able to develop experience and expertise in this field over a relatively short space of time. They are furthermore assisted by family counsellors who have an important inter-disciplinary role to play between the world of the lawyer and that of the social worker. The role of the family advocates therefore enables them not only to intervene where the court cannot, but also to gain access to information which judges often do not have at their disposal.

The Mediation in Certain Divorce Matters Act has now been amended by the insertion of a clause (s 1A) which states that its provisions are not applicable to divorce actions adjudicated in a family court established in terms of the act (120 of 1993), although the minister has the power to declare the provisions applicable in certain cases by notice in the *Government Gazette*. The family advocate does have the power to apply for suspension of proceedings in the family court and the referral of an action to the provincial or local division having jurisdiction, but generally the role of the family advocate in the family court would appear to be curtailed, which is not in accordance with the suggestions of the Hoexter Commission (s 9 8 2–3 s 9 9 part VII ch 9). The Hoexter Commission recommended the appointment of a "children's friend" or family advocate to protect the interests of minor and dependent children in the family court (s 9 8 3). The commission recommended further that, where the interests of minor children were at stake and the family advocate was of the opinion that the protection of the children's interests required it, the family advocate was to be given the power to arrange for legal representation of the children concerned at public expense.

It would be extremely unfortunate if, as a result of the new act, the work of the family advocate were to be confined to those matrimonial matters which are still heard in the supreme court. Persons unable to afford to litigate in the supreme court would then be denied the very valuable assistance and protection afforded by the family advocate in such matters.

Comparative legal criteria for a family court

In 1974, the Finer Committee in England set out certain criteria which in its opinion a family court should satisfy (Cmnd 5629, 1974). One of these was that the family court should organise its procedure, sittings and administrative services with a view to gaining the confidence and maximising the convenience of the citizens who appear before it. The proposals of the Finer Committee were not adopted at the time they were made, largely for financial reasons. However, it is interesting to note that the operation of the New Zealand family court system, which closely follows the recommendations of the Finer Committee, is now likely to be adopted in England as a result of the implementation of the Children Act 1989. In 1987, new proposals for a family court in England were made, based on the idea that the jurisdiction of such a court should include the present jurisdiction of the family division of the high court, the divorce county court, the family work of the county court and the civil jurisdiction of the juvenile courts. The most significant feature was that there should be a single family court office at which all process of a matter within the family jurisdiction should be issued, and at which as much as possible of the work within the family jurisdiction should be tried.

The proposed English family court is to provide information about and a source of referral to a local conciliation service. A family court welfare service is to be made available to all potential litigants in the family court for advice and appropriate referral. The service is to be easily accessible, both procedurally and geographically. The stages are to comprise the following:

(a) a family service office for advice and referral;

(b) a court welfare service for conciliation and report writing;

(c) a family registrar;

(d) referral to the high court, the county court and the first tier family court presided over by the family registrar, who is perceived to be pivotal to the whole system.

A family court has also been established in Australia. In marked contrast to the system proposed for South Africa, the family court of Australia is a superior court. In some respects it has inherent jurisdiction and as such it fulfils the important functions of a family court. It consists of a chief judge, a deputy chief judge and judge administrators. It is a precondition of the judge's appointment that s/he has been a judge of another court created by the Parliament or of a court of a state or has been enrolled as a legal practitioner of the high court or of the supreme court for not less than five years and by reason of his or her training, experience and personality is a suitable person to deal with matters of family law (s 22(2) of the Family Law Act 1975). Very detailed provision is made in the Family Law Act for the jurisdiction and procedure of this court and the appointment of registrars who are independent administrative officials, similar to the registrars of our own supreme court. The Australian family court makes provision for mediation: these conciliation procedures were introduced into the Australian court because the adversarial system was regarded as inadequate, expensive and inefficient (Voegli "Alternative dispute resolution in divorce conflicts" 1992 (July) *Civil Justice Quarterly* 287). The Family Law Act tries to encourage parties whose marriages or family lives are in difficulty to come and take advantage of the court's counselling facilities, regardless of whether proceedings are contemplated or not.

In New Zealand, likewise, the family court deals with all family matters and has its own specialist judges. As far as the custody of children is concerned, court appearances are intended as a last resort, to take place only after the parties have attempted to mediate. If an application is made for access to a child, mediation is usually compulsory before the matter is heard by a judge. The costs of mediation are met by the Department of Justice. A mediation conference is held if no initial agreement is reached. Both parties are able to discuss disputed issues with a family court to reach agreement. This conference is chaired by the judge and held at the family court and the general tenor of proceedings is more relaxed than on adversarial proceedings. Both parties attend and the lawyers of the parties may be present in an advisory rather than a representative capacity. If consensus is still not reached, then the matter proceeds to trial.

Conclusion

Three essential functions of a family court may be outlined: first, to resolve disputes whether arising from family breakdown or from the state's intervention in family life on behalf of the children; secondly, to assert a state interest in agreements between parties where, if the parties do not reach agreement, a court decision would be necessary; thirdly, to provide a vehicle for the enforcement of court orders, even those made by consent (British Agencies for Adoption and Fostering and Association of Directors of Social Services "Family justice – a structure for the family court" in Allen (ed) *The Report of the BAAF/ADSS Family Courts Working Party* (1986) 29–31). In performing these functions, a dual role for a family court would be ideal – as in Australia – with both a judicial and therapeutic component. Each may complement the other in the special context of a family court. To implement these functions fully, the family

court should not be limited in its jurisdiction and should be held in high regard by the public and profession. It is essential that the judicial officers appointed to this court be highly respected and recognised experts in family law. These factors require a court whose judicial officers and staff have developed special skills to equip them to handle these problems and facilitate the best form of agreement. With this in mind, the demand for greater informality in family matters must be tempered by the need for an expert and respected forum to administer the law in this regard.

BRIGITTE CLARK
Rhodes University

TO GET – OR NOT TO GET A *GET*?

1 Introduction

This note deals with the question whether a civil divorce court in South Africa could, and indeed should, grant an order compelling a party to a divorce action, where both spouses are of the Jewish faith, to obtain a so-called *get* from a Jewish ecclesiastical court before legally dissolving their marriage.

A *get* is a divorce bill employed by Jewish spouses to dissolve their marriage in accordance with their religious rites and customs (hereinafter referred to as a "religious divorce"). A Jewish husband or his agent is required to deliver the *get* to the Jewish wife under the supervision of the Jewish ecclesiastical court, also referred to as the Beth Din. The consequence of the delivery of the *get* is the rescission of the contractual obligations created by the marriage. (Bleich "Jewish divorce – judicial misconceptions and possible means of civil enforcement" 1984 *Connecticut LR* 256–257).

In South Africa there are two branches of Judaism, namely Orthodox Judaism and the Reform Movement. Adherents to Orthodox Judaism do not recognise a divorce decree granted in terms of the Divorce Act 70 of 1979, as they require a religious divorce to be decreed. Although the Reform Movement abolished the religious divorce, spouses adhering to the Reform Movement often make use of it (see Warmflash "The New York approach to enforcing religious marriage contracts: from Avitzur to the *get* statute" 1984 *Brooklyn LR* 232).

If Jewish spouses are divorced secularly, without obtaining a religious divorce, the children fathered by the husband in a second marriage are regarded as legitimate (Segal "Enforcement of agreement to grant a *get* or Jewish ecclesiastical bill of divorce" 1988 *SALJ* 100–101; Fox and Krosnow "Secular solutions to obtaining a Jewish divorce" 1988 *Ill Bar J* 274). Should the wife remarry, her second marriage is regarded as adulterous, and the children born from such a marriage are regarded as illegitimate (*mamzers*). She is regarded as still being married to her first husband and is derogatorily referred to as an *agunah* (Segal

1988 *SALJ* 100 – 101; Fox and Krosnow 1988 *Ill Bar J* 274; Warmflash 1984 *Brooklyn LR* 234).

The practice has recently developed for one of the spouses to refuse to obtain a religious divorce in order to use this as a lever in secular divorce negotiations. In order to reach a settlement agreement, for example, a spouse would promise to grant the other spouse a *get* solely to obtain favourable property or custody rights in return. Jewish men seem to be in a better bargaining position here, as the wife fears being labelled an *agunah* should a religious divorce not be obtained. She could therefore accept a detrimental settlement in order to obtain a *get* (Segal 1988 *SALJ* 100 – 101; Fox and Krosnow 1988 *Ill Bar J* 274; Aiardo "*Avitzur v Avitzur*: New York Domestic Relations Law Sec 255. Civil response to a religious dilemma" 1984 *Albany LR* 140).

2 The *get* – a comparative study

2 1 Israel

In Israel, the rabbinical courts have jurisdiction over marriage and divorce matters (Rabbinical Courts Jurisdiction [Marriage and Divorce] Law of 1953 s 6). It would appear that although the execution of the *get* may be ordered through imprisonment or extreme maintenance orders (Lew "Jewish divorces" 1973 *New LJ* 829), only a few people have ever made use of this procedure – it has therefore not had the required effect.

The Talmud states that a man marries a woman according to Rabbinical precepts and that the Rabbis have the authority to annul such a marriage should the man contravene such precepts (Shiloh "Marriage and divorce in Israel" 1970 *Israel LR* 497). A proposal has been made that a *takanah* (bill) should be enacted by the Rabbinate in Israel to provide for marriages to be annulled retrospectively in terms of Jewish law (Biale *Woman and Jewish law* (1984) 98). Should this proposal be universally accepted, it could abolish the requirement of the *get* and thus provide a solution for Jewish couples in general (*idem* 98).

2 2 The United States of America

According to the American Constitution, church and state are separate (the First and the Fourteenth Amendments to the Constitution; Glenn "Where heavens meet: the compelling of religious divorces" 1980 *AJCL* 5). Both state and federal governments are prohibited from passing laws which aid one religion, aid all religions or prefer one religion to another (*Everson v Board of Education* (1946) 330 US 1). During the 1950s Lieberman proposed that a clause, called the conservative *ketubah*, be added to a prenuptial agreement, stating that a husband and wife agree to abide by the decision of the Beth Din in any matter (Biale 64). In most divorce cases the courts ordered that a *ketubah* must be honoured as it was a civil matter and not a religious one.

In *Avitzur v Avitzur* (1983) 58 NY 2d 108, 446 NE 2d 136, 459 NYS 2d 572, the parties to a divorce matter entered into a conservative *ketubah* as part of their marriage contract at the time of their marriage. The court held that the parties entered into a contract when they signed the *ketubah*, which formed the basis of their marriage. A conservative *ketubah* establishes an antenuptial agreement, in terms of which a religious divorce is subject to arbitration in accordance with the Jewish law and tradition. The court further held that the

case could be decided solely by the application of the neutral principles of contract law, without reference to any religious principle (574; see also Warmflash 1984 *Brooklyn LR* 234 *et seq*; Fox and Krosnow 1988 *Ill Bar J* 275 – 276; Aiardo 1984 *Albany LR* 152 – 159).

In *Stern v Stern* 5 *Family Law Reporter* 2810 (BNA), the court held that where a marriage contract (*ketubah*) existed in terms of which the husband agreed to grant his wife a religious divorce, specific performance of the contract could be ordered. The court further distinguished between the relationship between God and man, which is religious, and the relationship between man and his fellow man, which is not religious. According to this point of view the writing, execution and delivery of a *get* therefore does not constitute a religious act (2811; see also Warmflash 1984 *Brooklyn LR* 242 – 243; Bleich 1984 *Connecticut LR* 254).

In *Minkin v Minkin* 7 *Family Law Reporter* 2730 (BNA), the parties to a divorce order had also entered into a *ketubah* at the time of their marriage, in which they promised to grant each other a *get* at the time of divorce. The court ordered specific performance of the *ketubah* as it constituted a binding contract and further held that the *get* did not involve a religious ceremony. The *get* procedure was considered to be no more religious than the marriage ceremony itself (see also Fox and Krosnow 1988 *Ill Bar J* 275).

In *Feuerman v Feuerman* 10 *Family Law Reporter* 1575 (BNA), the parties to a divorce matter entered into a property settlement that the wife would pay her husband $5 000 and that he would grant her a *get* within a reasonable period of time. The husband subsequently failed to grant the wife a *get*, and she then refused to pay him his money. The court held that the enforcement of a contract providing for the execution of a *get* served a secular purpose and that neither worship nor expression of faith was required in the execution of the *get*. The court was merely upholding the terms of the agreement by ordering specific performance. The court further held that the requirement that a husband must appear before a Rabbinical authority in order to obtain a *get* in terms of a *ketubah* does not constitute an interference with the church by the state.

Bleich 1984 *Connecticut LR* 289 proposes that the court should, in secular divorce proceedings where a *get* has not been obtained, withhold a decree of divorce until such time as the *get* is obtained. In *Whitmire v Whitmire* (1976) 236 Georgia 153, 223 SE 2d 135, the court held, however, that where both parties allege that the marriage has broken down irretrievably, the court would be erring in denying a divorce unless it could be shown that they had made an effort in good faith to succeed with their marriage or that their marriage had irretrievably broken down through no fault of either party.

2 3 Canada

As in the United States of America, every person in Canada has fundamental freedom of conscience and religion (s 2(a) of the Canadian Charter of Rights).

In *Re Morris and Morris* (1973) 36 DLR (3rd) 447, 42 DLR (3rd) 550 Manitoba QB, the marriage of the spouses was dissolved by a civil court. The husband then refused to divorce his wife under Jewish law. The court refused to grant her a *mandamus* to force her husband to grant her a *get*, as the court held that secular courts have declined to entertain litigation that would result in one religious opinion being preferred to another, or in the imposition of an obligation

to comply with the precepts of a spiritual belief. The power of civil courts should not be extended to assist any religious sect to enforce their orders. Furthermore, orders for specific performance of obligations of a personal nature are unenforceable in Canadian law (see also Glenn 1980 *AJCL* 17 – 18).

The Ontario Family Law Act of 1986 (s 2(4)), however, provides that an undertaking should be given at the time of a divorce, in terms of which the parties are to remove all barriers within his or her control that could prohibit the remarriage of the other spouse in accordance with the requirements of that spouse's faith. The Canadian Divorce Act was subsequently amended (Bill C 61 which came into operation on 1990-08-12) in accordance with the Ontario Family Law Act. In this regard the Canadian Divorce Act (s 21.1) provides that the court may refuse the granting of the divorce order or may order that any of the pleas or affidavits be struck out.

2 4 England

In England there seems to be some uncertainty whether a *get* may be enforced by civil divorce proceedings.

In *Maples v Maples* [1987] 2 All ER 188 the couple obtained a *get*, but not a secular divorce. The wife remarried and the court decided that the second marriage was void as she first had to obtain a secular divorce. The *get* was therefore not considered to be a legal divorce. In *Brett v Brett* [1969] 1 All ER 1007, however, a maintenance order was used to compel a *get* and therefore the *get* was in effect recognised in a civil court. The court held that should the husband grant his wife a *get*, a lump sum payment for maintenance that he must pay her will be reduced (see also Lew 1973 *New LJ* 830; Glenn 1980 *AJCL* 18 33 – 34). Such an order might constitute coercion under Jewish law, as the husband is induced to co-operate in the execution of a *get*. The effect of this coercion is to render a *get* executed as a result of such a civil order invalid.

2 5 Australia

In Australia church and the state are also constitutionally separated (s 116 of the Commonwealth Constitution). The interests of one church or religious community may not be promoted above any other (*Attorney-General for the State of Victoria v The Commonwealth of Australia* 1981 Australian Law Journal Report 159).

In *In the marriage of Shulsinger* (1977) 2 Family Law Reports 11.611, the husband had undertaken to grant the woman a *get* within 7 days of the secular divorce and she, in turn, undertook not to claim maintenance from him. As fate would have it, the husband did not obtain the *get*, whereupon the court ordered that the wife could claim maintenance from him and that he had to pay the costs. In appeal, the husband maintained that a *get* is a religious procedure, and as the church and the state are separate, the court could not order him to grant his wife a *get*. The court held that section 116 of the Constitution had not been infringed by the undertaking made by the appellant, and that it was concerned with the serious injustice contained in the secular divorce. The order as to costs was held to be valid (11.617).

The Australian Law Commission is presently considering whether the civil law should be used to compel a party within whose power it is to grant a religious

divorce, to do so when the marriage has been dissolved under civil law (Multiculturalism discussion paper 47). The commission proposed (33) that the court should have a discretion to postpone a divorce application, unless the applicant has done everything in his or her power to remove any religious barriers to the remarriage of the other spouse.

3 The current South African position

In terms of section 4(1) of the Divorce Act 70 of 1979, a court may grant a decree of divorce on the ground of the irretrievable breakdown of marriage once it is satisfied that the marriage relationship between the parties has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them. The marriage relationship should no longer be regarded as normal, and there should be no prospect of the restoration of a normal marriage relationship between the spouses. Once the court has determined that the marriage has broken down irretrievably, it has no discretion to refuse the divorce order.

In *Levy v Levy* 1991 3 SA 614 (A), the parties entered into an agreement on their wedding day in terms of which they stipulated that they were getting married according to Orthodox Jewish law, and that in the event of their marriage being terminated or dissolved by way of any civil proceedings, they would in addition appear before the Beth Din to have the marriage dissolved according to Jewish law. They furthermore stipulated that should one of them fail to do so, he or she would have to pay the other party R50 for each day of noncompliance.

After some time had elapsed, the appellant indeed sued her husband for divorce. When the respondent refused to appear before the Beth Din, the appellant claimed a decree of divorce and as ancillary relief, the payment of R50 per day, together with a declaratory order that the agreement was valid and enforceable. In effect it meant that the court should grant an order compelling the respondent to grant the appellant a *get*.

From the particulars of claim it appeared that the respondent had refused to grant his two previous wives a *get* unless large sums of money were paid to him. The appellant in the case under discussion was desirous of a divorce, but only on condition that it be accompanied by a *get*. The respondent's plea was that he need not appear before the Beth Din until such time as the parties are divorced. The *get* has nothing to do with a secular divorce.

The court decided that the marriage had broken down irretrievably, and that it did not have the discretion to refuse the granting of a divorce order once it found that the marriage had broken down irretrievably. The court may therefore not postpone the case until the husband granted the wife a *get* in the Beth Din.

In *Raik v Raik* 1993 2 SA 617 (W) the parties to a divorce action had entered into a *ketubah* at the time of the marriage, in terms of which they promised each other that on the breakdown of the marriage, the marriage would be dissolved according to Jewish law. The defendant refused to grant his wife (the plaintiff) a *get*. The court held that the parties to an agreement to grant a *get* must be held to it and an order for specific performance was granted. The agreement was not considered by the court to be of a personal nature concerned entirely with religious formalities (626D). The court further held (626F – G) that the objection to grant a *get*, namely that the wife was seeking specific performance

under circumstances in which the court cannot supervise the grant of the *get* by the Beth Din, was not correct, as the absence of supervision by a court does not preclude it from granting an order for specific performance (*Ranch International Pipelines (Transvaal) (Pty) Ltd v LMG Construction (City) (Pty) Ltd; LMG Construction (City) (Pty) v Ranch International Pipelines (Transvaal) (Pty) Ltd* 1984 3 SA 861 (W) 880). The *get* is in fact granted by the husband and not by the Beth Din.

The South African Law Commission (*Jewish divorces* Working paper 45, Project 76) has proposed the following amendment to the Divorce Act (insertion of s 5A):

> "5A. Refusal to grant divorce – If it appears to a court in divorce proceedings that despite the granting of a decree of divorce by the court the spouses will be bound by their religion to have their marriage dissolved in terms of the requirements of their religion before they, or any one of them, will in terms of their religion be free to remarry, the court may refuse to grant a decree of divorce unless it is satisfied that the said barrier to the remarriage of a party has been removed: Provided that if it appears to the court that the spouses cannot succeed in removing the said barrier the court may, having regard to the personal circumstances of each spouse and to public policy, make any order that it finds just."

4 Conclusion

There are various possibilities whereby the granting of a *get* by one spouse could be enforced by the other in a court of law. The first is where the parties enter into an agreement at the time of their marriage, in terms of which they agree to grant each other a *get* in the event of their being secularly divorced in the future (like the *ketubah* in the USA). On the one hand, our courts regard such an agreement as one of an intimate personal character as it is concerned with religious formalities, and are loath to order specific performance as it cannot supervise and control the Beth Din to grant a *get* (*Berkowitz v Berkowitz* 1956 3 SA 522 (SR) 524C – D). On the other hand, such an agreement is not regarded as of a personal nature concerned entirely with religious formalities; it is therefore wrong to argue that the court cannot grant a *get* because specific performance cannot be ordered on the ground that the court cannot supervise the Beth Din to grant the *get*. It is the husband that must grant the *get* (*Raik v Raik* 1993 2 SA 617 (W)). In my opinion this viewpoint is correct.

Should the parties to a marriage not enter into an agreement in terms of which they agree to grant each other a *get* in the event of their being secularly divorced in future, the second possibility is for the parties to enter into a settlement agreement at the time of the secular divorce in which they agree that the husband will deliver a *get* to his wife. This agreement should be made an order of court, since it is not of a personal nature concerned entirely with religious formalities. If it is not honoured, specific performance may be ordered, and an ex-spouse may be criminally prosecuted for failure to comply with the court order.

Should one of the parties to a civil divorce refuse to enter into a settlement agreement to deliver a *get*, the third possibility is that the wife could apply to the court during divorce proceedings for an order compelling the husband to obtain a *get before* dissolving the marriage legally. This would mean that the courts be granted a discretion to refuse a divorce, even though the marriage has irretrievably broken down. This option, however, seems to fall down on the lack of discretion afforded to the courts in terms of the Divorce Act.

At present, our courts are obliged to grant a decree of divorce once they decide that the marriage has irretrievably broken down (*Levy* case *supra*). Society has

an interest in the dissolution of a marriage that has reached a stage of irretrievable breakdown. Should we not also consider affording the court a discretion not to dissolve a marriage where the dissolution of the marriage is likely to bring about unjust consequences? Surely society also has an interest in the granting of a divorce with just consequences? The problem in this regard is to define what is to be included under "unjust consequences". It may, for instance, include cases where the divorce will cause grave financial hardship to the defendant (Hahlo *The South African law of husband and wife* 347 points out that in England the hardship clause is occasionally invoked but seldom applied – there are not many divorces which do not involve such hardship), or instances where one of the spouses will not be able to remarry in terms of his or her religion and the children born of the marriage will be regarded as illegitimate, to name but two problems.

The South African Law Commission (*supra*) has proposed an amendment to the Divorce Act to the effect that if it were to appear to a court in divorce proceedings that, despite the granting of a decree of divorce, the spouses will be bound by their religion to have their marriage dissolved in terms of the requirements of their religion before they, or any one of them, will be free to remarry according to their religious customs, the court may refuse to grant a decree of divorce unless it is satisfied that the said barrier to the remarriage of a party has been removed.

It is submitted, however, that a statutory discretion in this regard should not be limited to religious barriers or an injustice created by the religious beliefs and customs of the parties involved. A general discretion, not only on religious grounds, but on equitable principles would, in my view, serve the interest of South Africa as a whole far better than a specific discretion referring to religion.

The solution seems to be an amendment to the Divorce Act making provision for parties to state under oath, as part of their divorce settlement, that they have removed all barriers within their control that could prohibit the remarriage of the other spouse. The court may then, in the absence of such an affidavit, or where the affidavit is incomplete, faulty, or proved to be false, refuse to grant the divorce order. This seems to be an effective solution to an extremely sensitive and complicated situation affecting the legal status and lives of many women and children of the Jewish faith without the need specifically to enact an amendment applicable to persons of the Jewish faith only and without reference to specific religious customs and beliefs.

MARIÉ BLACKBEARD
University of South Africa

DERDEPARTYVERGOEDINGSREG EN REGSOPLEIDING

1 Inleiding

Daar is diegene wat van mening is dat dit nie die taak van 'n universiteit is om "prokureursopleiding" of "advokaatsopleiding" te doen nie en dat die opleiding

van regsgeleerdes om byvoorbeeld derdeparty-eise te hanteer aan die praktyk oorgelaat moet word aangesien dit 'n praktyks- en nie 'n akademiese vak is nie. Hierdie houding het tot gevolg dat in die samestelling van akademiese leergange sekere vakke totaal uitgesluit word of slegs beperkte aandag geniet. Die uitsluiting of beperkte behandeling van sekere vakke geskied nieteenstaande die feit dat die gemeenskap, en toekomstige kliënte van die kandidaatregsgeleerde, 'n bepaalde standaard van kennis en vaardigheid ten opsigte van sodanige vakke vereis en daarvoor sal moet betaal. Aan ander vakke word weer 'n belangrikheid toegesê wat buite verhouding is tot die eise wat deur potensiële kliënte en die gemeenskap gestel word aan die regsgeleerde wat die gemeenskap uiteindelik moet dien (sien hieroor Coetzee "Die bepaling van prioriteite in die aanbieding van die handelsreg" 1980 *De Jure* 14).

Die vraag is of die skeidslyn tussen sogenaamd akademiese en praktiese vakke die regsgeleerde en die gemeenskap dien en of hierdie onderskeid regverdigbaar is.

2 Kritiese beskouing van die heersende opvatting

2 1 Die leuen van "akademiese" en "praktyks"-vakke

Ten aanvang moet opgemerk word dat die rigiede klassifikasie van vakke as akademies en prakties by konsekwente implikasie daarop dui dat daar regsvakke is wat geen praktiese bestaansreg of aanwending het nie. Indien hierdie argument tot sy logiese eindpunt deurgevoer word, wil dit voorgee dat daar gebiede van die reg is wat slegs in die studeerkamers van akademici en lesingsale van universiteite 'n bestaan voer. (Daar is wel sulke vakke, maar hulle maak nie meer as 5% van die regsleergange uit nie.) Volgens vermelde indeling sou alle vakke wat deur universiteite aangebied word, akademiese vakke of teorie wees terwyl alle vakke wat in die praktyk beoefen of waarvoor opleiding deur professionele liggame aangebied word, praktiese vakke sou wees. Hierdie argument hou egter nie steek nie. Dit misken twee grondige waarhede: regswetenskap het 'n gemeenskapsgrondslag gesetel in die feitelike werklikheid en vervul terselfdertyd 'n praktiese en werklikheidsfunksie, naamlik om onderlinge verhoudinge te orden binne die gemeenskap wat dit dien. Omdat regswetenskap in die praktyk aanwending vind, is dit 'n geheelwetenskap wat nie aan so 'n kunsmatige onderskeid onderwerp kan word sonder dat die een of ander nadeel daaruit voortspruit nie. Van Heerden en Neethling *Onregmatige mededinging* (1983) 35 verklaar:

> "Hierdie beklemtoning van die voorjuridiese bestaan van individuele belange het nie slegs filosofiese betekenis nie, maar is inderdaad van kardinale regswetenskaplike en praktiese belang. Dit bring naamlik die insig na vore dat 'n begrip aangaande die hoedanighede van hierdie belange nie deur regsnorme bepaal kan word nie, maar alleenlik met verwysing na hulle voorkoms in die feitelike werklikheid. 'n Regswetenskaplike afbakening en omlyning van individuele belange, wat absoluut noodsaaklik is vir die vermoë om beskermende maatreëls noukeurig in die praktyk toe te pas, doen nie afbreuk aan hierdie waarheid nie. Hierin lê juis die taak van die regswetenskap, wat immers dien tot sistematisering, omskrywing en gevolglike hanteerbaarmaking van verskynsels van die feitelike sowel as die regswerklikheid."

Indien aanvaar word dat regswetenskap onlosmaaklik aan die werklikheid verbonde is, is 'n onderskeid wat hierdie fundamentele waarheid misken, vals. Dit is wel waar dat daar twee werklikhede is, naamlik die regs- en feitelike werklikheid. Trouens, dit is juis die primêre taak en funksie van die regsgeleerde om

'n versoening tussen die regswerklikheid (regsreëls) en die feitelike werklikheid (feite) te bewerkstellig op 'n wyse wat regswetenskaplik verantwoordbaar en korrek is sodat die gemeenskapsbelang van ordelikheid daardeur gedien word (*ibid*). Miskenning van die geheel-aard van regswetenskap (dws dat dit beide die feitelike werklikheid en regswerklikheid oorspan), bring mee dat die een of die ander van hierdie samestellende dele verontagsaam word met die gevolg dat volkome, geldige en doeltreffende wetenskapsbeoefening (dws "prakties" of "akademies") en regsopleiding nie kan plaasvind nie.

Indien die onderskeid gehandhaaf word, sal alles wat die praktisyn op universiteit geleer het "akademies" of "teorie" bly – dit sou ironies wees aangesien elke besluit wat hy neem en elke opinie wat hy uitspreek, noodwendig op sogenaamd "teoretiese" of "akademiese" beginsels soos wat dit in gewysdes en handboeke opgeteken staan, gegrond moet word – terwyl vir die akademikus alles wat in die regspraktyk plaasvind, onbekend, onbemind en onbelangrik sal wees – gevolglik van geen waarde nie. Dit is net so ironies. Geen regte kan in 'n lugleegte bestaan nie. Regte bestaan tussen subjekte en objekte wat 'n werklikheidsbestaan voer. Beoefening van regswetenskap sonder kennis van die omgewing waarin dit aanwending vind, is nie volkome wetenskapsbeoefening nie. Anders gestel, hoe kan effektiewe opleiding plaasvind as die kandidaat-regsgeleerde nie aan die feitelike omgewing waarin die besondere regsreëls toepassing vind (die werklikheid), blootgestel word nie? (Sien hierbo.) Die waarheid is egter dat regswetenskap dinamies in beide sfere bestaan. Die onderskeid is gevolglik onwerklik en kunsmatig en omdat dit onvolkome regsgeleerdes oplewer, word nóg student, nóg akademikus, nóg praktisyn en allermins die gemeenskap daardeur gedien: dit berus op 'n onwaarheid. Van akademici word dikwels gesê dat hulle te akademies of teoreties is en dat die praktyk "anders werk". Indien dit waar is, wonder 'n mens waarom daar geen optekening bestaan van die verskille tussen sogenaamde praktyksregsreëls en daardie regsreëls wat deur die howe toegepas en deur handboekskrywers weerspieël word nie. Dit kan wees dat die praktyksomgewing en bepaalde omstandighede 'n praktisyn verplig om 'n pragmatiese benadering tot 'n probleem te volg, maar die regsbeginsels word nie daardeur verander of gewysig om nuwe reg te skep nie. Byvoorbeeld: die geldelike omstandighede van 'n litigant kan van so 'n aard wees dat, alhoewel hy op die meriete 'n goeie saak het, hy nie kan bekostig om sy regte ingevolge die letter van die reg af te dwing nie. Dit kan tot gevolg hê dat sy saak op 'n minder gunstige grondslag afgehandel moet word, maar tot tyd en wyl sodanige praktyksgebruik in wetgewing of regspraak vasgelê word, kom geen nuwe reg of regsbeginsels deur so 'n reëling tot stand nie.

2 2 Hooftaakstelling en sosiale verantwoordelikheid van universiteite en regsfakulteite

Die klassifikasie van opleiding in akademiese en praktiese dele is, veral wat nie-regsdissiplines betref, in stryd met die beleid en praktyk van universitêre opleiding. Die meeste universiteite het as een van hulle hoofdoelstellings (Amerikaans-ontleende "mission-statement" of, in Afrikaans, "missie") die lewering van praktyksbruikbare afgestudeerdes. Hierdie oogmerk kan bereik word deur praktyks- en beroepsgerigte onderrig as 'n primêre doel na te streef. Die opvatting dat die taak van regsfakulteite bloot is om *regsgeleerdes* op te lei, is dus strydig met die doel om praktyks- en beroepsgerigte onderrig aan te bied. Op

die keper beskou, behoort daar geen beginselverskil te wees in die opleidingsbenadering wat gevolg word by die opleiding van 'n chemiese ingenieur, mediese praktisyn of regsgeleerde nie. Elkeen word opgelei om in sy veld doeltreffend te kan funksioneer. Stel jou 'n chemiese ingenieur voor wat nie in staat is om 'n suksesvolle chemiese aanleg te ontwerp, of 'n regsgeleerde wat nie sy kliënt se probleem effektief kan oplos of laasgenoemde se saak behoorlik voor die hof kan plaas nie!

Universiteite, en regsfakulteite in besonder, het 'n sosiale verantwoordelikheid om subsidies in die vorm van skaars belasting- en swaarverdiende universiteitsgelde produktief aan te wend. Produktiwiteit word nie net gemeet aan die aantal studente wat elke jaar suksesvol afstudeer nie, maar het ook te make met die vraag of sodanige afgestudeerdes professioneel doeltreffend tot voordeel van die samelewing kan funksioneer.

2 3 Toegang tot regspleging

2 3 1 Verdere aspekte van toegang tot regspleging

Daar word algemeen aanvaar dat toegang tot die regspleging verband hou met die verwydering van struikelblokke wat in die weg staan van 'n lid van die gemeenskap om deur 'n regsproses sy regte af te dwing of te beskerm. As struikelblokke word gewoonlik die proses self en duur regsdienste aangedui. Daar is egter 'n verdere struikelblok. Toegang tot die regspleging veronderstel professionele, doeltreffende en kundige regsbegeleiding. Laasgenoemde vereis weer doeltreffende en effektiewe opleiding. Ondoeltreffende of gebrekkige regsopleiding is dus 'n verdere oorsaak van ontoeganklikheid tot die howe en vind neerslag op twee wyses, naamlik skade wat lede van die publiek kan ly en die bydrae wat dit maak tot duur regsdienste (sien Klopper "Toegang tot die regspleging in Suid-Afrika" 1987 *De Rebus* 463).

2 3 2 Skade

Lede van die gemeenskap kan skade ly as gevolg van gebrekkige of ondoeltreffende opleiding deurdat noodsaaklike en volledige kennis, asook die vaardigheid wat nodig is om doeltreffende regsadvies te gee, by die regsgeleerde gebrekkig is. Byvoorbeeld: indien opleidingsgewys nagelaat word om die presiese vertolking, werking en aanwending van artikel 46 en 47 van die Multilaterale Motorvoertuigongelukkefondswet 93 van 1989 deeglik te behandel, kan die situasie ontstaan dat 'n derde party regsadvies ontvang dat sy eis óf beperk óf uitgesluit is terwyl dit nie die geval is nie. Die uiteinde daarvan is dat die betrokke praktisyn persoonlik aanspreeklik is vir die skade van die derdeparty veroorsaak deur sy onkunde en professionele nalatigheid. (Sien in hierdie verband die uitspraak van Kirk-Cohen R in *Moatshe v Commercial Union Assurance Co of SA Ltd* 1991 4 SA 372 (W). In hierdie saak het die verteenwoordiger gesloer om die nodige feite te bekom wat hom in staat kon stel om 'n dagvaarding wat aan die bepalings van Hooggeregshofreël 18 voldoen, te laat uitreik en beteken. Die aansoek om kondonasie misluk as gevolg hiervan, maar die regter bevind dat onkunde oor die korrekte vertolking van die bepalings van a 14(2) van die MVO-wet van 1986 nie verwytbaar is nie ten spyte van die hoër graad van sorg en vaardigheid wat van 'n regspraktisyn verwag word (sien ook *Broderick Properties (Pty) Ltd v Rood* 1964 2 SA 310 (T); *Mouton v Mynwerkersunie* 1977 1 SA 119 (A); *Bezuidenhout v AA Mutual Insurance* 1978 1 SA 703 (A);

Rampal (Pty) Ltd v Brett, Wills and Partners 1981 4 SA 360 (D); *Mosala v Santam Insurance* 1986 1 SA 808 (O); *Slomowitz v Kok* 1983 1 SA 130 (A). Die feit dat daar in die eerste plek 'n verkeerde vertolking was, spreek vir doeleindes van hierdie aantekening boekdele.)

Verder kan skade berokken word deur verhaalbare skadevergoeding uit onkunde nie te verhaal nie, dit verkeerd te bereken of aan 'n kliënt advies te gee dat hy geen eis het nie terwyl daar wél 'n ontvanklike eis is. (Soos by 'n verkeerde vertolking van a 47 van die Multilaterale Motorvoertuigongelukkefondswet (MMF-wet) 93 van 1989. 'n Ander voorbeeld is waar 'n prokureur die verlies van verdienvermoë van 'n derdeparty bereken het deur die verdienste van die derdeparty voor die besering te neem, te bepaal wat die verdienverwagting is en bloot die verdienste met die aantal jare verdienverwagting te vermenigvuldig! Die voorbeeld lyk vergesog maar het onlangs werklik gebeur.) Die uiteinde van hierdie toedrag van sake is geen of belemmerde toegang tot die regspleging, dikwels teen aansienlike koste!

2 3 3 Kosteverhogende invloed

Onvolledige opleiding dra voorts by tot duur regsdienste. 'n Kandidaatprokureur moet as gevolg van sy onvolledige universiteitsopleiding op koste van 'n prinsipaal en/of die beroep heropgelei word om doeltreffend te kan funksioneer. Die direkte en indirekte koste verbonde aan hierdie opleiding word uiteindelik van die publiek verhaal. ('n Kandidaat-prokureur se salaris is in die omgewing van R15 000,00 tot R18 000,00 per jaar en die duur van sy leerkontrak agtien maande tot twee jaar. Dit voeg benewens die akademiese opleidingstydperk van vier tot vyf jaar (waarvan die koste in staatsubsidie alleen ongeveer R6 000,00 tot R10 000,00 per student per akademiese jaar bedra), ongeveer R30 000,00 tot R36 000,00 aan direkte uitgawe by die uiteindelike opleidingskostes by – om nie eens te praat van sy personeel-, kantoor- en studieverlofbehoeftes en ander indirekte kostenewewerkings nie. Hierdie salaris word ontvang terwyl hy vir ses maande die verpligte praktiese skool teen volle besoldiging bywoon en weens sy onvolkome opleiding vir 'n geruime tyd van sy leerkontrak nie noemenswaardig fooi-produktief kan wees nie. Dieselfde geld met die nodige aanpassings vir 'n advokaatspupil. Die kostes word verhaal in die vorm van 'n verhoogde fooiestruktuur wat voorsiening maak vir hierdie uitgawe en verlies van inkomste.)

2 4 Aanvullende praktyksopleiding en derdepartyvergoedingsreg

2 4 1 Prokureurs

2 4 1 1 Inleiding

Deur die opleiding ten opsigte van derdepartyvergoedingsreg aan die professie oor te laat, word veronderstel dat sodanige opleiding doeltreffend, deeglik en prakties afloop.

2 4 1 2 Praktiese opleiding?

(a) Inhoud en metodiek Indien die *curriculae* van die praktiese regsopleiding van prokureurs nagegaan word, is dit duidelik dat derdepartyvergoedingsreg 'n onderdeel van 'n module uitmaak. Hierdie module bestaan uit drie wyduiteenlopende onderwerpe, naamlik Hooggeregshofpraktyk, Landdroshofpraktyk en Derdeparty-eise (Motorvoertuigongelukke). Die opleidingsmetode wat gevolg

word, is hoofsaaklik deur middel van lesings deur praktisyns. Gemiddeld elf dae word aan hierdie module afgestaan.

Die tyd wat aan 'n onderwerp bestee word, is egter nie 'n getroue maatstaf van die doeltreffendheid en deeglikheid van opleiding nie. Die enigste tasbare maatstaf is die studiemateriaal wat by die opleiding gebruik word, byvoorbeeld die derdepartyvergoedingsregaantekeninge: (Die opsteller(s) van die 1992-aantekeninge gebruik die verwarrende betiteling "Motorvoertuigongelukke". Die wet wat tans derdeparty-eise beheer, is die MMF-wet en sy voorganger die MVO-wet. Lg se werking is deur die MMF-wet met ingang van 1989-05-01 opgeskort (sien a 1 van die MMF-wet).) Hieruit blyk dat geen aandag aan die nalatigheidsvraagstuk by motorbotsings gegee word nie – hierdie kennis word veronderstel – en dat daar sekere verdere leemtes is.* Vir aantekeninge wat vir gebruik by praktiese opleiding bedoel is, het die aantekeninge baie min voorbeelde of toeligtende gevallestudies.

(b) Doen en leer Daar word algemeen aanvaar dat opleiding waar die leerproses deur selfdoen plaasvind, die doeltreffendste wyse van opleiding is – dit is dan ook een van die verklaarde hoekstene van die huidige praktyksopleiding. (Daar word veronderstel dat 'n kandidaat wat 'n bepaalde module loop, daarna praktyksblootstelling moet kry. Daar is egter geen formele kontrole of dit wel plaasvind nie.) 'n Kardinale voorwaarde is egter dat die doen-en-leerproses doelgerig,

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* Hierdie leemtes ontstaan omdat die akademie veronderstel dat dit die taak van die praktyk is om dit te onderrig; die praktiese opleiding skiet egter ook tekort: die 1992-aantekeninge laat bv na om belangrike sake wat in 1991 gerapporteer is, by te werk. Daar is ook sekere weglatings van toonaangewende beslissings wat voor 1991 gerapporteer is. (Sien tov belangrike toonaangewende beslissings vóór 1992 in volgorde van behandeling in die aantekeninge oa *Masiba v Constantia Versekering* 1982 4 SA 333 (K) (emosionele skok); *Nkahla v Mutual en Federale Versekeringsmaatskappy* 1985 1 SA 824 (O) (oor die begrip "bestuur"); *Sehire v Central Board for Co-operative Insurance Ltd* 1976 1 SA 524 (W) (*ibid*); *Senator Versekering v Sibeko* 1985 2 SA 585 (A) (vervoer in die loop van diens); *Mphosi v Sentrakoöp* 1974 4 SA 633 (A) (a 48(a), wetteregtelike uitsluiting van aanspreekliheid van werkgewer teenoor werknemer en die betekenis van skadeloosstelling teenoor skadevergoeding); *Assistent-Ongevallekommissaris v Ndevu* 1980 2 SA 976 (OK) (betekenis van vervoer in loop van diens en a 27(3) van die Ongevallewet, 1941); *Mali v Shield Insurance* 1984 2 SA 798 (SOK) (betekenis van vervoer teen vergoeding); *Nhlangwini v NEG* 1989 1 SA 96 (W) (aangehaal tov onwettige vergoeding, maar nie tov onwettige besigheid nie); *Nkisimane v Santam* 1978 2 SA 430 (A) (standaard van voltooiing van MMF 1-eisvorm); *Standard General Insurance v Verdun Estates* 1989 1 SA 779 (K); 1990 2 SA 693 (A) (verhaalsreg van benoemde agent); *Federated Employer's Insurance v Magubane* 1981 2 SA 711 (A) (beginsels van toepassing by 'n aansoek om kondonasie van verjaring); *Mamela v Constantia Insurance* 1983 1 SA 218 (A) (kondonasie); *Erasmic v Botha* 1990 3 SA 330 (K) (voeging in die landdroshof); *Sandler v Wholesale Coal Supplies* 1941 AD 194 (grondbeginsel by die bepaling van nie-vermoënskadevergoeding); *Protea Assurance v Lamb* 1971 1 SA 530 (A) (beginsels by die gebruik van vorige vergelykbare toekennings as riglyn by die bepaling van nie-vermoënskade). Sien tov nuwe regspraak in 1991 gerapporteer oa *Rabie v Kimberley Munisipaliteit* 1991 4 SA 243 (NK) (tov die uitwerking van a 52 en voeging van mededaders); *Zimnat Insurance Co Ltd v Chawanda* 1991 2 SA 825 (ZS) (tov die eis van 'n swart weduwee); *General Accident Insurance Co South Africa Ltd v Xhego* 1992 1 SA 580 (A) (tov kousaliteit en "'n ander onregmatige daad"); *Reynecke v Mutual and Federal Insurance Co Ltd* 1991 3 SA 412 (W) (tov die verhaalbaarheid van nie-vermoënskade en die kostes van 'n *curator ad litem*); *Lebona v President Versekeringsmaatskappy* 1991 3 SA 395 (W) (tov die eise van afhanklikes en onwettige inkomste asook die inhoud, verkryging en waarde van aktuariële verslae); *Nel v Federated Versekingsmaatskappy Bpk* 1991 2 SA 422 (T) (tov die beginsels van toepassing vir die verkryging van tussentydse betalings).)

gekontroleerd en gestruktureerd moet afloop. Dit kan egter nie van die nielesinggedeelte van die praktiese opleiding gesê word nie, in elk geval nie waar die kursus voltyds deurloop word nie. By deeltydse studente is daar geen waarborg of meganisme wat verseker dat die betrokke kandidaat na afloop van 'n bepaalde module praktiese ervaring in daardie afdeling sal opdoen nie. Daarom is die doelstelling van die praktiese regsopleiding vir kandidaatprokureurs nie praktiese kursusse nie maar wel praktyksgeoriënteerde kursusse (sien die bekendstellingsbrosjure van die Vereniging van Prokureursordes (VPO) *Praktiese regsopleiding: opleiding van kandidaatprokureurs* (1993) 2).

Hantering van derdeparty-eise is verantwoordelike en hoë-risiko werk. Slegs 'n klein persentasie kandikaatprokureurs ervaar die mate van blootstelling aan die vakgebied wat vereis word om werklik praktykvaardige praktisyns daar te stel. (In 'n eksperiment aan die UP gedurende 1989 is aan vyfdejaar LLB-studente 'n vrywillige werkopdrag gegee om op grond van 'n strafrekord 'n opinie oor die meriete en kwantum van 'n derdeparty-eis, asook 'n dagvaarding, verweerskrif en teeneis op te stel. 'n Deeltydse student wat dit voltooi het, se kommentaar was dat ten spyte van die feit dat hy onder leerkontrak was en sy prinsipaal derdeparty-eise hanteer, die werkopdrag sy eerste van hierdie aard was.) Dit beteken dat daar eintlik nie van praktiese opleiding in die sin van 'n doelgerigte en gestruktureerde praktiese doen-en-leer-program sprake is nie. Die instelling van praktykskole is 'n erkenning en bewys van hierdie leemte en 'n deugdelike poging om dit reg te stel.

(c) Doeltreffendheid en kontrole Voorts is die toelatingseksamen en die voorafgaande skoling ook nie die doeltreffendste wyse om te verseker dat kandidate oor die nodige kennis en professionele vaardigheid op hierdie gebied beskik nie. Die toelatingseksamen dek 'n wye veld waarvan derdepartyvergoedingsreg net *'n afdeling* van 'n module is. (Dié eksamen is 'n weerspieëling van ondoeltreffende opleiding. Dit toon dat die eindproduk wat universiteite lewer, nie in staat is om doeltreffend as regsgeleerde te funksioneer nie ten spyte daarvan dat van die aspekte wat in die toelatingseksamen opgeneem is, ook in universiteitsleergange aangetref word.) Die voorbereiding van die meeste kandidate is volgens my ervaring – oud-studente het my in die verlede met die oog op die eksamen om hulp genader; sonder uitsondering was almal se versoeke dat ek saam met hulle vorige vraestelle moet deurwerk – bloot op die slaag van die toelatingseksamen afgestem. Trouens, eksamenskoling is een van die verklaarde doelwitte van die praktykskursusse. Die bekendstellingsbrosjure van die VPO (2) lui soos volg:

> "– Die doel van die toelatingseksamen is om 'n hoë standaard van praktyk in die professie te verseker. *Die kursusse is dus ook eksamengerig.*
>
> – Die kursusse vorm 'n belangrike faset van *die voorbereiding vir die eksamen.*
>
> – *Die eksamensillabus* word by die beplanning en aanbieding van kursusse in ag geneem . . ." (my beklemtoning).

Deur nie voldoende en deeglike aandag aan derdepartyvergoedingsreg op universiteit te gee nie, kan die gewenste onderbou wat noodsaaklik is vir 'n doeltreffende regsgeleerde op hierdie gebied, nie geskep word nie. Gevolglik sal daardie praktisyns wat uiteindelik die opleiding en eksaminering van kandidate moet waarneem, ook nie oor hierdie onderbou beskik nie. Daar word ook erken dat doeltreffende opleiding inhou dat die program oor 'n langer tyd moet strek en dat kennis en vaardighede wat oor 'n langer tydperk aangeleer word, meer blywend is. Wat tans gebeur, is dat die meeste kandidate hulle voorbereiding

hoofsaaklik op vorige vraestelle toespits (sien die opmerking hierbo). Die huidige stelsel van aanvullende opleiding deur die professie is miskien voldoende vir daardie vraagstukke wat binne die alledaagse ervaringsveld van die deursnee praktisyn val, maar beslis nie vir *alle* gevalle nie. (Vir vbe sien *Rabie v Kimberley Munisipaliteit* 1991 4 SA 247 (NK) waar die litigante en die hof 'n eienaardige opvatting openbaar van die aard van aanspreeklikheid wat by derdepartyvergoedingsreg ingevolge die MVO-wet, 1986 ter sprake is (vir 'n bespreking van hierdie vonnis sien Klopper 1992 *De Jure* 513 – 516). Sien ook die buitengewone opvatting van die wisselwerking tussen die gemenereg en die wettereg op die gebied van derdepartyvergoedingsreg soos dit blyk by Woods "The MVA Act 86 of 1986: a plea for equal rights" 1989 *De Rebus* 368. Die skrywer is skynbaar oningelig oor die herkoms van die aanspreeklikheidsbeperkende artikels van die MVO-wet en begryp oënskynlik ook nie ten volle die wisselwerking tussen die gemeenregtelike *nemo ex suo delicto*-reël en die MVO-wet, 1986 nie. Sien ook die appèlhofuitspraak van *General Accident v Xhego* 1992 1 SA 580 (A) waar die primêre aanspreeklikheidsgrondslag, die kousaliteitsvraagstuk en die alternatiewe grondslag van aanspreeklikheid geskep deur a 8(1) van die MVO-wet, 1986, nl "'n ander onregmatige daad", met mekaar verwar word.)

(d) Gevolgtrekking Op die keper beskou, val die huidige stelsel van praktyksopleiding tot 'n groot hoogte terug op 'n nie-praktiese en eksamengerigte onderrigmetode, naamlik lesings met 'n onbekende mate van ongekontroleerde en ongestruktureerde praktiese blootstelling. Dit is juis toe te skryf aan die feit dat die beroep 'n ernstige poging aanwend om die gebrekkige universiteitsopleiding in 'n relatief kort tydperk aan te vul en reg te stel. (Sien die doelstelling van die praktiese opleiding van kandidaatprokureurs in die bekendstellingsbrosjure van die VPO 2: "Die doelstelling van die kursusse is om die kandidaatprokureur se opleiding *binne die praktyk aan te vul . . .*" (ek beklemtoon).) Indien die universiteitsopleiding egter nie 'n gesonde basis vir die praktiese opleiding daarstel nie, kan praktiese opleiding wat primêr bedoel is om aanvullend en regstellend van aard te wees, ook nie vaardige en doeltreffende regspraktisyns oplewer nie. (Trouens, dit het al met sommige vyfdejaarstudente aan die UP gebeur dat hulle die prokureurstoelatingseksamen slaag, maar die derdepartyvergoedingsreg *capita selecta* in Handelsreg 500 (waar skadeberekening en verjaring by derdeparty-eise behandel word) druip.)

2 4 2 Advokate

Die opmerkings en gevolgtrekkings gemaak oor die praktiese opleiding van prokureurs geld *mutatis mutandis* ook vir die stelsel van pupilskap.

2 5 Onbekostigbare luuksheid

Uit voorgaande oorwegings volg dat die argument ten opsigte van die indeling "akademiese" en "praktiese" vakke onhoudbaar is. Hierdie onderskeid is 'n luuksheid wat universiteite en die gemeenskap doodgewoon nie meer kan bekostig nie. Opleiding geskied nooit in 'n lugleegte nie – allermins in die geval van regsgeleerdheid wat werklikheids- en gemeenskapsgegrond is. 'n Mens kan jou kwalik voorstel dat 'n mediese fakulteit sou besluit dat chirurgie 'n praktiese vak is en derhalwe nie op universiteit aangebied moet word nie! Hierdie analogie is ook vir regsvakke – veral by derdepartyvergoedingsreg – geldig.

Daar is ook 'n sienswyse dat universiteite slegs *regsgeleerdes* in teenstelling met *regspraktisyns* moet oplei. Hierdie argument kan met verwysing na 'n

analogie beantwoord word: 'n mediese student is nie net 'n "akademiese" medikus nie maar moet ook diagnoses kan maak en operasies kan uitvoer. Net so behoort regstudente opgelei te word om hul man in die praktyk te kan staan. Trouens, in hierdie tye van aansienlik stygende universiteitsgelde vra al hoe meer toegewyde en doelgerigte regstudente met reg waarom hulle nie doeltreffend vir hulle professie opgelei word nie.

2 6 Toegang tot die regsprofessies

Die huidige stelsel het onvolkome opleiding tot gevolg. Dit noodsaak die daarstelling van bykomende regstellende opleiding en kontrole deur die professies ten einde die vereiste standaard vir toetrede tot die professies te verseker. Hierdie verskynsel belemmer toetrede tot die professies. Indien "akademiese" en "praktiese" opleiding geïntegreer word, sal geen verdere vereistes vir toetrede in die vorm van professionele opleiding of eksamens vereis hoef te word nie. 'n Afgestudeerde sal uit hoofde van sy universiteitskwalifikasie *ipso facto* geregtig wees om as prokureur of advokaat te praktiseer – onderworpe natuurlik aan die nodige inspraak en kontrole ten opsigte van die inhoud en standaard van opleiding (sien meer hieroor in par 5.2 hierna).

3 Verandering nodig

Die huidige benadering tot regsopleiding kan nie onbepaald voortduur nie. Aan die een kant veroorsaak dit 'n oorproduksie van regsgeleerdes. (Volgens beamptes by die Departement van Justisie in Pretoria is daar 'n waglys van ongeveer 300 regsgegradueerdes wat aansoek gedoen het vir aanstelling as aanklaers. Statistiek deur die VPO saamgestel toon dat daar in 1991 820 BProc-grade en 1 383 LLB-grade landswyd toegeken is, dws 'n totaal van 2 203 regsgegradueerdes. Daar was in dieselfde tydperk slegs 1 081 kandidaatprokureurposte beskikbaar.) Aan die ander kant is daar steeds duisende beskuldigdes wat sonder verteenwoordiging verhoor word (sien Klopper 1987 *De Rebus* 463). Hierdie verskynsel is die gevolg van 'n regsopleidingstelsel (en in 'n mate van 'n regsberoep) wat nie voldoende gemeenskaps- of behoeftegerig is nie. Dit het tyd geword dat alle regsfakulteite en die professies die saak van regsopleiding en die strukturering van die regsberoepe wetenskaplik moet herondersoek en vindingryke oplossings moet bedink wat vir Suid-Afrikaanse omstandighede doeltreffend sal werk. Daar is reeds stappe in hierdie rigting gedoen, soos die uitbreiding van kandidaatprokureurposte by gemeenskapsdienssentrums, maar ook dit het getal- en geldelike beperkings.

4 Gevolge van huidige rigting

Indien volhard word met die huidige regsopleidingsbeleid, kan dit gebeur dat die gemeenskap sy rug op regsopleiding by universiteite en die regsberoep begin draai. Dit wil trouens voorkom of die publiek reeds vertroue in die regsberoep begin verloor. (Reeds in 1984 het die RGN in 'n ondersoek namens die Regshulpraad bevind dat meer as 83% van die bevolking verkies om nie regsgeleerdes op 'n gereelde grondslag te raadpleeg nie. Die tyd van die prokureur as vriend wat gereeld geraadpleeg word, is skynbaar verby (sien Klopper 1987 *De Rebus* 463).) Toegang tot die regspleging veronderstel doeltreffende en bekostigbare regsbegeleiding tot voordeel van die kliënt. Ondoeltreffende regsbegeleiding en die gepaardgaande gebrekkige toegang tot die regspleging geskied teen aansienlike koste. (Neem bv die geval waar 'n lid van die publiek 'n regsgeleerde

raadpleeg oor die verkoop van aandele in 'n privaatmaatskappy deur 'n medeaandeelhouer aan 'n nie-aandeelhouer, en die betrokke regsgeleerde uit onkunde die kliënt meedeel dat hy geen regsmiddels tot sy beskikking het nie terwyl volgens die ware stand van die reg die statute van die meeste privaatmaatskappye 'n voorkoopreg tgv aandeelhouers bevat en dat stappe ter afdwinging van die voorkoopreg gedoen kan word (sien *De Villiers v Jacobsdal Saltworks* 1959 3 SA 873 (O) 877). So 'n geval het onlangs in die praktyk voorgekom.) Boonop skaad dit die beeld van die regsberoep in so 'n mate dat die toekoms daarvan in gevaar gestel kan word omdat al hoe minder lede van die publiek van regsdienste gebruik sal wil maak (sien hierbo).

5 Moontlike oplossings

5 1 Veelstroom-opleiding

Daar kan met vrug gewerk word aan die idee van 'n veelstroom-opleiding waar die student by die aanvang van sy studies aandui of hy 'n regskursus vir professionele of nie-professionele doeleindes wil volg. Ten einde dit te kan bewerkstellig, moet van die huidige stelsel van vakke afgesien word ten gunste van 'n stelsel van onderwerpe. 'n Leergang word met ander woorde uit onderwerpe saamgestel (so sal bv derdepartyvergoedingsreg en deliktereg afsonderlike onderwerpe wees wat onafhanklik van mekaar geneem kan word). Vir nieprofessionele-doeleindes is daar dan basiese verpligte onderwerpe asook verskillende keusevakke. Vir professionele doeleindes moet die professionele profiel van die betrokke professie die verpligte vakke bepaal en moet keusevakke in oorleg met die professies vasgestel word. Hierdie stelsel van 'n "spyskaart" van onderwerpe het die voordeel dat dit binne sekere perke vir spesialisasie voorsiening kan maak en ondervang die probleem van verlies van staatsubsidies aan universiteite weens spesialisering van opleiding en gevolglike afname van studentegetalle.

5 2 Akkreditasie

5 2 1 Inhoud

Binne die voorgestelde veelstroomopleidingstelsel kan 'n sisteem van geakkrediteerde vakke geskep word. Ingevolge hierdie stelsel sal die professies deur middel van gedesentraliseerde staande onderwerpskomitees inspraak in die inhoud en aanbieding van regsvakke verkry. Standaarde sal beheer word deurdat eksamens deur die betrokke geakkrediteerde regsfakulteit afgeneem word terwyl bevoegde lede van die professies as eksterne moderatore optree (tov van inhoud en nasien van vraestelle). 'n Kandidaat wat 'n geakkrediteerde onderwerp slaag, kry vrystelling daarvoor vir toelatingseksamendoeleindes. Verdere beheer oor standaarde word deur die beroep uitgeoefen deurdat regsfakulteite en vakke wat nie die vereiste akkreditasiestandaarde handhaaf nie, hulle akkreditasiestatus kan verbeur. Akkreditering is 'n erkende beginsel by professies soos ingenieurswese.

5 2 2 Voordele

Die stelsel van akkreditering sal die regsberoepe meer toeganklik maak: Opleiding sal geïntegreerd verloop sodat gaandeweg weggedoen kan word met grootskaalse verdere praktiese opleiding en ander voorvereistes vir toetrede tot die beroepe. Die getalle wat tot die professies toetree, word dan aan natuurlike

markkragte oorgelaat. Dit sal elke individu 'n gelyke kans bied om toe te tree op 'n skaal wat nie ingevolge die tans geldende stelsel prakties of finansieel haalbaar is nie. Verder sal dit die aansienlike finansiële las verlig wat die professies tans dra om heropleiding te doen en sal dit hopelik bydra om regsdienste meer bekostigbaar te maak. Eenvormige standaarde kan sodoende gehandhaaf word en 'n natuurlike uitdunning van regsfakulteite sal waarskynlik plaasvind omdat studente meestal voorkeur sal gee aan daardie fakulteite wat akkreditasie-status het.

6 Gevolgtrekking

Die verdeling van regswetenskap in "praktiese" en "akademiese" vakke is 'n miskenning van die ware aard en funksie van regswetenskap. Regswetenskap is 'n volwaardige werklikheidsverskynsel wat nie blote teorie is nie en in beide die feitelike- en regswerklikheid tot ordening van die gemeenskap funksioneer. (Daar word egter nie ontken nie dat daar sekere dissiplines in akademiese *curriculae* is wat slegs as teorie beskou kan word omdat sodanige dissiplines nie in die bestaande werklikheid neerslag vind nie. Sulke dissiplines vervul wel 'n funksie, maar verdien minder gewig as wat normaalweg daaraan toegesê word.) Indien hierdie waarheid misken word, kan behoorlike regswetenskapsbeoefening en regsopleiding nie plaasvind nie.

Die onverdienstelike skeidslyn tussen "praktiese" en "akademiese" vakke het ook tot gevolg dat derdepartyvergoedingsreg sy regmatige plek in akademiese *curriculae* ontsê word. Dit veroorsaak dat daar vir die opleiding van hierdie vak geheel en al op praktiese opleiding van 'n relatiewe kort duur gesteun word om vaardige praktisyns te lewer. Die aard van praktiese opleiding is egter primêr aanvullend en regstellend. Indien daar slegs op praktiese derdepartyvergoedingsreg-opleiding gesteun word, is die vereiste akademiese onderbou dus afwesig en die resultate van die opleiding steeds onvolmaak.

Gevolglik moet daar oor die huidige benadering tot regsopleiding herbesin word. Die hoofdoel van regsopleiding moet wees om gemeenskapsvoordelige en -gerigte, praktyksvaardige en diensbare regspraktisyns te lewer sonder die noodsaak van aanvullende of regstellende praktiese opleiding.

HB KLOPPER
Universiteit van Pretoria

POWERS OF THE MINISTER OF JUSTICE IN RELATION TO THE ATTORNEY-GENERAL OF BOPHUTHATSWANA

The question to be discussed here revolves around a decision to prosecute a person made by the attorney-general of a former independent national state (Bophuthatswana) when the latter was still in existence as an independent state, and whether the Minister of Justice of the Republic of South Africa has the power at present to overrule such a decision.

In South Africa the position was formerly regulated by the now repealed section 3(5) of the Criminal Procedure Act 51 of 1977, which provided as follows:

> "An attorney-general shall exercise his authority and perform his functions under this Act or under any other law subject to the control and directions of *the Minister, who may reverse any decision arrived at by an attorney-general* [my emphasis] and may himself in general or in any specific matter exercise any part of such authority and perform any of such functions."

In terms of this subsection, the Minister of Justice of the Republic had the authority to reverse a decision of an attorney-general in this country, although in the past it was often claimed that this ministerial control existed only in theory.

Section 3 of the Criminal Procedure Act 51 of 1977 was repealed by section 8 of the Attorney-General Act 92 of 1992. This act now puts the matter beyond any doubt: attorneys-general are free from ministerial interference in the exercise of their powers. In South Africa, therefore, the Minister of Justice does not at present have the power to reverse any decision made by an attorney-general.

The Attorney-General Act was promulgated in the Republic when Bophuthatswana was still an independent state. It did not, therefore, apply to Bophuthatswana and the same or similar act was not promulgated by the Parliament of Bophuthatswana.

In Bophuthatswana, the Criminal Procedure Act 51 of 1977 applied. At first section 3(5) (see above) applied, but this subsection (5) was amended by section 2 of the Criminal Procedure Amendment Act 20 of 1980 (Bophuthatswana).

The amended section 3(5) then read as follows:

> "The attorney-general shall, in exercising and performing his rights, authorities, powers, duties and functions under this Act or any other law, be subject to the control and directions of the Minister who may, after consultation with the Chief Justice, set aside or vary any decision of the attorney-general and may himself, whether in general or in relation to any specific matter, exercise and perform any of the rights, authorities, powers, duties and functions of the attorney-general, whether in whole or in part."

It is clear, therefore, that in Bophuthatswana the minister could overrule a decision of the attorney-general to prosecute but only after consultation with the Chief Justice.

Bophuthatswana ceased to exist an as independent state on 31 March 1994. After that date the area comprising Bophuthatswana once again became part of South Africa. This was confirmed by the Constitution of the Republic of South Africa Act 200 of 1993 (s 1 read with Part 1 of Schedule 1) which came into operation on 27 April 1994 (see s 251(1) of this act, hereinafter referred to as "the Constitution").

In terms of section 229 of the Constitution

> "all laws which immediately before the commencement of this Constitution were in force in any area which forms part of the national territory, shall continue in force in such area, subject to any repeal or amendment of such laws by a competent authority".

In my opinion, the amended section 3(5) of the Criminal Procedure Act 51 of 1977 applies to the territory formerly known as Bophuthatswana and the Minister of Justice of the Republic may therefore overrule a decision of the attorney-general of Bophuthatswana (in respect of the latter, see s 241(4) of the Constitution: "Every attorney-general holding office immediately before the commencement of this Constitution in terms of a law, shall continue to hold such

office in accordance with such law") but only after consultation with the Chief Justice of Bophuthatswana. As regards the latter, see section 241(3) of the Constitution:

> "All other judicial officers holding office immediately before the commencement of this Constitution in terms of a law, shall continue to hold such office in accordance with such law."

The words "the Minister . . . may, after consultation with the Chief Justice", are qualified by section 233(4) of the Constitution, namely that "such decision shall be taken in good faith after consulting and giving serious consideration to the views of such other functionary". The Minister of Justice will therefore have to consult the Chief Justice about this matter, give serious consideration to his views and thereafter take a decision in good faith. (See for the sake of interest, s 233(3) where the words "to take a decision in consultation with another functionary", are defined as meaning that "such decision shall require the concurrence of such other functionary", ie there must be consensus.)

The answer to the question posed at the beginning of this note is, therefore, in the affirmative; the Minister of Justice of the Republic of South Africa may overrule a decision to prosecute a person taken by the attorney-general of Bophuthatswana, but only after consultation with the Chief Justice of Bophuthatswana.

PEET M BEKKER
University of South Africa

[T]here are in the case of the defence of truth in the public benefit cogent policy considerations for burdening the defendant with the full onus *of proof. In the case of qualified privilege the defendant who transmits the defamatory matter is generally thus impelled by considerations of duty or of protection of an interest. The matter stands rather differently in regard to the defence of truth in the public benefit. Here no form of compulsion operates on the mind of the defendant whose decision to put the character of the plaintiff in jeopardy proceeds entirely from his own volition . . . Since it is entirely of his own accord that the defendant elects to vilify the plaintiff, justice demands that he should do so at his peril; and that in an action for defamation he should have to establish what he should have troubled to verify before he maligned the plaintiff. I recoil from the suggestion that it is enough for a defendant who invokes the defence of truth in the public benefit to plead, and to prove, no more than: (1) that it is just as likely as not that his defamatory allegations concerning the plaintiff are true; and (2) that it is not improbable that they might be in the public benefit* (*per* Hoexter JA in *Neethling v Du Preez; Neethling v The Weekly Mail* 1994 1 SA 708 (A) 770).

VONNISSE

CERTAINTY OF PREMIUM AND INSURANCE COVER AT A PREMIUM TO BE ARRANGED

Zava Trading (Prop) Ltd v Santam Insurance Ltd
Case no 4108/89 1989-11-29 (D)

Background

A claim arising out of a contract of marine insurance falls within the admiralty jurisdiction of the South African Supreme Court. (See par (u) of the definition of a "maritime claim" in s 1(1) read with s 2(1) of the Admiralty Jurisdiction Regulation Act 105 of 1983 (the AJRA). As to this act and the admiralty jurisdiction of South African courts generally, see eg Rycroft "Changes in South African admiralty jurisdiction" 1984 *Lloyd's Maritime and Commercial Law Quarterly (LMCLQ)* 417; Staniland "The implementation of the Admiralty Jurisdiction Regulation Act in South Africa" 1985 *LMCLQ* 462; Ramsden "Maritime law in South Africa: recent developments" 1989 *Journal of Maritime Law and Commerce (JMLC)* 191.)

In the exercise of its admiralty jurisdiction in respect of claims on marine insurance contracts, a South African court must apply "the Roman-Dutch law applicable in the Republic" (see s 6(1)(b) of the AJRA). This is so because marine insurance is *not* a matter in respect of which local admiralty courts had jurisdiction immediately before the commencement of the AJRA on 1 November 1983 (see eg *Shooter t/a Shooter's Fisheries v Incorporated General Insurances Ltd* 1984 4 SA 269 (D) 272; *Incorporated General Insurances Ltd v Shooter t/a Shooter's Fisheries* 1987 1 SA 842 (A) 856–857; Van Niekerk "Marine insurance claims in the admiralty court: an historical conspectus" 1994 *SA Merc LJ* 26; in respect of such matters English law (as at the date of that commencement) applies: see s 6(1)(a) of the AJRA. On the applicable law in case of disputes arising on marine insurance contracts, see generally Van Niekerk "Marine insurance" 12 (1988) *LAWSA* par 297–299).

Marine insurance contracts, like those of non-marine insurance, are therefore governed by the general principles of South African law, drawing upon its Roman-Dutch common law. This means not only that the specific principles of the South African law of (marine) insurance will find application, but also that the general principles of the South African law of contract will have to be considered in appropriate circumstances. The English Marine Insurance Act 1906 (6 Edw 7 c 41 (the MIA)) and English law generally, which continue to apply in that system to contracts of marine insurance save in so far as it is

inconsistent with the provisions of that act (see s 91(2) of the MIA), therefore have no inherent binding authority in insurance matters arising before South African courts. English law may, at most, be of persuasive authority in those instances where indigenous legal principles provide no (or no acceptable) solution to a particular problem.

Obviously the development of the (uncodified) South African law of marine insurance by way of judicial pronouncement is of great importance to local insurance lawyers and practitioners alike. Unfortunately marine insurance disputes seldom reach South African courts and, even if they do, the decisions are not always reported. For this reason alone the unreported decision in *Zava Trading* per Thirion J, even though it was handed down more than four years ago, and even though, strictly speaking, it is not concerned with a marine insurance contract, is noteworthy. But the decision calls for a brief discussion for other reasons too: first of all because it demonstrates a particularly claustrophobic approach to a seemingly straightforward question of (marine) insurance law, and secondly because subsequent developments in another area of the South African law of contract may well have rendered it obsolete.

The facts and decision in *Zava Trading*

The plaintiff in this case, Zava Trading, was the owner of a consignment of 496 bales of textile which had been landed at Durban in August 1987. Its forwarding agents, Sealandair Shipping and Forwarding, had concluded a marine cargo policy with the defendant insurance company, Santam, in 1983. The policy in question was a floating (open) policy in what appears to have been a fairly standard form. It required the insured to declare every consignment without exception, the insurers being bound to provide cover up to an amount to be stated in each case. The policy covered the sea, air, postal, road and/or rail conveyance of cargo and purported to insure "goods and/or merchandise and/or interest as per attached schedule", interests other than the goods listed in the schedule being "held covered on conditions and at rates to be agreed". The schedule attached to the policy set out the rates (stated as a percentage of the value of the goods) for conveyance by sea and by air. It provided no rates for the determination of premiums in respect of the conveyance of goods by any other means, but merely provided that "other goods [were to be] held covered at rates and conditions to be agreed".

In contemplation of the carriage of the consignment by road from the port to a nearby bonded warehouse and thence to Zava's place of business, which was situated inland in the Orange Free State, Sealandair, acting on behalf of Zava, completed a declaration in February 1988. In it it notified the insurer through its broker of the fact that the consignment had arrived several months previously and requested maximum cover for the intended conveyance. The insurer replied that its inspection of the consigment at the port showed signs of soiling and poor packaging and that in consequence it provided only restrictive fire, collision and overturning cover and only for the journey from the port to the particular bonded warehouse; if all risks cover for the onward journey to the Free State was required, the insurer would in turn require a survey of the consignment. Sealandair then removed the consignment from the Durban harbour. It was taken, not to the bonded warehouse in question, but to the forwarding agents' own place of business in Durban. Before onward transportation to the

ultimate destination could commence, though, the consignment was destroyed by fire.

Zava claimed the value of the consignment from Santam on grounds of the policy it alleged was concluded between its agent, Sealandair, and Santam. The insurance company raised several (unspecified but, on the facts, probably not groundless) defences to the claim. After calling only one witness (the broker), the insured presented no further evidence on whether a contract had been formed between the parties. In this respect the insurer submitted that no contract had been formed because no agreement had been reached on one of the essential elements of the contract of insurance, namely the (amount of the) premium payable by the insured.

In reaching a decision, the court noted that, apart from the fact that no premium or rate of premium for the goods in question had been specifically agreed upon, the floating policy in question "laid down no method whereby the premiums for transportation by road could be determined independently of the will of the parties". It noted, furthermore, that the policy in question appeared to be more appropriate for application in conjunction with the British MIA and that there was no provision "in our insurance laws" similar to that contained in the latter act. (S 31(1) of the MIA provides that where insurance is effected at a premium to be arranged and no arrangement is made, a reasonable premium is payable; s 31(2) provides substantially the same in respect of insurance at an additional premium. In terms of s 88 of the MIA, what is a reasonable premium is a question of fact.)

Supported by evidence that a premium would specifically have had to be agreed upon by the parties themselves, the court came to the conclusion that the parties

> "must be held to have intended that, for there to be a contract of insurance, [they] would themselves have to agree on the premium [and that] the premium was not to be left to be determined by custom or practice or by what was reasonable in the circumstances".

The court accordingly held that, since no premium had specifically been agreed upon, no contract of insurance had come into existence, and it found for the insurer. In conclusion it emphasised that the insurance in question was not one for, nor incidental to or part of any, conveyance by sea.

Comment

The decision in *Zava Trading* caused some disquiet in local (marine) insurance circles where it was feared that it would have a hampering effect on generally accepted practices. The decision may be criticised for two reasons: first for the inference drawn on the facts before the court about the intention of the parties, and secondly for its failure to view the law of (marine) insurance in its broader context as but a part of the law of contract and, in consequence, to apply the relevant general principles to the insurance contract before it.

As will appear from the discussion which follows, two related but independent questions were relevant in *Zava Trading*. The first question, one of fact, was whether by agreeing to insure at a premium to be agreed, the parties intended that in the absence of such an agreement a reasonable premium would be payable; that is, whether an agreement to insure at a reasonable premium could be implied in this case. The second question, one of law and general principle,

was whether an (express or implied) agreement to pay a reasonable premium satisfies the criterion of certainty generally required in South African law for the validity of contracts. Obviously, if the answer to either of the two questions is "no", the other does not have to be decided. The court considered only the first question and answered it in the negative, and in consequence it did not feel the need to turn to the second question. However, as will be contended, its answer to the first question may well have been wrong. Furthermore, it is submitted that had the second, and logically more fundamental, issue been considered, the decision would certainly have been more satisfactory, even if probably no different. But there is a sequel too. As result of developments susequent to the decision in *Zava Trading* and relating to the general principles relevant to but not considered by the court there, it appears that the same point could well be decided differently should it come before a South African court today. These developments, and their possible influence on insurance contracts, therefore have to be noted in any discussion of and response to the *Zava Trading* decision.

The intention of the parties

First, then, the court's finding that by agreeing to insure at a premium to be agreed, it is the intention of the parties that, in the absence of any subsequent agreement as to premium, there is to be no insurance contract. Is it really correct and in accordance with general insurance practice that in such circumstances the parties intend that, for there to be a contract of insurance, they would themselves have to agree on the premium and that, failing such agreement, the premium was not to be left to be determined by custom or practice or by what was reasonable in the circumstances?

Generally speaking, the fact that parties to a contract agree to leave a matter which is capable of subsequent determination otherwise than by themselves, to be agreed upon later, should arguably not exclude the possibility of inferring an intention that, failing any subsequent agreement, that matter is to be so determined. But this may not be a necessary inference. The parties may in fact intend that their subsequent agreement on the matter in question is to be a condition suspending the operation of their contract. (In the light of the general rule that an interpretation which renders a contract valid and enforceable should be preferred to one which renders it invalid or inoperative, it could be argued, though, that a rebuttable presumption exists in favour of the inference that the parties did not by implication intend their subsequent agreement to operate as a suspensive condition. The party wishing to establish that this is the case, will then bear the burden of proof.) It is, therefore, a question of the parties' intention in every case and of an interpretation of the contract in the light of surrounding circumstances. Various factors may be relevant in this regard and may strengthen the conclusion that such an inference is justified: the type of contract in question; trade usages generally followed in respect of such contracts; the nature of the matter left by the parties for subsequent agreement; the relationship between the parties and whether, for example, they have concluded similar contracts in the past; the status of the parties; and their conduct subsequent to their agreement to agree.

While the application and precise scope of an agreement to insure "at a premium to be agreed" are not in all respects free of uncertainties and pitfalls, the very necessary function of such agreements nevertheless results in the

continued insertion of so-called "held covered" provisions in insurance contracts. For present purposes, I will confine my comments to the effect of an agreement to insure at a premium to be arranged only, leaving aside any further issues that may arise when the agreement is one to insure on terms, or at a premium and on (other) terms, to be agreed. (Nevertheless, it is thought that the relevant considerations and principles to be taken into account in such cases would be largely similar, the amount of the premium being but one of the essential terms of an insurance contract. (More about this point shortly; see generally Parkinson (genl ed) *MacGillivray and Parkington on insurance law* (1988) par 220 – 222 as to an (implied) agreement to insure on the insurers' usual term of cover, and par 1384 – 1386 as to an agreement to insure on terms to be agreed.)

Ordinarily, the held covered provision serves to provide further (continued) or additional insurance cover in particular circumstances, such as on the termination of existing cover, or the suspension of such cover in case of certain specified breaches of contract or changes in the risk. The cover is usually granted on notice by the insured to the insurer of the occurrence of the circumstances provided for, and at an additional premium (and terms) to be arranged.

But the provision may also serve to provide basic or initial (provisional) insurance cover at a premium (and terms) to be arranged in circumstances where cover is immediately required but where final agreement on such premium (and terms) is not possible, for example because of the urgency with which the cover is required, or because the details of the risk available at that time are insufficient to permit such final agreement.

It is submitted that insurers are prepared to provide and insured prepared to accept cover in this way precisely because they know that if subsequently they cannot reach an agreement on the premium, that will not result in their underlying agreement being of no effect; the cover it provides will remain in place as they intended and a reasonable premium will be payable. They know that if they themselves cannot agree on a premium, a reasonable premium will be determined for them by law or, where appropriate, by arbitration. In *Greenock Steamship Company v Maritime Insurance Company Limited* 1903 1 KB 367 375, for example, it was noted that in terms of a held covered provision, the parties must ascertain the premium and that

> "[i]f they cannot do it by agreement, they must have recourse to a Court of law . . . The [insurance] is good, but the [premium] has to be ascertained, either by agreement or at law".

The word "arranged" in the phrase "at a premium to be arranged" has been understood to mean "agreed or, in default of agreement, fixed by an arbitrator or by the Court" (see *Liberian Insurance Agency Inc v Mosse* 1977 2 Lloyd's LR 560 568). They know, furthermore, that this is possible because a premium is a matter which is capable of subsequent determination otherwise than by themselves. (The relevance of this factor appears from the fact that it has been held, albeit on an all risks policy which did not provide for an amendment of terms of cover as held covered provisions now usually do (see Lambeth *Templeman on marine insurance: its principles and practice* (1986) 95 where this point is made), that where no premium could be arranged (that is, where no cover for the risk could be obtained on the market), or where it would not be a premium which could properly be described as a reasonable commercial rate (where, eg, it equals the amount of loss: see *Greenock Steamship Company supra* 375), the held covered clause will not apply and the cover it purported to provide

will therefore not be effective (see *Liberian Insurance Agency v Mosse supra* 568).) They entertain no notion that in the absence of such agreement on the premium, their agreement to provide and accept cover under the held covered provision will be declared void, for they know that such a possibility will enable either one of them in appropriate circumstances (the insurer in case of loss, the insured in the event of no loss occurring during the period of cover) to escape his obligations (to pay for the loss, or to pay a premium) merely by refusing to agree on the premium. In *Mentz, Decker & Co v Maritime Insurance Company* 1910 1 KB 132 135 the court agreed that

> "it is impossible to construe the [held covered] clause as giving an option to the assured to be covered or not as he chooses . . . [and] in the event of the ship arriving safely . . . the underwriter would be entitled to his premium".

Accordingly a term must, where necessary and possible, be implied into the held covered provision to the effect that, should the parties fail to reach agreement on the premium to be arranged, a reasonable premium will be payable. (It may not be necessary because the held covered provision may provide for this expressly. Further, it may not be possible because circumstances may indicate that this is not the parties' intention: see eg *American Airlines Inc v Hope; Banque Sabbag SAL v Hope* 1973 1 Lloyd's LR 233 (CA), from which it is apparent that an agreement to insure on terms "to be arranged" may in a particular context show the intention of the parties to have been that there was to be no binding agreement until such outstanding (essential) matters have in fact been settled. It is to be noted that the matter not settled in this case was not simply the amount of an additional premium, but also the geographical limits within which the additional cover was to operate, and that the former could not be agreed until the latter had been determined. It is suggested that *MacGillivray & Parkington* par 1386 is correct in submitting that this case does not displace the usual presumption that where only the rate of premium is left to be agreed, the cover is effective pending such agreement. The wording of the held covered provision may also make it clear that agreement on, if not payment of, the premium is (like the giving of prompt notice, where this is required) a suspensive condition, that is, a term suspending the operation of the insurance contract and the cover it provides until the condition has been met: see eg the clause considered in *Northwestern National Insurance Company v Federal Intermediate Credit Bank of Spokane, Washington* 1988 American Maritime Cases (AMC) 1839 (US CA, 9th Cir).)

It is suggested that it is necessary to imply such a term to give business efficacy to the contract. (It is for this very reason that another term has been implied into a held covered provision providing further or additional cover in certain circumstances. This term is to the effect that the insured is to give the insurer prompt notice of the occurrence of an event for which the insured is held covered in terms of the provision: see eg *Thames and Mersey Insurance Co Ltd v HT van Laun & Co* 1917 2 KB 48 (HL) and *Hood v West End Motor Car Packing Co* 1917 2 KB 38 (CA) 48 where the court remarked that

> "the natural tendency of an assured is to wait and see if the matter goes through all right, and only in the case of a loss happening to give notice to the underwriters. In order to meet that tendency the stipulation as to notice is implied".

It is to be noted that this term is now usually expressed (as a suspensive condition: see above) in held covered provisions.)

Did the facts in *Zava Trading* militate against such a term being implied? The court, it appears, was influenced in its decision in this regard by two matters in particular.

First, by the nature of the cover provided by the held covered provision. The insurance contract in question, although in the form of a marine policy, provided cover solely against land risks. The cover it provided was not incidental to any cover against marine losses and the contract may therefore be classed as one of non-marine insurance. In fact, as the court remarked, the form of policy employed was quite unsuited to the risks it sought to cover and protection may equally well, and probably with fewer problems, have been provided by way of a goods in transit policy. (For an example of a case where an agreement to insure against (incidental) land risks at a premium to be agreed was contained in a marine insurance contract, see *Northern Feather International Inc v Those Certain London Underwriters Subscribing to Policy No JWP108 through Wigham Poland Ltd* 1989 AMC 1805 (US Dist Ct, Dist NJ). Nevertheless, it is submitted that the type of contract itself should not make any difference. It is true that held covered provisions most commonly occur in marine insurance contracts, but by concluding a non-marine contract in a marine form, the parties must be presumed to have been aware of the technical meaning in the marine business of the words and phrases they chose to employ, and to have intended them to bear the same meaning. This should be so even in the case of a commercial non-marine contract not in a marine form where held covered or similar provisions to insure at a rate to be agreed are uncommon but not unknown (see *MacGillivray and Parkington* par 216 1384; it is not necessary to consider here whether the same may be submitted for non-commercial insurances).)

In the second place the court was seemingly influenced by evidence, presented interestingly enough by the insured's broker, that "the premium would have had to be specifically agreed upon" by the parties themselves. The brief judgment does not provide any further detail of the nature of the evidence presented to the court on this point and it is not certain whether the evidence was in fact to the effect that, in South Africa, where the premium is not specifically agreed upon by the parties themselves, they would as a matter of accepted insurance practice not consider themselves bound by their agreement and would not resort to law or arbitration to have it determined.

But there are other factors which, although not pertinently raised before or analysed by the court, seem to suggest that this was not the intention of the parties in this case. The held covered provision was here contained in a marine floating policy which at the time of the dispute had been in effect between the (agent of the) insured and the insurer for some five years, and with reference to which marine risks and occasionally, as here, even non-marine risks had presumably been covered during this period. The insurer itself, both in its response to the insured's declaration and in a letter subsequent to the loss in which it referred the insured to the brokers involved, considered that a contract of insurance had been concluded with the insured.

It is submitted, therefore, that there is nothing to suggest, either in local insurance practices and law, or on the facts before the court in *Zava Trading*, that a term could not in that case have been implied into the held covered provision to the effect that, should the parties fail to reach an agreement on the

premium to be arranged, a reasonable premium would be payable. It is of course possible and, in South Africa, where there is no statutory regulation of the matter, probably advisable in order to avoid a result such as that reached in *Zava Trading*, that held covered provisions expressly contain a term to that effect.

The applicable general principles

As a result of its decision on the facts as to the intention of the parties, the court in *Zava Trading* did not consider it necessary to apply any relevant general principles. It is a pity, nevertheless, that the court did not even refer to those principles nor allude to their possible application to the case before it, an application which would have been necessary had its finding on the facts gone the other way as it arguably should have. In fact, the impression is created that the court may have thought that no such general principles were applicable to the case. Its apparent assumption that the English MIA and its regulation of the matter were not applicable, is certainly correct. So too, it would appear, its view that there exists no similar provision "in our insurance laws": the practice of insuring at a premium (or for that matter on any other terms) to be agreed was, as far as could be ascertained, unknown to the Roman-Dutch law of insurance and has not yet been the subject of any reported South African judicial decision. (There is some statutory recognition of an analogous practice: s 20*bis* of the Insurance Act 27 of 1943, which deals with the obligation of insurance intermediaries to account to insurers for premiums received, defines a "premium", for the purposes of that section, as including a deposit premium, and a "deposit premium" as

> "a provisional premium which is agreed upon in the event of it being impossible at the due date of the premium to determine the exact premium, and which represents a reasonable estimate of the premium" (see subs (6)).

But that, surely, is not necessarily the end of the matter. The issue may be, and in this case arguably was, governed by general principles which the court should have considered. It is submitted, further, that in applying such general principles it matters not whether or not the contract is one of marine insurance, or whether or not the risks in question are marine risks. General principles apply to all contracts, including insurance contracts, and therefore also to all insurance contracts.

What, then, are the general principles applicable in this case? It is trite law that the material or essential terms of a contract must be reasonably certain or ascertainable for it to be valid and binding, and that if this requirement of certainty is not met, the contract will be void for vagueness. Any performance rendered in terms of such a "contract" will be recoverable by an enrichment action. In determining whether the requirement of certainty has been met, the express and tacit (unexpressed) provisions of the contract have to be considered, and, where appropriate, also the terms implied by law together with any relevant trade usages (see eg Lubbe and Murray *Farlam and Hathaway: Contract, cases, materials and commentary* (1988) 307 – 319).

There is no doubt in South African law that agreement on the payment of a premium (as opposed to the actual payment itself) and on the amount of premium is an essential or material term of a true contract of insurance. (See eg Reinecke and Van der Merwe *General principles of insurance* (1989) par 21 190. In *Lake v Reinsurance Corporation Ltd* 1967 3 SA 124 (W) 127 – 128 it was held that "the contract of insurance is validly made and complete even

though the premium of insurance is not paid", and that, although this is subject to an express provision to the contrary, a provision that the policy is not to attach until payment of the premium will not be implied into an insurance contract. But this decision is not, as is suggested in *MacGillivray and Parkington* par 216 fn 18, authority for the statement that "[a]ll the parties have to do is to commit themselves to a certain arrangement for ascertaining the rate of premium". If it were, it would of course have been very relevant to the decision in *Zava Trading*.) The crisp point arising in connection with *Zava Trading* is therefore whether the requirement of certainty is met in the case where the parties to an insurance contract simply agree, either impliedly (as has been suggested they did in that case) or expressly, on insurance "at a premium to be agreed".

Uncertainty may take many forms and arise in different ways, and it is not always readily apparent whether an uncertainty as to an essential term is such as to vitiate the transaction. The application of the principle is admittedly not always an easy one. Nevertheless, its application in one particular set of circumstances has often attracted the attention of South African courts in the past, and may very usefully have been considered by way of analogy in the present case. The circumstances referred to arise where the parties to a contract of sale or a contract of lease either agree to sell at a price to be agreed, or to lease at a rental to be agreed, or agree (expressly or by implication) to sell at a reasonable price or to lease at a reasonable rental. The very direct analogy in this connection between insurance and sale in particular (that is, between premium and price) is not surprising. Historically the evolution of the modern contract of insurance is closely linked not only to the maritime loan but also (albeit to a lesser extent) to the contract of sale: insurance contracts initially took the form of (fictitious) loans or sales. In the case of the latter, property consigned and insured was considered to have been sold by the insured to the insurer, subject to a resolutive condition (a condition subsequent of nullity) in the case of the safe arrival of that property at the destination to which it had been consigned. Not only is there a direct analogy between the insurance premium on the one hand and the purchase price on the other, but insurance doctrines relating to insurable interest, indemnity, subrogation and abandonment may conceivably, at least to some extent, have been shaped and influenced by principles known to the law of sale (see on these points Sanborn *Origins of the early English maritime and commercial law* (1930, reprinted 1989) 237 – 239 247 – 248 256). The analogy between insurance and sale is one which apparently also did not escape the drafter of the English MIA. Section 31(1) of the codifying MIA is not based upon any express decision to that effect, but it accords with mercantile understanding and follows the analogy of a reasonable price in the case of contracts of sale (see Hardy Ivamy *Chalmers' Marine Insurance Act 1906* (1983) 47 and *Greenock Steamship Company supra* 375 where the effect of an agreement to hold covered at a premium to be agreed was likened to "the case of goods sold at a reasonable, though an unnamed, price").

The position in 1989

What was the position in South African law as regards the certainty of price or rental in 1989 when *Zava Trading* was decided?

It was clearly established that an agreement which leaves the decision whether or what to perform in the discretion of either the debtor or the creditor or their

agents, or to be determined by an unspecified third party, will not suffice; the agreement will in such a case be void for vagueness. This will not be the case where the decision is left to a specified and independent third party.

But what if the parties agree, for example, to leave the determination of what has to be performed to subsequent agreement between them and then fail to reach such agreement? It has been equally well established that a mere agreement to agree will not suffice to save an agreement incomplete on an essential matter (such as the amount of the price or rental) from being void for vagueness (see *Farlam and Hathway* 317 – 318; Kerr *The law of sale and lease* (1989) 27). It is quite possible that such an agreement to agree may, on failure to agree in appropriate circumstances, be regarded as amounting to an implied agreement by the parties that the usual or a reasonable price or rental would then be payable. But would such an implied agreement to pay the usual or a reasonable price or rental, or even an express agreement to that effect, suffice? It appears that an agreement to pay the usual or customary or market price or rental is acceptable (see Kerr 175). Less clear, in 1989, was the position where the agreement was for a reasonable price or rental. The majority of common-law writers (but there is authority to the contrary: see Erasmus, Van Warmelo and Zeffertt "Certum pretium and the Hooge Raad" 1975 *SALJ* 267) and, following them, the majority of South African decisions, considered the fixing of a price or rental as a "reasonable" one to be insufficiently certain (see *Farlam and Hathaway* 315; Kerr 27 174 – 176; and eg *Erasmus v Arcade Electric* 1962 3 SA 418 (T) *obiter* 419 – 420 (sale); *Lombard v Pongola Sugar Milling Co Ltd* 1963 4 SA 119 (D) 128 (sale); *Adcorp Spares PE (Pty) Ltd v Hydromulch (Pty) Ltd* 1972 3 SA 663 (T) (sale); *Trook t/a Trook's Tea Room v Shaik* 1983 3 SA 935 (N) (lease)). The underlying reason was that the performance (the price or rental) has to be certain or at least objectively ascertainable without the need for further agreement by the parties. This was in contrast to the position in English law and a number of other legal systems. (Eg s 8(2) of the British Sale of Goods Act 1979 (c 54), in this respect following the equivalent provisions of the Sale of Goods Act 1893 (56 & 57 Vict c 71), provides that where the price, which may be fixed by the contract, left to be fixed in a manner agreed by the contract, or determined by the course of dealing between the parties, is not so determined, the buyer must pay a reasonable price, which, in terms of s 8(3), is a question of fact dependent on the circumstances of each particular case; for some useful comparative perspectives, see Nicholas "Certainty of price" in Clark (ed) *Comparative and private international law: Essays in honour of John Henry Merryman on his seventieth birthday* (1990) 247 – 255.) But there was no unanimity in South African law: the opposite view was favoured in some decisions (see eg *Lobo Properties (Pty) Ltd v Express Lift Co (SA) (Pty) Ltd* 1961 1 SA 704 (C) (lease)), and, in the case of contracts for services and contracts of employment, the provision for the payment of a reasonable fee or remuneration was considered sufficiently certain (see eg *Inkin v Borehole Drillers* 1949 2 SA 366 (A); *Middleton v Carr* 1949 2 SA 374 (A) 386; *Angath v Muckunlal's Estate* 1954 4 SA 283 (N) 284; *Chamotte (Pty) Ltd v Carl Coetzee (Pty) Ltd* 1973 1 SA 644 (A) 649; *Elite Electrical Contractors v The Covered Wagon Restaurant* 1973 1 SA 195 (RA)). Not surprisingly, commentators were rather critical of the approach generally followed (see eg Zeffertt "Sales at a reasonable price" 1973 *SALJ* 113) and, indeed, it was rather inconsistent: the criterion of a reasonable price or rental appears to be an objective and therefore determinable

one, undistinguishable in principle from the case where it is agreed to leave the determination of price or rental to a specific third party. And it was, in any event, no different from the criterion of a reasonable remuneration which was in fact considered sufficiently certain. The approach, a relic of the strict rule of Roman law in this regard, was obviously out of touch with modern commercial reality, and was one which could in appropriate cases frustrate the clear intention of the parties to create a binding contract.

By analogy, the general principles set out above are arguably also applicable to insurance contracts (see Reinecke and Van der Merwe par 22 63 for a discussion of the application of those principles to insurance contracts). Unless some reason could be found for not applying them to insurance contracts, a court confronted with the matter in 1989 may well have considered itself bound by the dominant, albeit by no means unanimous, view. Thus the premium need not have been expressed, but it must at least have been determinable or ascertainable. This meant that at least the rate or basis of calculation had to be agreed upon precisely. As in the case of sale and lease, an agreement to insure at the insurer's ordinary or usual rate of premium in force at a particular time was held to be acceptable as ascertainable (see eg *Robin v Guarantee Life Assurance Co Ltd* 1984 4 SA 558 (A)), but where the agreement was for a premium to be agreed and none was agreed upon, or where the agreement (expressed or implied) was for a reasonable premium, the insurance contract would, in 1989, have been void for uncertainty.

Therefore, even had the court in *Zava Trading* come to the conclusion that an agreement could be implied that, failing an agreement by the parties themselves, a reasonable premium would be payable, the application of the general principles of the law of contract as they were at the time would probably not have resulted in a decision any different to that at which the court arrived in that case. But subsequent developments may now make a difference.

Subsequent developments

On the question whether an agreement to pay a reasonable price or rental satisfies the requirement of certainty, at least one subsequent decision by the Appellate Division, the first in which the issue has been considered by the court, has given rise to the very strong possibility that, on general principles, a case like *Zava Trading* may well be decided differently today.

In *Genac Properties Jhb (Pty) Ltd v NBC Administrators CC (previously NBC Administrators (Pty) Ltd)* 1992 1 SA 566 (A) (see also Hawthorne "The contractual requirement of certainty of price" 1992 *THRHR* 638) the court, in reviewing the unsettled state of the law as well as the position in other systems (including English law), remarked (577) 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". This statement, although *obiter*, and the whole tenor of the court's exposition, provide a strong indication of how such cases may be decided in future. The way may well have been paved for a less restrictive requirement of certainty in South African law. There is no reason why this will not also apply in the case of insurance contracts, and agreements to insure at a reasonable premium, like those to insure for the usual or customary premium, may now arguably be valid. (Another decision, *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd* 1993 1 SA 179 (A), although less directly in point,

gives an indication of the review and possible relaxation of the restrictiveness of another aspect of the requirement of certainty. Here the court confessed that it had "considerable difficulty in grasping why a price (or rent) fixed by one of the parties should be regarded as less *certain* than one to be determined by a third party", and although it nevertheless assumed that it was bound by the view of common-law authors that a sale or lease is invalid if the price or rent is to be determined by only one of the parties to the agreement, the court restricted this rule to the case where such a determination was entirely within the unfettered discretion of one of the parties: see further Hawthorne "Determination of rent by one of the parties" 1993 *THRHR* 508.)

Conclusion

In principle the usual agreement to insure "at a premium to be agreed" should not cause any problems under South African law where no such agreement on premium is in fact reached. Parties may in appropriate circumstances be taken to have agreed that a reasonable premium will be payable in such a case, and an agreement to pay a reasonable premium, whether expressed or implied, will in all probability in future no longer be regarded as being insufficiently certain and as rendering the insurance contract void for vagueness.

More generally, the decision in *Zava Trading* serves to emphasise that in determining the intention of the parties to an insurance contract, regard should be had to the nature and purpose of the contract and to the commercial background against which such contracts operate and against which parties presumably intended their contract to operate. It also illustrates the importance of realising that insurance contracts, whether marine or non-marine, are governed also, if not in the first place, by the general principles of the law of contract.

JP VAN NIEKERK
University of South Africa

JOINT CUSTODY: IS IT A FACTUAL IMPOSSIBILITY?

Pinion v Pinion 1994 2 SA 725 (D)

In the case of *Pinion* the parties to a divorce action felt so strongly about their desire to exercise joint custody over their minor daughter, aged seven years, that they preferred not to be divorced at all unless the court was prepared to accede to their request for a joint custody order. The application was supported by the family counsellor and the family advocate who interviewed the parties and the child at an enquiry in terms of the Mediation in Certain Divorce Matters Act 24 of 1987. The decision to ask for the joint custody of their child had been taken by the parties because they were "very concerned parents" and they wanted "their divorce to cause as little disruption and distress to D (the child) as possible" (727J).

Page J accepted that he had the power to grant a joint custody order in terms of section 6(3) of the Divorce Act. However, the learned judge focused on "the obvious disadvantages inherent in such an order" (728G) and concluded (731C) that it was not in the best interests of the child to grant an order of joint custody. In his judgment Page J referred to the cases of *Heimann* 1948 4 SA 926 (W), *Whitely v Leyshon* 1957 1 PH B9 (D), *Edwards* 1960 2 SA 523 (D), *Kastan* 1985 3 SA 235 (C), *Schlebusch* 1988 4 SA 548 (E) and *Venton* 1993 1 SA 763 (D). The works of legal writers that he referred to were Hahlo *The South African law of husband and wife* (1985) 389 402, and Hoffman and Pincus *The law of custody* (1989) 53 – 56.

Although the learned judge clearly favoured the "cautious approach" of Hoffman and Pincus *op cit* and *Schlebusch supra*, he did point out (729D) that the contention that joint custody was a legal impossibility was no longer good law. Yet, in giving reasons for his judgment (730E – F) Page J expressed himself in a way which leaves one with the feeling that a joint custody order is (in his view) a factual impossibility. He said:

> "The future behaviour of parents, as of other humans [one interposes at this point to wonder whether parents are a particular species of humans!], is unpredictable; and where their potential behaviour can give rise to a situation which will be detrimental to the interests of the minor concerned, it would, in my view, be better to exclude that possibility by avoiding creating a situation where it can occur unless the advantages to the minor of such a course are so significant as to justify taking the risk involved. I do not think that the fact that the parties may approach the Court should the risk materialise is any justification for taking it; it would serve the minor's interests far better not to take it all."

In short, what the learned judge appears to be saying is that any step that may possibly not be in the interests of a child should be avoided and discouraged. Does this mean, for example, that couples wanting to marry should be discouraged from doing so because "there is . . . [a] real risk of acrimonious or irresoluble disagreement between them in the future, which will redound to the detriment of the minor" children to be born as a result of their union? There can be no denying that the overwhelming desire of most couples wanting to marry is to have children. This is not a facetious or hypothetical question in view of the high risk of any marriage ending in the divorce courts these days. One does not need to cite the appalling divorce statistics to confirm this.

Even where a marriage does not end in divorce, the risk of parental disagreement exists in any "normal" marriage about the way in which the children should be brought up, what schools they should attend, who they should or should not be allowed to be associated with, what church they should attend, and so on. Thus, it also could be said of the "normal" marriage that

> "even if they [the parents] do succeed ultimately in resolving their differences by discussion, it will not be practically possible to conceal those differences from or present a united front to the minor, particularly as she grows older" (730I).

Does this mean that couples should not be allowed to have children? Surely not!

In any event, the extract cited by Page J from the work of Hoffman and Pincus *ibid* does not support the conclusion he reached. The authors certainly do not suggest that a joint custody order is a factual impossibility. They correctly draw attention to the fact that such an order should only be granted where

> "the parents retain no hostility or resentment towards each other, that they are mutually supportive of each other in regard to the children, and that they have a great deal of respect for each other and mutally desire joint custody. Joint custody should, without

> exception, only be awarded to those parents who are truly adult in their dealings with each other, and mature in the way that they relate to their children". (See also Schäfer "Joint custody" 1987 *SALJ* 159–160.)

The only recent case that supports the learned judge's conclusion in the instant case is *Schlebusch supra*, a judgment of Mullins J in the Eastern Cape Division which was criticised and not followed by Didcott J in *Venton supra*. Like the authors Hoffman and Pincus, it can be said that Didcott J also adopted a "cautious approach". Thus, after referring to the advantages and disadvantages of the joint custody order Didcott J concluded that there are no

> "hard and fast rules [for the granting of a joint custody order], except for the one guiding rule . . . the rule governing all questions of custody, the rule that the interests of the child or children are paramount. And those must always be assessed with reference to the particular circumstances of the case" (766).

What Didcott J was at pains to stress was that the impression generated by cases such as *Schlebusch* that the "Judiciary of this Province [Natal] had set its face against joint custody" (764G) was not true. He pointed out that such orders had in fact been granted in unreported cases in the Natal Provincial Division.

One should also point out that joint custody orders have been granted by judges in the Eastern Cape Division despite *Schlebusch's* case. (For criticisms of the approach of Mullins J in the *Schlebusch* case see, *inter alia*, Schäfer *The law of access to children* (1993) 128 fn 715.)

It is submitted that, like Mullins J in *Schlebusch*, Page J in the instant case was over-zealous in intervening where such intervention was uncalled for. The refusal to grant the joint custody order was based on speculation about the possibility that the parents would inevitably disagree with each other over the bringing-up of their daughter. Of course, such disagreements are as inevitable as night follows day. But does this justify the uncompromising approach of Page J? It is submitted that if the parents were prepared to try and act as mature and caring parents in the best interests of their daughter they should have been encouraged to do so. At the very least, in the absence of evidence to the contrary, they should have been given the chance to act jointly in the interests of their daughter.

In any event, it is trite that a judge of the supreme court, in the exercise of his authority as upper guardian, should not interpose his authority merely because he disagrees with the decision of the child's parents. He would have to go further and stigmatise the decision or wishes of the parents as being contrary to the best interests of the child. This was correctly emphasised by Mullins J in *S v L* 1992 3 SA 713 (E) 721G (see also Schäfer *op cit* 44 fn 264). It would seem that the finding that a joint custody order in the instant case would not be in the best interests of the child was based on the personal view of Page J. It is difficult to imagine a case where an order of joint custody would be more justified.

One can forgive the parties in the instant case for thinking that the law, far from supporting their endeavour to act as responsible parents, actually discouraged them from doing so. The circumstances that the parties in the instant case found themselves were far from ideal. The father, who was frequently absent on business in Swaziland, lived on a yacht in the Durban harbour, while the mother lived in close proximity in a flat on the Victoria Embankment. But what they had to offer their daughter, whom they both loved dearly, was the best in the circumstances. Moreover, the daughter appeared to have "adjusted to this arrangement and feels comfortable with both her parents" (728A).

It is also a pity that Page J dismissed the judgment of Didcott J in *Venton* as a "sarcastic illusion". It was nothing of the sort. The sarcasm, if any, was surely on the part of Mullins J in *Schlebusch* who pointed out (551J) that "such a Utopian state of affairs rarely in practice exists"; that is, where the parents are able to engage in "joint decision-making . . . and where the children continue, even years after a divorce, to regard their parents with equal affection and loyalty". Indeed, Didcott J gave well-considered reasons for disagreeing with Mullins J's concern with "any trend towards the granting of joint custody orders".

The parties were denied the divorce to which they appeared to be entitled by the refusal to grant a joint custody order. One of the consequences of this is that the parents will be forever condemned to the fact that neither of them will be able legally to marry anyone else (unless, of course, an application for a divorce is made at a later stage). It is to be hoped that practitioners in the Natal Provincial Division will continue to advise their clients along the lines of *Venton's* case rather than *Pinion's* case.

IVAN SCHÄFER
Rhodes University

BEMOEIING MET 'N KONTRAKTUELE VERHOUDING AS DELIKTUELE SKULDOORSAAK

Lanco Engineering CC v Aris Box Manufacturing (Pty) Ltd
1993 4 SA 378 (D)

Die eiser het 'n besigheid op 'n sekere eiendom bedryf. Hy is in November 1989 ingelig dat die eienaar van die gebou van voorneme is om die gebou in Maart 1990 af te breek. In Desember 1989 het die eiser 'n huurkontrak met die eienaar van 'n ander eiendom (wat in daardie stadium in besit van die verweerder was) gesluit ingevolge waarvan hy in Februarie 1990 okkupasie daarvan sou neem. Die eiser het beplan om Februariemaand te gebruik om sy toerusting na die nuwe eiendom te vervoer. Die verweerder se huurkontrak het op 31 Desember 1989 ten einde geloop. Hy het egter versuim om die eiendom op hierdie datum te ontruim en die eiser kon eers in April 1990 okkupasie daarvan neem. Die eiser eis skadevergoeding met die Aquiliese aksie van die verweerder op grond van 'n onregmatige en opsetlike bemoeiing met die eiser se kontraktuele verhouding in verband met die huur. Die eis slaag.

Regter Galgut noem ten aanvang dat daar ten minste drie vereistes is vir 'n suksesvolle beroep op bemoeiing met 'n kontraktuele verhouding as Aquiliese aksiegrond (380F): "These are that there must be (a) an unlawful and (b) a culpable (in the broad sense) (c) interference." Ons bespreek hierdie vereistes vervolgens.

1 Bemoeiing ("interference")

In hierdie verband betoog die verweerder dat daar twee noodsaaklike vereistes is waaraan 'n bemoeiingshandeling moet voldoen (381B – E):

> "The first is that the interference by the defendant must result in a breach of the contract by the party with whom the plaintiff contracted . . . The second . . . is that such interference must consist of an inducement exercised by the defendant upon such party to commit the breach."

Die regter toon oortuigend aan (381G – 384E) dat, alhoewel daar baie sake is waarin sodanige aanstigting en kontrakbreuk voorkom (sien ook Neethling, Potgieter en Visser *Law of delict* (1994) 294; Van Heerden en Neethling *Onregmatige mededinging* (1983) 194; Neethling "Die reg aangaande onregmatige mededinging sedert 1983" 1991 *THRHR* 566 – 567; *Aetiology Today CC t/a Somerset Schools v Van Aswegen* 1992 1 SA 807 (W) 820), bemoeiing met 'n kontraktuele verhouding geensins tot hierdie gevalle beperk is nie. Dit word gestaaf deur uiteenlopende voorbeelde uit die regspraak van omstandighede wat ook as bemoeiing met 'n kontraktuele verhouding tipeer kan word. Hierdie voorbeelde kan onses insiens onder drie hoofde ingedeel word:

(a) Bemoeiing met 'n kontraktuele verhouding kan eerstens voorkom waar 'n buitestander so optree dat 'n kontraksparty nie die prestasie verkry waarop hy *ex contractu* geregtig is nie, maar sonder dat kontrakbreuk plaasvind of dat die optrede op aanstigting ("inducement") neerkom. Voorbeelde uit die regspraak is waar 'n derde grond wat aan 'n persoon verhuur is, ongemagtig beset het sodat die huurder nie besit daarvan kon neem nie (*Dantex Investment Holdings (Pty) Ltd v Brenner* 1989 1 SA 390 (A) – dit was ook die geval *in casu*); waar 'n landdros in 'n motorongeluk beseer is en vir twee maande nie kon werk nie maar die staat nietemin ingevolge die dienskontrak sy volle salaris vir bedoelde periode moes betaal (*Union Government v Ocean Accident and Guarantee Corporation Ltd* 1956 1 SA 577 (A); sien ook *Lanco* 282B – H); waar 'n kabel wat elektrisiteit aan die eiser se fabriek ingevolge 'n ooreenkoms met die stadsraad voorsien, op 'n nalatige wyse deur die verweerder beskadig is en die eiser produksieverlies gely het (*Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D); sien ook *Lanco* 383H – I); waar gifstof wat die Spoorweë gebruik het om onkruid langs die spoorlyn te vernietig, versprei, boere se wingerde beskadig en 'n swak druiweoes veroorsaak het – die eiser, die korporasie aan wie die boere hul druiwe ingevolge 'n ooreenkoms moes lewer, ly gevolglik vermoënsverlies (*Franschhoekse Wynkelder (Kooperatief) Bpk v SAR & H* 1981 3 SA 36 (K)). Hieronder kan ook die gevalle tuisgebring word waar 'n persoon (soos die huurkoopkoper) wat kragtens 'n kontrak met die eienaar in besit daarvan is, in die mate waarin hy 'n direkte ekonomiese belang in die ekonomiese waarde van die saak het, die *actio legis Aquiliae* kan instel teen 'n derde wat die saak beskadig het (Neethling, Potgieter en Visser 294 – 295).

(b) Tweedens kan bemoeiing met 'n kontraktuele verhouding voorkom in omstandighede waar daar wel van 'n aanstigtingshandeling sprake is, maar die aanstigting nie tot kontrakbreuk lei nie maar tot *regmatige* beëindiging van die kontrak. As voorbeeld kan die geval dien waar 'n werknemer van 'n ondernemer na aansporing deur 'n mededingende ondernemer sy dienskontrak regmatig beëindig (vgl *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Gwano (Pty) Ltd* 1981 2 SA 173 (T) 200; *Lanco* 383A – F; Van Heerden en Neethling 150 – 152). Of sodanige bemoeiing *onregmatig* is, is natuurlik 'n ander vraag waarop hieronder ingegaan word.

(c) Derdens is daar sprake van bemoeiing met 'n kontraktuele verhouding waar 'n derde party so optree dat 'n kontraksparty se kontraktuele verpligtinge verswaar word. So 'n geval het in *Shell and BP SA Petroleum Refineries (Pty) Ltd v Osborne Panama SA* 1980 3 SA 653 (D) voorgekom. Hier het die verweerder se tenkskip 'n meerboei op nalatige wyse beskadig. Dit het tot gevolg gehad dat die aflaai van 'n tenkskip waarvan die eiser die huurder en bevragter was, vertraag is en dat hy ingevolge die ooreenkoms tussen hom en die verhuurder bygevolg meer lêgeld moes betaal vir die vertragingstydperk (sien Neethling 1981 *THRHR* 78; Neethling, Potgieter en Visser 293 296 vn 207; vgl Van der Merwe en Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 371 381 vn 6).

2 Onregmatigheid

Volgens regter Galgut in die *Lanco*-saak (380F – G) moet onregmatigheid aan die hand van die *boni mores*-maatstaf bepaal word:

> "The question of unlawfulness, and in particular by what yardstick such unlawfulness is to be determined, is a matter which, until the last decade at any rate, provided our Courts with some difficulty. As I understand the cases it is, however, by now well settled that what determines whether any particular conduct is unlawful or not is the general criterion of reasonableness or the *boni mores* as perceived by the public."

Alhoewel die regter aanstigting en kontrakbreuk as absolute vereistes vir 'n suksesvolle beroep op bemoeiing met 'n kontraktuele verhouding as deliktuele aksiegrond verwerp, speel hierdie faktore volgens hom tog 'n belangrike rol by die onregmatigheidsvraag in hierdie verband. Hy stel dit soos volg (384D – H):

> "In all of the circumstances it seems therefore that I may safely conclude that an inducement and a breach are not prerequisites to a successful action for the unlawful and intentional interference by a third party in a party's contractual relationship. I hasten to add, however, that this does not mean that these matters are irrelevant. On the contrary, they will nevertheless be features of importance. As I see it their true significance lies, however, in the question of unlawfulness . . . They are no more than features which must be thrown into the scales when a Court considers whether public policy, or the *boni mores*, or the criterion of reasonableness, will regard any particular interference in a contractual relationship as unlawful or not. Indeed, they are important considerations, so important that in a given case their absence might make it difficult for a Court to conclude that the inference concerned was unlawful. I emphasise however that each case must depend upon its own facts."

Alhoewel hierdie standpunt in die algemeen instemming verdien, moet tog daarteen gewaak word om nie te veel klem op aanstigting en kontrakbreuk as onregmatigheidsvestigende faktore te plaas nie. So 'n benadering kan moontlik stremmend inwerk op die toepassing van die soepele *boni mores*-maatstaf. Aangesien 'n mens in gevalle van bemoeiing met 'n kontraktuele verhouding deurgaans met benadeling in die vorm van suiwer ekonomiese verlies te make het (sien Neethling, Potgieter en Visser 296), moet beklemtoon word dat nie elke feitelike bemoeiing met 'n kontraktuele verhouding deur 'n derde *prima facie* onregmatig is nie. Dit is eers die geval indien sodanige bemoeiing boonop *contra bonos mores* of onredelik is; en hier gaan dit in laaste instansie by suiwer ekonomiese verlies oor "a value judgement embracing all relevant facts and involving considerations of policy" (*Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 1 SA 783 (A) 797). So gesien, kan faktore wat by die onregmatigheidsvraag in die geval van suiwer ekonomiese verlies 'n rol speel (sien Neethling, Potgieter en Visser 282 – 286), soos die dader se *subjektiewe wete* dat die eiser benadeel gaan word, ook by bemoeiing met 'n kontraktuele verhouding relevant

wees (sien ook Neethling en Van Aswegen "Aspekte van aanspreeklikheid weens suiwer ekonomiese verlies: bemoeiing met 'n kontraktuele verhouding en die rol van beleidsoorwegings" 1989 *THRHR* 609 – by implikasie word hierdie benadering reeds deur die *Shell and BP*-saak *supra* gerugsteun). Die onderhawige saak is juis 'n voorbeeld waar ten spyte van die afwesigheid van aanstigting en kontrakbreuk die bemoeiing as onregmatig gebrandmerk is hoofsaaklik omdat die verweerder (verteenwoordig deur ene Paruk) *geweet* het dat die eiser benadeel gaan word. Paruk het naamlik in die stadium toe die ooreenkoms tussen die eiser en die eienaar van die betrokke perseel onderhandel en gesluit is, op oneerlike wyse versuim om te verduidelik dat die verweerder die huurperseel nie betyds sou kon ontruim nie. Daarom ontlok sy optrede nie alleen morele verontwaardiging nie maar word dit tereg as *contra bonos mores* en daarom onregmatig beoordeel (*Lanco* 388H – 389E).

Met verwysing na gevalle waar die bemoeiing met 'n kontraktuele verhouding tot regmatige beëindiging van die kontrak lei (sien (b) hierbo), kan dit vreemd voorkom dat aanstigting tot regmatige optrede onregmatig kan wees (vgl Van Dijkhorst R in *Atlas supra* 200). Tog gaan dié standpunt in die mededingingstryd dikwels op in die lig van die mededingingsprinsiep en die redelikheidskriterium as aanvullende onregmatigheidsmaatstaf (sien Van Heerden en Neethling 151 – 152 vir 'n volledige uiteensetting). In dié verband verwys regter Galgut in *Lanco* 383E – F met goedkeuring na laasgenoemde skrywers:

> "Commenting on this passage [*Altas supra* 200] the authors of *Onregmatige Mededinging* . . . also strongly suggest that our law does not preclude the upholding of a claim on the basis of an interference which results in an employee lawfully terminating his contract of service."

3 Skuld

Wat skuld in gevalle van bemoeiing met kontraktuele verhoudinge betref, is die tradisionele standpunt dat aanspreeklikheid slegs op *opsetlike* bemoeiing volg. In navolging van *Union Government supra* weier die howe in die reël om deliktuele aanspreeklikheid weens die *nalatige* bemoeiing met 'n kontraktuele verhouding buite die histories-verantwoordbare gevalle uit te brei (Neethling, Potgieter en Visser 294). Nietemin is daar aanduidings dat die appèlhof die vraag na aanspreeklikheid *ex lege Aquilia* vir die nalatige bemoeiing met 'n kontraktuele verhouding in heroorweging kan neem (sien ook Neethling en Van Aswegen 1989 *THRHR* 608 – 609; Neethling, Potgieter en Visser 296 vn 207). In *Dantex supra* 395 verklaar appèlregter Grosskopff naamlik:

> "It is clear that an interference with contractual rights can in certain circumstances constitute a delict. What is less clear is what precisely the requirements for liability are . . . In the present case Mr *Slomowitz* accepted that this cause of action required fault in the form of *dolus* on the part of the defendants. Moreover both parties were *ad idem* that, if such *dolus* has been pleaded, the pleading would disclose a cause of action in delict. For the purposes of this case I assume, without deciding, that the parties' attitude is correct. I would, however, emphasise that the question whether *culpa* might not constitute a sufficient element of fault to ground liability for damages for an unlawful interference with contractual relations, was not raised or debated in argument. Since there was in any event no allegation of *culpa* in the pleadings I need say no more about this possibility."

Hierdie benadering van die appèlhof vind ook in *Lanco* weerklank (380J – 381B):

> "As far as the question of culpability is concerned, it is clear that *dolus* at least is necessary. Whether *culpa* will also suffice is a question that has thus far not been settled by the Courts. It was left open by the Appellate Division in *Dantex* [*supra*]. In the

> case before me there is no need to go into this question, firstly, because counsel for the plaintiff accepts that *dolus* is necessary and, secondly, because, as I will show, *dolus* has in any event been proved. I will therefore assume that *dolus* is the necessary ingredient to found a successful claim."

Daar bestaan na ons mening in beginsel geen rede waarom deliktuele aanspreeklikheid nie ook in die geval van nalatige bemoeiing met 'n kontraktuele verhouding gevestig kan word nie. Die vrees vir oewerlose aanspreeklikheid kan besweer word deur die korrekte toepassing van al die elemente, veral dié van onregmatigheid, van die onregmatige daad (Neethling, Potgieter en Visser 296).

J NEETHLING
JM POTGIETER
Universiteit van Suid-Afrika

OWNERSHIP OF MONEY AND THE *ACTIO PAULIANA*

Commissioner of Customs and Excise v Bank of Lisbon International Ltd 1994 1 SA 205 (N)

1 Introduction

This case deals with an appeal against the refusal of the court *a quo* to refer the application of the appellant for the hearing of oral evidence. In the course of the judgment interesting points in respect of the ownership of moneys, the *actio Pauliana* as well as certain banking practices, which deserve further attention, were raised.

2 Facts

Passamonte was the sole director and shareholder of Reob. Passamonte was also the sole director and shareholder of Workshop Jewellers (Pty) Ltd, trading as Time Square Jewellers, and he traded personally under the name of Afro International Trading Corporation. All relevant bank accounts were with the Bank of Lisbon. Passamonte also had two instalment sale accounts in terms of instalment sale agreements with the Bank of Lisbon in respect of an automatic hydraulic press and dies and a Mercedes-Benz motor vehicle (216B – C). Reob, the second respondent, defrauded the Commissioner of Customs and Excise of large sums of moneys, which were paid into Reob's account with the Bank of Lisbon, which account had at all relevant times a credit balance (207E – F). The bank transferred amounts of this money from Reob's account into the accounts of Time Square and Afro, which were substantially overdrawn and into the two instalment sale accounts under which large amounts were outstanding (216E – F). The bank alleged that these transfers were authorised by Reob in terms of a general banking purposes facility. The manager of the Durban branch of the bank explained the nature of the facility as allowing a group

of companies, or an individual operating different accounts, to operate all the accounts within the limits of one total facility agreed upon between the bank and the customer. This facility also obviates the necessity to transfer funds from one account to another when overdraft facilities in respect of one particular account are either exceeded or if additional facilities are required. Finally, the facility, which operates as a single facility within a group of accounts, also means that when it is called up, any credit standing to any of the accounts will be debited against it for the credit of those accounts in debit (216I – 217B).

Passamonte had applied for this facility, which was granted, in respect of all the bank accounts of the group.

3 Ownership of money

One of the points raised was the ownership of the moneys which Reob had fraudulently obtained from the commissioner and which Reob had subsequently paid into its bank account. The court *a quo* had found that the commissioner had traced each payment and proved that the moneys found their way into the account without mixing with other money (208B). Thirion J found the circumstances under which Reob obtained the moneys by fraud from the commissioner to be such as to deprive delivery to Reob of any legal effect and, relying on *R v Manual* 1953 4 SA 523 (A) and *S v Kotze* 1965 1 SA 118 (A), considered the taking of the moneys nothing short of theft (208G). He was therefore satisfied that the moneys were the property of the commissioner at the time when it was paid into Reob's account; however, he concluded that when the money was paid by Reob into its bank account with the Bank of Lisbon, ownership of the money passed to the bank, since money is a *res fungibilis* and the bank received it without reason to believe that it had been stolen by Reob or obtained by fraud. He based this finding on *Foley v Hill* (1848) 2 HL Cas 28 (9 ER 1002) and *S v Kotze supra* 208H – I.

Such a finding appears to conflict with the golden rule of the law of property, namely *nemo plus iuris ad alium transferre potest quam ipse habet* or *nemo dat qui non habet* (Kleyn and Boraine *Silberberg and Schoeman's The law of property* (1992) 76). Thus neither a thief nor any other person who is not the owner can transfer the right of ownership to another person, regardless of whether the person who acquires the thing acts in good or in bad faith and gives value for it (*idem* 271). The owner's power to vindicate his property is, however, restricted by the doctrine of estoppel and the instances of stolen money and negotiable instruments payable to bearer, which cannot be vindicated from a person who has acquired them in good faith and for valuable consideration. Originally, the mixing up of the stolen money with other money of the recipient was required, but in *Woodhead Plant & Co v Gunn* (1894) 11 SC 4 this requirement was dropped (cf *Adams v Mocke* (1906) 23 SC 782; *Amalgamated Society of Woodworkers v Die Ambagsaal* 1976 1 SA (T) 596; Kleyn and Boraine 301 ff; Van der Merwe *Sakereg* (1989) 365).

Although it is clear from the above that under the general principles of the law of property, it appears impossible for Reob to transfer the ownership of the money to the bank, the possibility exists that the bank could have acquired ownership by way of an original method, namely *commixtio* (Van der Merwe 365), which rule derives from *D* 46 3 78. This text is *prima facie* in conflict with the general rules of *commixtio* in terms of which either joint ownership

or retention of each owner's right in the mixture results from mixing or mingling (cf *Andrews v Rosenbaum & Co* 1908 EDC 419; Kleyn and Boraine 222 ff).

3 1 Roman law

Since the origin of this rather exceptional position in respect of the ownership of money appears to be founded in Roman law, a short excursus into this field should yield clarity. Rome began minting its own silver coins in about 268 or 269 BC. However, silver had already been coined in Magna Graecia and Etruria and was in circulation in Rome prior to this date (Daremberg-Saglio *Dictionnaire des antiquités grecques et romaines* (1877 – 1919) 406). The variety of coins in circulation necessitated exchange banking, while counterfeiting led to the introduction of coin proofing by the *nummularius*. In antiquity, coins circulated for long periods and the debasement of coinage and scarcity of coined money were essential characteristics of the ancient economy. In 86 BC the praetor M Marius Gratidianus passed an edict conferring on creditors the right to demand that the coins tendered in payment were proofed by a *nummularius* (Cicero *De officiis* 3 20). Moreover, so-called *tesserae nummulariae*, small bone tags, were tied to sacks of money and formed a guarantee of their contents (Cary "Tesserae gladiatoriae sive nummulariae" 1923 *Journal of Roman Studies* 110). The variety of different coins in circulation meant that exchange of coins, also undertaken by the *nummularii* who charged a service fee, was vital. Although the exchange of coins was later regarded as sale (*D* 48 10 9 2), Cicero (*Ad Atticum* 12 27) still considered it barter, thereby reflecting the primitive view of money as an object and not as a means of payment. This dualistic point of view, the result of the absence of a standard currency, is also found in the contract of *depositum*. In terms of an orthodox deposit, a depositor transferred money to a depositee, for example a banker. However, neither ownership nor possession was vested in the transferee. Thus the banker was obliged to return the same coins to his client and was not permitted to use the money while it was deposited with him. This closed deposit meant that the client deposited his moneys in a closed, sealed sack. It offered the client safety and could also be used to effect payment to a third party. However, a second form of deposit developed, the so-called *depositum irregulare*, where the banker became owner of the money deposited with him, could use the money and was obliged to return an equivalent sum (*D* 16 3 25 1; 16 3 28; 19 2 31).

Money is considered to be a *res fungibilis* and is also generic and consumptible (*Inst* 2 4 2; *D* 12 1 2 1). Thus money as a means of exchange is consumed by spending it. However, the difference between money and other *res consumptibiles* is that in general consumed goods no longer exist, while the coins do. *D* 12 1 13 *pr* and 1 and *D* 12 1 19 1, which deal with loan for consumption of another's money, make provision for the practical problem that *reivindicatio* of money is possible only in the exceptional circumstances where the money can be identified, for example, because it was and still is in a sealed sack. Thus in cases where the borrower has consumed the *nummi alieni*, a *condictio* on the basis of *mutuum* was granted. In his essay "Das Geld im roemischen Sachenrecht" 1961 *Tijdschrift voor Rechtsgeschiedenis* 169 – 229 Kaser authoritatively sets forth that money held a special place in the law of property because of its special characteristics. The fact that Roman law sources often refer to the *vindicatio nummorum* is explained by the practice of paying larger amounts in sealed sacks and storing these sacks in a safe. Smaller payments in loose coins

would as a rule mix with the money of the recipient, in which case the *reivindicatio* became practically impossible. In consequence, a special case for the mixing of moneys developed, as contained in *D* 46 3 78, excluding the *vindicatio pro parte* in deviation of the general rule for *commixtio* of solids and leaving the previous owner of the money with the *actio furti* and the *condictio ex causa furtiva* against the person who had made the payment. Thus the first exception applicable to money is that ownership of another's money is acquired by mixing it with one's own money.

A rather more drastic deviation from the general principles of the law of property in respect of money is, however, the second case, which was established by Burdese ("In tema di consumptio nummorum" 51 1 (1953) *Rivista Diritto Commune* 269 ff) and taken over by Kaser (*supra*), namely that consumption of another's money affects the ownership of the money. Long known, but never explicitly stated, since only indirectly formulated in the texts (*D* 12 1 11 2; 12 1 12; 12 1 14; 12 1 13 *pr* and 1; 12 1 19 1; 12 1 31 1; 19 1 30 *pr*; 23 3 81; 26 8 9 2; 34 5 15; 40 7 3 9; 44 7 24 2; 46 1 56 2; 46 3 14 8; 46 3 17; 46 3 94 2), this important break with the golden rule of the law of property is explained by the fact that money as *res consumptibilis* is consumed, not by identifying consumption with mixing. No texts state that the mixing of another's money with own money is consumption. No text allows the *reivindicatio* after consumption, which is a clear indication that ownership has been lost. Kaser formulates the special rule that the person who spends another's money in good faith makes the recipient owner (cf also *Das roemische Privatrecht* 431). However, since the sources are far from unanimous as regards the requirement of good faith on the part of the spender and in view of the rationale for this exception to the *nemo plus iuris* rule, it is submitted that *bona fides* on the part of the recipient is a more likely and indeed the only requirement. This would lead to another formulation of the rule, namely consumption of another's money makes the *bona fide* recipient owner of the money.

3 2 Roman-Dutch law

Although the abovementioned special rule relating to the transfer of ownership of money is nowhere explicitly stated in the sources and is found in the subtext, both Van der Keesel and Voet were aware of it. In *Commentarius ad pandectas* 12 1 8 Voet discusses the lending of another's money without the consent of the owner and excludes the *reivindicatio* if the money has been spent. In this case the *condictio*, a personal action, applies if the money has been spent in good faith, or the *actio ad exhibendum* if it has been spent in bad faith. Spending of the money could also validate a loan where that which was granted, had not become the property of the receiver. Voet explains (in 12 1 9) that spending means not only disbursing or ceasing to exist, but also mixing with the property of the receiver.

Van der Keessel *Praelectiones ad* 3 10 § 2 follows the same reasoning; in cases where another's money is loaned, the owner can institute the *reivindicatio* before the moneys are spend. After the money is spent in good faith, the debtor is liable, not to the owner but to the creditor on the basis of *mutuum*. Van der Keessel considers the consumption of coins to have taken place if mixing with own coins has taken place.

In his discussion of the *reivindicatio* Voet 6 1 mentions explicitly that where stolen money was paid to a *bona fide* creditor, or paid as a purchase price or

spent or mixed with another's money, it cannot be claimed with either the *reivindicatio* or a *condictio*, since the coins were considered consumed. (Voet finds authority for this rule in *D* 46 3 78; 46 3 17; 12 1 19 1; Matthaeus *De auctionibus* 1 18 12 and Neostadius *Decisiones curiae supremae* 36.) In this instance *bona fides* is required on the part of the recipient only and the fact that Voet fails to draw the conclusion that ownership has been transferred, may be explained by the context, that is, the title *de rei vindicatione*.

Although both Voet and Van der Keessel fail to make the dogmatic distinctions of Kaser, it is clear that the special position of money in respect of the transfer of ownership was maintained in Roman-Dutch law. Both authors are explicit that after consumption, whether by disbursing or mixing, the *reivindicatio* will fail and that, depending on the circumstances, a personal action may be available, indicating that ownership has been transferred.

3 3 South African law

Maasdorp (*The institutes of Cape law* III (1924) 124 and *Institutes of South African law* III (1978) 83) draws the logical conclusion from Voet 12 1 8, namely that the consumption of money affects its ownership. His construction, that consumption of another's money vests ownership in the consumer and that the previous owner is divested of his ownership, is clearly aimed at respecting the *nemo plus iuris* rule. He regards money as consumed, not only when it has been used up, but also when it has become so mixed with the borrower's own that it can no longer be separated or identified. The standard textbook approach appears to be, however, that *commixtio* is the only method to acquire ownership of money from a *non-dominus*, although Van der Merwe 49 follows Voet and considers the mixing of money to be an instance of consumption (Kleyn and Boraine 302 fn 3; Hutchison, Van Heerden, Visser and Van der Merwe *Wille's principles of South African law* (1991) 288). Their solution is to classify stolen money under the exceptional cases in which the owner cannot vindicate his property (*Wille's principles* 271; Van der Merwe 365; Kleyn and Boraine 301).

3 4 Conclusion

Malan ("Share certificates, money and negotiability" 1977 *SALJ* 249) has, independently of Kaser and on the basis of our case law, made the distinction between the instance of *commixtio* and the exception to the *nemo plus iuris* rule in respect of consumed money (*R v Gordon* 1914 CPD 123 125; *Ex parte Estate Kelly* 1942 OPD 265 269; *Woodhead Plant & Co v Gunn* (1894) 11 SC 4 7–8; *Sandell v Jacobs* 1970 4 SA 633 (SWA); *Adams v Mocke* (1906) 23 SC 782 788), but it appears that this contribution has attracted scant attention and no open adherents. An explanation for this may be found in the fact that one of the characteristics of South African law of property is that it jealously protects the right of ownership (Malan 1977 *SALJ* 245). Moreover, South African law has a proprietary concept of money and treats it as *res corporales*; ownership of the coins and notes is acquired by the same methods as other movable property, regardless of the South African Reserve Bank Act 29 of 1944 and the South African Mint and Coinage Act 78 of 1964 (cf Van der Merwe 365). In this context exceptions to the *nemo plus iuris* rule are unwelcome and questions whether a successful plea of estoppel, or consumption of another's money confer ownership, are left open.

It should be noted, however, that modern money has no intrinsic value, but serves only as a means of exchange and that in the modern world of finance and banking with its sophisticated technology, sealed bags are being replaced by electronic transfers. The special position the Roman jurists developed in respect of the transfer of ownership of money is tailor-made for modern economic circumstances and it is submitted that one exception to the *nemo plus iuris* rule will not shatter the foundations of the law of property.

Finally, the conclusion must be reached that Thirion J was correct when he found that when the money was paid by Reob into its bank account with the Bank of Lisbon, ownership of the money vested in the bank (208H – I). The question whether the bank's ownership was the result of *commixtio* with the bank's moneys, the one exception, or of consumption, the other exception, was left open.

4 ***Actio Pauliana***

Thirion J was nevertheless of the opinion that the commissioner should have a remedy, similar to the English tracing order (209B – D) against the bank (208J – 209A), and set out to find an analogous remedy in South African law. The first remedy under scrutiny was the *actio Pauliana*. Referring to *Fenhalls v Ebrahim* 1956 4 SA 723 (D) 727D – G, the court accepted the requirements as set forth in this case, in particular Pothier's interpretation of the general elements for this action (209G – H). Thereafter the court pointed out that where the bank had acquired the property *ex titulo lucrativo*, it was not necessary to show that it was a party to the fraud or acted *mala fide* (209I – 210D). On the strength of *Fenhalls v Ebrahim supra* the court held, moreover, that Reob did not have to be sequestrated before fraudulent alienations could be set aside by an individual creditor, but that the question is whether the *actio Pauliana* is also available where the debtor has neither been declared insolvent nor was insolvent at the time of disposal of the fraudulently obtained property (210D – F). Making a distinction in respect of the *Fenhalls* decision by pointing out that in that case the debtor was hopelessly insolvent at the time of alienation (210F – G), the judge analysed the sources to ascertain whether the operation of the *actio Pauliana* is confined to cases where the debtor's assets had been sequestrated or where he was in insolvent circumstances (Van der Keessel *Theses selectae* 200; Hunter *Roman law* 881; Buckland *A textbook of Roman law* 596; Moyle *Institutes of Justinian* 532; Kaser-Dannenbring *Roman private law* 52; *D* 42 8 1 and 42 8 1 2; Van Oven *Leerboek van Romeinsch privaatrecht* 361). Thirion J concluded that the developed *actio Pauliana* had shed its earlier restrictions and had become a personal action of general application with which an individual creditor who has suffered loss as the result of the debtor's fraud, can recover property alienated by the debtor *in fraudem creditorum* from third parties where these parties either had knowledge of the fraud or had not given value for the property, regardless of sequestration or insolvency of the debtor's estate (213E – G). Consequently the court was of the opinion that the *actio Pauliana* found application in the present case since Reob diminished its assets available to pay its debt to the commissioner, by paying the moneys to the bank (213G – I). Thirion J pointed out that the relationship between banker and customers is that of debtor and creditor, the customer having a "special property or interest" in the money in his bank account and that the bank is in the same position as any other third party receiving money under a gratuitous title. He

therefore held that the bank would not be in a position to resist the claim of a defrauded creditor in respect of stolen money deposited in the thief's bank account, unless the bank had acquired the money *titulo oneroso* and ignorant of the fraud (213I – 214C; cf also 230E – F).

After examining the *condictio sine causa* (Huber *Heedensdaegse rechtsgeleertheyt* 3 35 16; De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg* 82; *Govender v Standard Bank of South Africa Ltd* 1984 4 SA 392 (C) 405A – C), Thirion J concluded that this remedy would also be available to the commissioner, unless the bank had given value for the money (214C – 215B).

Finally, the court enquired whether the facts of the case as set out in the commissioner's founding affidavit supported the various remedies. It found that the *reivindicatio* was not applicable, since the bank had not acted *mala fide* in transferring the moneys out of Reob's account (215B – F), thereby ignoring its own finding in respect of the ownership of the money. However, Thirion J found support for the *actio Pauliana*, as the four requirements stated by Pothier were all present. Knowledge of the fraud on the part of the bank would not be necessary if the bank had received the money *ex titulo lucrativo* or without a counterperformance – when a client pays money into his bank account the bank does not in normal business practice render any counterperformance (215G – I). The court deemed it unnecessary to consider whether the *condictio sine causa* would find application, but pointed out that this remedy appears to be available, in which case the onus would be on the bank to prove its entitlement to the money (219J – 220C).

Thirion J found that in the present case there were sufficient reasons to doubt the existence of a general banking purposes facility, and if such facility had indeed been granted there was uncertainty regarding the scope. He allowed the appeal and referred the matter for the hearing of oral evidence (220C – F).

In his minority judgment, McLaren J concurred on the main points with Thirion J, but analysed certain aspects of the case in depth. He was also of the opinion that the *actio Pauliana* was the applicable remedy (231H), but pointed out that the bank was a debtor of Reob since the credit in Reob's account was regarded as a loan to the bank (230E). Although the money in the account became the property of the bank and the bank could use it, the bank was under the obligation to pay it (ie a similar amount) back on demand (230F).

5 Conclusion

It must be kept in mind that all that was decided in the present case was whether the facts *prima facie* support a claim based on the *actio Pauliana* (215I – J).

The traditional requirements recognised by South African law as set out by Pothier, were confirmed once again:

(a) the alienation should be of such a nature that the debtor's assets are diminished thereby (Pothier 42 8 6 – 7);

(b) the recipient should not receive his own property (*idem* 42 8 8 – 12);

(c) the intention to defraud should be present (*idem* 42 8 13 – 20);

(d) the creditors' loss should be the result of the fraud (*idem* 42 8 21 – 22).

The application of these requirements to the present case raises the following questions:

First, were Reob's assets truly diminished by the transaction? In this respect the court's finding that the delivery of the money by the commissioner to Reob was without any legal effect (208G), is of importance. It is an obvious requirement of the *actio Pauliana* that the debtor must alienate his own assets. If Reob did not acquire ownership of the money, it could not alienate the money and could not diminish its own assets. Ignoring the correctness of the court's finding on this point, it should, however, be noted that the court implied that Reob did acquire a claim against the bank as a result of the relationship between banker and customer (213I – 214C; cf 230E – F). While Reob had this claim against the bank, the creditor (the commissioner) could obtain judgment against Reob and attach this claim in execution. The bank terminated Reob's claim against it by debiting the credit in Reob's account and passing corresponding credits to the overdrawn accounts of the other members of the general banking purposes facility group, eliminating their debts to the bank and thus paying itself. By these transactions executed in terms of the alleged facility Reob alienated his assets, that is, his claim against the bank. It is submitted that, although this was not so stated by the court, it was the termination of its claim against the bank which diminished Reob's assets. In so far as the court had the alienation of the money itself in mind (213G – I) the requirement would not have been met, since the court had found that Reob had not become the owner of the money (208G).

The second requirement is related to the question whether the creditor did receive something owing to him. For example, where the debtor pays an existing debt, the *actio Pauliana* is not available in principle, since the creditor received what was due to him in terms of an existing obligation. Only in exceptional cases could the *actio Pauliana* be used to rescind the performance of existing debts, for example where several creditors were pressing for payment simultaneously and the debtor favoured one of them (Pothier 42 8 10 – 12; Voet 42 8 17 – 18). The available facts do not make clear whether the settled debts were in fact due and payable by Reob, since the existence and the terms of the general banking purpose facility were uncertain.

Thirdly, the intention to defraud should be present. Where the alienee has given value in exchange for the alienated asset, he must be a party to the fraud, but if he received the asset without counterperformance, the intention to defraud the debtor's creditors is not required (Pothier 42 8 16 and 19; Voet 42 8 4 – 5; De Groot *Inleidinge* 2 5 4; Van der Keessel *Theses selectae* 200; *Scharff's Trustee v Scharff* 1915 TPD 476; *Hockey v Rixom and Smith* 1939 SR 107). Apparently the court accepted that the bank received *titulo lucrativo*, in which case fraud by the bank was unnecessary (209I – 210D 215G – J). The finding of the court that the depositing of the money by Reob would be *prima facie* evidence that the bank received the money *ex titulo lucrativo* (215I; cf also 214C) cannot be supported, since a depositor acquires a claim against the bank for the deposited amount as well as interest. This amounts to value. In this respect the conflict of facts regarding the existence of the general banking purposes facility is also relevant since the bank argued (217C) that it had given consideration for the money received – supposedly by way of the credit facilities granted to the members of the group, which credit was probably linked to the agreement

in terms of banking practice. In this context the question which requires answering is whether the bank gave value to Reob and whether Reob's payment of the debts of the other group members constituted payment of an existing debt between Reob and the bank in terms of the agreement. Lack of information limits the discussion of this point. It should be noted, however, that a general banking purposes facility agreement creates some form of value, thus making the alienation *ex titulo oneroso*. For instance, the group of accounts will save interest and a bank could make this agreement a prerequisite for the granting of overdraft facilities to the participants as a group, especially since this agreement provides the bank with some form of security. In *Hockey v Rixom and Smith supra* 120 it was held that the criterion for an onerous title is whether the alienation was made for a consideration that was not gratuitous or merely nominal. This court was of the opinion that this is quite a different test from the test of value or adequate value under the Insolvency Act 24 of 1936. However, the term "value" as it applies to section 26 of the Insolvency Act (disposition without value) has no technical connotation and simply means value in the ordinary sense of the word (*Estate Wege v Strauss* 1932 AD 76 82). Nor is the term confined to a monetary or tangible consideration (*Goode Durrant and Murray Ltd v Hewitt and Cornell* 1961 4 SA 286 (N) 291), but must be decided with reference to all the circumstances under which the transaction was made (*Langeberg Koöperasie Bpk v Inverdoorn Farming and Trading Co Ltd* 1965 2 SA 597 (A) 605; *Swanee's Boerdery (Edms) Bpk v Trust Bank of Africa Ltd* 1986 2 SA 850 (A) 862E). Finally, value can, in a particular instance, even include the granting of a guarantee by a company in a group for the liabilities of another company in the same group which gives financial stability to the whole group (*Swanee's Boerdery supra* 862; cf also *Langeberg Koöperasie Bpk supra*).

The fourth requirement is that the fraudulent alienation must have the effect of defrauding the creditors: that is, that the creditors must be in a worse position regarding the recovery of their debts after the alienation, since insufficient assets to pay them in full were available as a result of the alienation (Pothier 42 8 21 – 22; Voet 42 8 13 – 14; De Groot *supra*; Van der Keessel *supra*). In this regard it is important to note that it has been held in South African law that the *actio Pauliana* is available to creditors prior to sequestration of the debtor's estate (*Fenhalls v Ebrahim supra*). If this is the case, there should at least be evidence of the insolvency. The best evidence to ascertain a shortfall outside the law of insolvency is to obtain judgment and execution against the debtor. If it appears that there are insufficient assets, there should be no problem to rescind fraudulent alienations with the *actio Pauliana*. The court was apparently of the opinion that Reob was solvent, but did not consider this fact an obstacle to the availability of the *actio Pauliana* (213E – G). The court's conclusion that the *actio Pauliana* has shed the restriction that the debtor must be insolvent and that it has become an action of general application so that there remains no reason to deny it to an individual creditor who has suffered loss as the result of the debtor's fraud (213E – G), constitutes another problem. Before verifying whether the debtor was indeed not in a position to pay the indebted amount to his creditors as a result of insufficient assets (cf *Scharff's Trustee v Scharff supra* 476, which was not referred to; in *Fenhalls v Ebrahim supra* 728C – E this *dictum* was held to be *obiter*) the conclusion was drawn that the creditor suffered a loss which falls within the framework of the *actio*

Pauliana. The court did not examine this requirement thoroughly and the argument that the various Roman law remedies in the case of alienations in fraud of creditors fused into a uniform action, namely the *actio Pauliana*, is not convincing. Since a clear indication concerning the solvency/insolvency of the debtor was lacking, the commissioner should have instituted a claim for repayment before the *actio Pauliana* could become available. However, the court typecast the *actio Pauliana* as a general action which finds application in all instances of a debtor's fraud and consequently unjustifiably ignored several of the generally accepted requirements. It is submitted that the *actio Pauliana* was not the appropriate remedy in this instance as the facts did not meet its essential requirements.

PhJ THOMAS
A BORAINE
University of Pretoria

VIA MEDIA CLASSIFICATION IN PRIVATE INTERNATIONAL LAW

Laurens v Von Höhne 1993 2 SA 104 (W)

1 The plaintiff was the liquidator of a German private company, Schnellradialen GmbH, which was liquidated by a German court in 1984. The original share capital, when the company was incorporated in 1978, amounted to DM 100 000. By means of a members' resolution in 1979 it was decided to increase the share capital by DM 300 000. In 1982 the then sole shareholder in the company (Dörrenberg) sold and transferred the entire shareholding to the defendant. According to German law, which was the law governing the substantive issues *in casu* (112I), both the purchaser and seller of shares are liable *in solidum* for the payment to the company of any amount outstanding on the shares at the date of notice to the company of the sale. On this date, the full DM 300 000 had been outstanding. Classification of the potentially applicable rules on the proof of payment of share capital was in dispute. According to the plaintiff, the German rules in this regard were applicable. The expert witness for the plaintiff (prof Sandrock) testified that according to German law payment of share capital can be proved only by receipt documents which are unassailable beyond doubt and comply with the principles of proper bookkeeping or by the oral evidence of a witness who is absolutely credible. The plaintiff alleged that payment had not been proved in accordance with said rules. However, according to the defendant, the South African rules of evidence were applicable, and payment had been proved in accordance with these rules. The classification of the potentially applicable extinctive prescription rules was also in dispute. According to the plaintiff, the German prescription rules were applicable and his claim had accordingly not prescribed. To the contrary, the defendant alleged that the South African

prescription rules were applicable and that the plaintiff's claim, if any, had indeed prescribed.

2 Schultz J accepted the *via media* classification technique proposed by Falconbridge (see *inter alia* "Conflicts rule and characterization of question" 1952 *Can Bar R* 103 264). The judge formulated this approach as follows:

> "Falconbridge's approach is a *via media* according to which the Court has regard to both the *lex fori* and the *lex causae* before determining the characterisation.
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> According to him, although the matter is one for the law of the forum, the conflict rules of the forum should be construed '*sub specie orbis*', that is from a cosmopolitan or world-wide point of view, so as to be susceptible of application to foreign domestic rules. (Turpin ["Characterisation and policy in the conflict of laws" 1959 *Acta Juridica* 222] 223.)
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> In doing so it will pay full attention to the 'nature, scope and purpose' of the foreign rule in its context of foreign law. What the forum should do, so it is contended, is to make a provisional characterisation having regard to both systems of law applicable, followed by a final characterisation which takes into account policy considerations."

This is the first time in South African private international law that the *via media* approach has expressly been adopted. In the past, in only one judgment (ie *Anderson v The Master* 1949 4 SA 660 (E)), was classification based not on the *lex fori* but rather on the *lex causae*. (See Schmidt "Conflict of laws" in Joubert (ed) 2 (1977) *LAWSA* par 519; Forsyth *Private international law* (1990) (hereinafter referred to as Forsyth) 69. In *Sperling v Sperling* 1975 3 SA 707 (A) 718B Corbett CJ remarked that "[t]here may . . . be some room for argument as to whether the issue [in *Anderson*] was correctly classified as relating to the proprietary rights of husband and wife".) Certain *dicta* by Booysen J in *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 3 SA 509 (D) may be interpreted as support for an enlightened *lex fori* or even the *via media* approach (see Forsyth "Enforcement of arbitral awards, choice of law in contract, characterization and a new attitude to private international law" 1987 *SALJ* 10 – 11; Edwards "Conflict of laws" in Joubert-Dlamini (ed) 2 (1993; first reissue) *LAWSA* par 417 fn 10; Kahn *1994 Supplement* to Corbett, Hahlo, Hofmeyr and Kahn *The law of succession in South Africa* (1980) (hereinafter referred to as Kahn *Supplement*) 171), but the judge also pronounced his support for and indeed made use of the *lex fori* approach (see 518C – D; 520A – 521B; cf 523I). Effective support for the *via media* approach may, however, be deduced from the judgment of O'Donovan J in *Kuhne & Nagel AG Zürich v APA Distributors (Pty) Ltd* 1981 3 SA 536 (W) 539D – E (see the *Laurens* case 118G – H). South African authors advocate similar approaches (see Forsyth 66 – 69; Kahn "The conflict of laws in the South African law of succession" in Corbett, Hahlo, Hofmeyr and Kahn *The law of succession in South Africa* (1980) (hereinafter referred to as Kahn *Succession*) 621 – 622; Kahn "Jurisdiction and conflict of laws in the South African law of husband and wife" in Hahlo *The South African law of husband and wife* (1975) (hereinafter referred to as Kahn *Husband and wife*) 579 – 580; Turpin 1959 *Acta Juridica* 222). (For similar approaches in foreign legal systems, see North and Fawcett *Cheshire and North's private international law* (1992) 45 – 46; Collins (ed) 1 *Dicey and Morris on the conflict of laws* (1987) 47; Van Hecke and Lenaerts *Internationaal privaatrecht* (1989) 141 – 142.)

3 The judge used the *via media* technique to classify the relevant German and South African rules on the proof of payment of share capital. (The *lex fori*

will always be a possible *lex causae* in matters which are potentially of a procedural nature.) According to the *lex causae*, its own rules form part of the substantive rules of company law and are not procedural rules of general application (117F – G). In South African law the matter is regarded as procedural as it concerns the *probans* (the type of evidence that may prove the relevant facts) and not the *probandum* (the facts that have to be proved) (117I – J). The judge then listed several reasons for his choice of the *lex fori* to determine whether payment had been made (120C – 121A). Applying the *lex fori*, the judge was satisfied that the DM 300 000 had indeed been paid. The plaintiff's claim therefore failed (121C).

The line of reasoning can, I believe, be explained more comprehensively as follows: If the relevant rules of the *lex causae* were classified according to the *lex fori*, they would be part of adjective law and thus not applicable, since the *lex causae* governs issues of substantive law only. The relevant rules of the *lex fori* are part of procedural law (this term is presently used to include the law of evidence) and as the *lex fori* indeed governs issues of procedure, they will be applicable. *In casu* application of the *lex fori* would therefore be the result of classification *lege fori*. (Of course, in other circumstances application of the *lex causae* may be indicated when classification takes place in terms of the *lex fori*.)

Classified according to the *lex causae*, the relevant rules of the *lex causae* form part of substantive law and thus are applicable, since the *lex causae* governs issues of substantive law. (It may be noted in passing that classification *lege causae* would lead to the appearance of cumulation, since the relevant South African rules would also still be applicable. In terms of *lex causae* classification, rules must be characterised in terms of the law in which they appear (Forsyth 64).) The rules of the *lex fori* must therefore be classified in terms of the *lex fori*. Cumulation means that more than one legal system is *prima facie* applicable or claims to be applied. (On cumulation see Forsyth 64 ff; Kahn *Succession* 622 – 623; Bennett "Cumulation and gap: are they systemic defects in the conflict of laws?" 1988 *SALJ* 444.)

The question which had to be decided on the basis of policy considerations and taking into account classification *lege causae*, was whether the categories of the *lex fori* should be extended (*in casu* substantive law) and/or restricted (*in casu* procedural law) in order to include rules like those of German law under consideration within the scope of substantive law and to exclude such rules from procedural law. The reasons for the judge's refusal to extend or restrict the categories of the *lex fori* are set out in the following paragraph.

4 Legal certainty and fairness in the individual case, are aims of the law that will naturally often be in conflict (see eg Dworkin *Taking rights seriously* (1978) 77 – 78 87 116 122). The *via media* classification technique goes a long way towards accommodating the need for individual justice. The danger inherent in this method is, however, the unpredictability of decisions and resulting legal uncertainty. To overcome this threat, a judge, making use of the *via media* technique, should use the categories of the *lex fori* as his or her point of departure and substantiate the final classification in as much detail as possible, especially when the categories of the *lex fori* are deviated from. In the interest of legal certainty, an alteration of the categories of the *lex fori* should not readily be decided on. In this way new legal rules and principles will develop in the course

of time. These should, however, remain flexible to permit deviation if the result of the application in the particular circumstances would be highly unfair. (See Valk "Recht en billijkheid. De zin en de legitimiteit van het voorlopige rechtsoordeel" in *Als een goed huisvader. Opstellen aangeboden aan JH Nieuwenhuis* (1992) 45; "Redelijkheid en billijkheid in het nieuwe Burgerlijk Wetboek. *Lex specialis derogat legi generali*?" in *Erudita ignorantia. Vijftien opstellen bij het vijftiende lustrum van Societas Iuridica Grotius en de vierhonderdentiende geboortedag van Grotius* (1992) 153; Forsyth 67 fn 49.)

In this context it may be useful to refer to the five choice-influencing considerations enumerated by Leflar: predictability of result; maintenance of interstate and international order; simplification of the judicial task; advancement of the forum's governmental interest; and application of the better rule of law (see Leflar, McDougall and Felix *American conflicts law* (1986) 279 as quoted by Juenger *Choice of law and multistate justice* (1993) 104 fn 663). International harmony of decision could be added (according to Forsyth 55 – 56, this is the guiding principle for the development of private international law) and "the better rule of law" should be understood to refer to the quality of the legal rules and principles *per se* as well as the fairness of the application of these to the particular facts. *Inter alia* the above-mentioned considerations (which were meant to have general application in private international law) may be taken into account when deciding on a final classification.

Schultz J named several reasons for his final classification of the rules on the proof of payment of share capital: classification in terms of the unmodified *lex fori* (that is, without extending or restricting the categories of the *lex fori*). *In casu* this method of classification prescribes the application of the *lex fori*. The application of German law would have been the result of a sufficient extension in the *lex fori* of the category of substantive law (accompanied by a corresponding limitation of the category of procedural law). The following reasons were mentioned:

(a) Incomplete evidence was led on the contents of German law in this regard (120C-G).

(b) The judge found it difficult to apply foreign (especially continental) abjective law (abjective when classified according to the *lex fori*) (120G – I).

(c) The judge was convinced that the payments had in fact been made and therefore

> "it [would be] much to ask of [him] that [he] should hold that they were not, notwithstanding *fiat justitia ruat caelum*. [He did] not see why the heavens [had] to fall" (120I – 121A).

Reasons (a) and (b) relate to the attainability and convenience of the application of a certain legal system (it is also for the sake of convenience that rules in connection with pleadings, discovery of documents, costs, execution etc must remain the sole domain of the *lex fori*), while (c) is concerned with the fairness of the result of the application of the rules and principles of a particular legal system. International harmony of decision was apparently not a decisive consideration.

It is submitted that factors like the stage of development of the indicated legal systems and the suitability and adaptability of these to the issues at hand, may be taken into account in appropriate instances (also see par 7 below). In addition, the fact that the application of a certain classification technique results in neither gap nor cumulation (as the unmodified *lex fori* classification did *in casu*), may

be taken into consideration if these phenomena will actually emerge when another method of classification is applied. In the present case, however, although classification *lege causae* would have led to cumulation, this would not be the case if the categories of the *lex fori* are proportionally extended and restricted and classification then takes place in terms of the modified *lex fori*. In certain instances when the categories of the *lex fori* are not *proportionally* extended and restricted, such modified *lex fori* classification may lead to gap or cumulation even if unmodified *lex fori* classification would not. The appearance or absence of gap and cumulation can thus be manipulated (at least when only two *leges causae* are potentially applicable) by the (dis)proportionality of the shifting in categories (cf Forsyth 67 fn 49). (Gap is the situation where none of the potential *leges causae* is *prima facie* applicable. On cumulation and gap see Forsyth 64 ff, Kahn *Succession* 622 – 623, Kahn *Supplement* 171 – 172 and Bennett 1988 *SALJ* 444. In *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 3 SA 509 (D) the resulting gap was dissolved by the *ad hoc* application of the *lex fori*. *In casu* the *lex fori* was one of the potentially applicable *leges causae*. It has been suggested that when the choice is not between the *lex fori* and a *lex causae/leges causae* but between two or more *leges causae*, automatic recourse to the *lex fori* may not be appropriate and an informed choice between the alternative *leges causae* must then be made: Forsyth 1987 *SALJ* 13 – 14.)

It may be pointed out in passing that fairness is an aspect of justice and therefore the taking into account of reason (c) is not at all in conflict with the instruction *fiat iustitia ruat caelum* (see Du Plessis *Die juridiese relevansie van Christelike geregtigheid* (LLD thesis PU for CHE 1978) 790 – 791 832 – 834; Georgiadis "Equitable and equity in Aristotle" in Panagiotou (ed) *Justice, law and method in Plato and Aristotle* (1987) 159).

5 The judge also used the *via media* technique to classify the rules of extinctive prescription:

> "Our Prescription Act [68 of 1969], as interpreted in [*Kuhne & Nagel AG Zürich v APA Distributors (Pty) Ltd* 1981 3 SA 536 (W)], is classified as substantive so that it is not a matter for the *lex fori*. German law, even although their prescription laws are only remedy-barring, characterises them as substantive. I follow the *via media*. Looking at both the *lex fori* and the *lex causae*, the policy decision is in my view obvious. German law should be applied. In this case there is no conflict between the two systems. The situation differs from that in [*Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 3 SA 509 (D)] at 530I – J, so that there is not even a temptation to fall back on the residual *lex fori*. I find that the plea of prescription fails.
>
> Based on the finding of payment I dismiss the plaintiff's claim" (121D – F).

The line of reasoning can once again be explained more comprehensively as follows: The extinctive prescription rules of the *lex causae*, classified according to the *lex fori*, are so-called weak in character, barring the remedy without extinguishing the underlying right. They would therefore be part of procedural law in South Africa and thus would not have been applicable because the *lex causae* governs substantive law only. The rules of extinctive prescription in South African law form part of substantive law (*Kuhne* 537H – 538A; *Laconian* 523I – 524A; *Laurens* 118F – G) and are therefore not applicable as South African law is not the *lex causae*. *Lex fori* classification therefore leads to a gap.

Classification according to the *lex causae* would make the prescription rules of the *lex causae* applicable because these are regarded as part of substantive

law in the *lex causae* (although they would be part of procedural law in South Africa). (As the South African rules of prescription would, of course, still not be applicable when classification occurs *lege causae* (also see par 3), no cumulation or gap presents itself when this technique is used.)

The judge named two reasons for his policy decision to apply German law: the absence of cumulation (and gap, it may be added) when sufficiently extending the category of substantive law in the *lex fori* to include a rule like the German prescription rule (that is how I interpret the reference to the absence of "conflict") and the fact that a gap would emerge when classification occurs in terms of the unmodified *lex fori* (that is how I interpret the reference to the difference with the *Laconian* case). (As the South African extinctive prescription rules are of a substantive nature, it does not make any difference whether the category of procedural law is (proportionally) restricted.) It could be added that the plaintiff would have had a legitimate expectation that German law would be applied since all factors in the case clearly pointed to this (112I). Furthermore, it would be unfair to place the onus on him to determine the prescription terms in all the different jurisdictions in which the case could possibly be heard (which in its turn (partly) depended on the whereabouts of the defendant). (Cf Australian Law Reform Commission *Report no 58: Choice of law* (1992) 130 – 131.) In addition, the application of German law would lead to (at least partial) international harmony of decision as it is highly probable that the German courts would apply their own law in this regard.

As it had already been decided that the plaintiff did not have a claim, the defence of prescription was no longer relevant. The defence would, however, have failed because German law adheres to a prescription term of 30 years.

6 The division of extinctive prescription rules into rules of a substantive and rules of a procedural nature (substantive when it extinguishes both the remedy and the underlying right; procedural when it bars the remedy only) has come under attack for its perceived artificiality (see eg Australian Law Reform Commission 129 ff). South African cases following the traditional distinction include the judgments in *Kuhne, Laconian* and *Laurens*. The Rome Convention of the European Union (Convention on the Law Applicable to Contractual Obligations 1980 art 10(1)(d)), the Foreign Limitation Periods Act 1984 of the United Kingdom and the German conflict of laws statute (*EGBGB* art 32 (1)) all provide for the application of foreign extinctive prescription rules as part of the *lex causae*, regardless of their nature as substantive or procedural. The Australian Law Reform Commission also recommends the treatment of limitation periods as matters of substance (133).

The use of the *via media* technique, which may be followed in other judgments, makes it difficult to predict which country's extinctive prescription rules will govern a dispute. For the sake of legal certainty it is recommended that the South African Law Commission investigates the issue and considers proposing legislation in this regard. (For the advantages and disadvantages of the present system and the proposed alternative, see Australian Law Reform Commission 130 ff.)

7 One cannot escape the impression that the decision on policy considerations whether to extend or restrict the categories of the *lex fori*, is a rather complicated way to justify a process that plainly comes down to a choice between the

potentially applicable legal systems. Turpin seems to be of the same opinion when he explains the *Anderson* case in terms of the *via media* approach:

> "The characterization of the right should be made in a policy-conscious manner, for the ultimate question is whether the *jus relictae* is a right which good policy requires should be recognized by the court of the forum irrespective of the change in the domicile of the parties" (227; also see 224).

In connection with *Pitluk v Gavendo* 1955 2 SA 573 (T) he states: "The real issue before the Court was whether this is a matter which a sound legal policy requires to be determined by the law of the matrimonial domicile" (228).

Although the judge in the *Laurens* case approved of the *via media* approach, from the way he expressed himself, it is evident that he held the opinion that he was entitled to choose any of the potentially applicable legal systems. (See 121A: "[a]pplying the *via media* . . . I decide as a matter of policy that the *lex fori* must determine whether payment has been made" and 121E: "I follow the *via media*. Looking at both the *lex fori* and the *lex causae*, the policy decision is in my view obvious. German law should be applied." The *lex fori* and the *lex causae* are mentioned in their own right, not as the result of a particular method of classification. On 121E, however, references to the different classification techniques are made as well: the absence of cumulation and the presence of gap (see par 5).)

Modern conflicts theory, especially in the United States of America, is moving away from the multilateralism of Von Savigny. Notable currents are the *lex fori* approach (Ehrenzweig), neo-statutism (Currie) and the better law approach (Leflar) (see Strikwerda *Inleiding tot het Nederlandse internationaal privaatrecht* (1992) 39 – 42). Support for a radical version of the last-mentioned approach may be found in a recent thought-provoking monograph by the American conflicts lawyer Juenger *Choice of law and multistate justice* (1993). The author advocates the so-called (teleological) substantive law approach to private international law, which allows a judge to choose from the *lex fori* and any other *leges causae* with a sufficient link to the case, the system that has the best arrangement for the given situation. It seems that according to Juenger, both the quality of the rules and principles of the potentially applicable legal systems *per se* and the result of their application in the particular circumstances, should be taken into account. *Prima facie* this approach leads to a considerable degree of legal uncertainty, especially because it has never attracted sustained systematising efforts (171). However, Juenger suggests that it will lead to more certainty than the present system in the long run, because judges will admit what they are actually doing and on what grounds, rather than to fabricate an *ex post facto* justification for their decision (see eg 193 – 194 202 204).

According to Juenger, classification is one of the "escape devices" used to cover up what is in fact a choice between potentially applicable legal systems (see eg 71 – 74 174 – 175). (On the use of *renvoi* as such "escape device" see Juenger 77 – 79; also see Neels "Die gedeeltelike uitsluiting van *renvoi* in resente wetgewing" 1992 *TSAR* 742 – 743 with references to authority.) It is submitted that the application of the *via media* technique in the *Laurens* case is a fine illustration of this point. In many instances it is readily possible to use the *via media* classification technique as a tool to apply a moderate substantive law approach.

To what extent it can be used as such, depends on whether the court is bound by the classification of a rule by its own legal system. Forsyth is of the opinion

that potential *leges causae* which are excluded according to their own law, cannot be considered (66 – 67 67 fn 46). Kahn (*Husband and wife* 579 with fn 15; *Succession* 621) and Turpin 223 take the opposite view. The classification techniques will remain of primary importance when Forsyth's view is followed, but will play a secondary role if Kahn and Turpin's views are applied. According to Forsyth's point of view, as applied to the facts of the *Laurens* case, it would be possible to extend the category of substantive law to include the German extinctive prescription rules, as these are classified as substantive in German law. The category of patrimonial consequences of a marriage could be extended to include rules in connection with a *ius relictae* of a surviving spouse if such rules are classified as part of the patrimonial consequences of marriage in terms of the *lex domicilii matrimonii* (cf Forsyth 66 and the *Anderson* case). According to the views of Kahn and Turpin, it would, moreover, be possible to include in the category of substantive law, the extinctive prescription rules of a *lex causae* in terms of which these rules are considered part of procedural law. Rules in connection with a *ius relictae* could be included under the patrimonial consequences of marriage even if these rules form part of the law of succession of the *lex domicilii matrimonii* (Kahn *Succession* 622; *Husband and wife* 579 fn 15; *contra* Forsyth 66 – 67). One could likewise include rules of the *lex domicilii* regarding the consequences of marriage under the category of personal consequences of marriage, even if according to both the *lex domicilii* and the *lex fori*, these rules form or would form part of the *proprietary* consequences. (This could provide another justification ground for the application of eg s 21(1) of the Matrimonial Property Act 88 of 1984 to marriages of which the personal consequences are presently governed by South African law but of which the patrimonial consequences are not. On this issue see Forsyth 255 – 256; *Ex Parte Senekal* 1989 1 SA 38 (T); Neels "Die internasionale privaatreg en die herverdelingsbevoegdheid by egskeiding" 1992 *TSAR* 341.)

Even if the views of Kahn and Turpin are accepted, a connecting factor still has to be found to justify the application of a desired legal system and the foreign rule should roughly fit into the category corresponding to that connecting factor. The views of Juenger go much further: any legal system with a sufficiently close link to the case may be considered. The different classification techniques are not allowed to play any role at all. The result is that, of the views discussed, Juenger's will potentially make the most legal systems available to choose from, and Forsyth's the least, with the views of Kahn and Turpin taking a middle position.

Regardless of which of the above views is to be followed within the *via media* approach (Juenger's view, of course, falls beyond the scope of this approach), it is submitted that when deciding on a governing legal system (from the potentially applicable ones), both the following considerations should be kept in mind: the proximity of the legal system to the specific legal problem *and* its quality, having regard to the quality *per se* as well as to the fairness of the result of the application thereof *in casu* (cf Juenger 206). In the *Laurens* case the first consideration was decisive with regard to the prescription rules and the second with regard to the rules of evidence. To stimulate legal development and, as a result, a larger degree of legal certainty, a judge should substantiate his or her decision in this regard *in detail* (also see par 4).

8 On the *onus* of proof of payment the judge expressed himself as follows:

> "It is common cause that the *onus* of proof of payment for the share capital . . . rests on the defendant. This is clearly so because German law places the *onus* on the defendant and German law is clearly the proper law in this case . . . It might be added that the South African law regards *onus* as being a part of the substantive law – see *Tregea and Another v Godart and Another* 1939 AD 16 – so that it would indicate German law which governs questions of substantive law as the law to determine *onus*. In any event, the burden of proving payment in South African law is on the debtor – see *Pillay v Krishna and Another* 1946 AD 946" (112H–113A).

Lex fori and *lex causae* classification (and therefore probably *via media* classification as well (at least according to Forsyth – but see par 7 above)), would have the same result: application of the *lex causae* (German law). By coincidence the internal *lex fori* has a similar arrangement in this regard. It may be added that this legal position corresponds to the arrangement in the Rome Convention (art 14(1)) and the German conflicts of law statute (*EGBGB* art 32(3)) (both with regard to contractual obligations), as well as to a proposal of the Australian Law Reform Commission (140 182 194: "burden of proof in relation to a question to be determined in the case").

JAN L NEELS
Rand Afrikaans University

"ENRICHMENT AT WHOSE EXPENSE?" – A POSTSCRIPT

Van der Burgh v Van Dyk 1993 3 SA 312 (O)

The vexed question of causation in an enrichment action – or the requirement that the enrichment of the defendant be at the plaintiff's expense – has come before our courts once again in the present case. The facts, which took the form of a stated case submitted to the court, were briefly as follows: The second defendant, Boland Bank, was the registered owner of a Mercedes Benz truck. It sold the vehicle in May of 1987 to one Van der Merwe Mans under an instalment sale transaction, in terms of which the bank would retain ownership unless and until the purchase price was paid in full. Mans subsequently sold the vehicle – without the bank's knowledge – to the first defendant Van Dyk, who in turn sold and transferred the vehicle to the plaintiff in October 1987 for R12 000. Plaintiff thereafter effected repairs to the vehicle, in the process incurring expenditure of some R24 000.

In November 1988 the estate of Mans was sequestrated, at which time the total outstanding amount due and owing to the bank on the purchase price was R32 352,82 plus interest. In September 1990 an employee of the bank presented himself to plaintiff and demanded return of the vehicle – asserting the bank's lawful ownership of the vehicle. On the strength of these representations, plaintiff handed possession of the vehicle over to the bank, although at all material times prior to this plaintiff genuinely and honestly believed that he was the lawful

owner of the vehicle. At the time the bank recovered possession of the vehicle, its value was estimated as being R25 000. A further R5 692,75 worth of repairs were effected before the vehicle was finally sold by the bank to a third party for R29 000. At no time did the vehicle ever form an asset in the insolvent estate of Mans, it being agreed between the curator of the insolvent estate and the bank that the latter would accept the vehicle unencumbered in exchange for abandoning any claims which it might have had against the estate.

Plaintiff brought the action in question against Van Dyk and the bank to try and recover that which he had lost as a result of his purchase, repair and subsequent loss of the vehicle. Like the bank, however, plaintiff was, at first instance, faced with a man of straw: Van Dyk was declared insolvent and his estate sequestrated before plaintiff could recover anything from him. The claim against Van Dyk was consequently abandoned and plaintiff proceeded with an enrichment action against the bank alone – it being common cause that the improvements effected to the vehicle by plaintiff increased its market value by an amount of R16 000.

In order to succeed, plaintiff was required to satisfy the court as to two facts: first, that an enrichment action lay in respect of movables; and secondly, if such an action did lie in respect of movables, that it properly lay against the bank. The answer to both these questions, according to Wright J, was intimately connected with the question whether the party seeking to recover the value of the improvements effected to the property had retained possession of the property.

The judge pointed out that in Roman law a *bona fide possessor* enjoyed, as against anyone seeking to recover possession from him, a right of retention for useful and necessary improvements effected to movables. However, if he lost possession he could not recover the value of the enrichment by instituting a separate enrichment action (318D – E).

The position in Roman-Dutch – and consequently also in South African – law was, however, not as certain. Two conflicting *obiter dicta* in the cases of *Reed Bros v Ford* 1923 TPD 150 and *Wipplinger v Wax* 1933 EDL 60 pointed to opposite conclusions: In the Transvaal decision it was found that the improver of a moveable did not enjoy an enrichment action in respect of movables, either in Roman-Dutch or South African law. In *Wipplinger's case*, however, it was found that, on a *correct* reading of the old authorities, such an action did lie (318E – I).

Support for the view in *Wipplinger's* case is to be found, *obiter*, in the case of *Rondalia Bank Bpk v Pieter Nel Motors (Edms) Bpk* 1979 4 SA 467 (T) and in two publications by De Vos ("No enrichment action for improvements to movables?" 1974 *THRHR* 308; *Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg* (1987) 233) who asserts:

> "Hierdie mening is heeltemal onjuis. Die *bona fide possessor* van roerende goed is ten aansien van vergoeding in presies dieselfde posisie as die *bona fide possessor* van onroerende goedere."

De Vos finds support for this position in the case of *Acton v Motau* 1909 TS 841 where it was stated that even a *mala fide possessor* of movables (excluding a thief) enjoyed an enrichment action (318I – 319C).

After having thus discussed the authorities, however, the judge was not prepared to give a finding either way. Recognising that there are instances when

movables are treated differently to immovables, as illustrated by the maxim *mobilia non habent sequelam ex causa hypotheca*, there was in any event, he held, no reason to decide the matter in this instance:

> "Vir doeleindes van hierdie saak word derhalwe in elk geval aanvaar dat die *bona fide possessor* van roerende goedere ook in beginsel aksie kan instel op grond van verryking ten aansien van die verbeterings wat deur hom aangebring is" (319D).

That Wright J declined to give a definite answer to this first question of whether or not an enrichment action lay in respect of movables, was extremely unfortunate. Any disinclination on the part of our judiciary to clarify the law when given the opportunity to do so, is not to be welcomed, for two reasons. First, because to do so is both inefficient, in so far as it deprives the law of an opportunity for development and growth, and denies the opportunity to expand upon the store of jurisprudential knowledge that sustains the legal process. Even a "wrong" judgment is better than no judgment at all, for it gives a basis from which to develop further. Secondly, a failure to bring certainty to a relatively contentious aspect of the law when the opportunity to do so arises, does not serve the interests of the law or those whom it serves. The opportunity to give a determination on the question of enrichment actions in respect of movables was firmly before the judge. He had described the two main streams of opinion with sufficient particularity to make a final determination possible, and yet he declined to do so.

It seems clear on a reading of the authorities – summarised by De Vos *Verrykingsaanspreeklikheid* 233 ff – that, historically at least, such an action did lie. Furthermore, there seems no reason in principle or logic why the plaintiff should be denied relief simply because the property he improved or preserved at his expense was a movable. Indeed, it is likely that, in our consumer-oriented society, enrichment and impoverishment in the context of improvements to movables will be more common than similar claims in respect of immovable property, where possession and ownership is more jealously guarded; this is in itself ample justification for the recognition of an enrichment action for movables: it seems to me to be intolerable to disallow a potentially large number of enrichment claims simply by reason of the nature of the property improved. Should there be a need, the law should strive to answer that need, and in this instance the means to do so is already at hand. To do otherwise would be contrary to the equitable principles underlying the law of enrichment.

Once again, the equitable principles underlying enrichment law were offended in relation to the second question that fell to be decided, for it was ultimately the denial of plaintiff's claim on the question of causation that proved to be the insurmountable hurdle for him and which, according to Wright J, rendered a final determination of the first question unnecessary. The requirement of causation can be stated thus:

> "Die blote feit dat daar verryking en verarming was, is nie genoegsaam vir aanspreeklikheid nie; *daar moet ook 'n kousale verband tussen die verryking en die verarming wees in die sin dat die verryking uit verarming voortgevloei het of vice versa* . . . ['n Mens moet] aanvaar dat 'n juridies-relevante kousale verband ontbreek waar [daar] nie 'n direkte of onmiddellike vermoënsverskuiwing plaasgevind het nie. Met 'n direkte vermoënsverskuiwing word bedoel dat die verskuiwing van 'n bepaalde vermoënsdeel uit die boedel van die verarmde nie *via* die boedel of vermoë van 'n tussenpersoon in die boedel van die verrykte te lande kom nie" (Van der Walt "Die *condictio indebiti* as verrykingsaksie" 1966 *THRHR* 221–222; my italics).

The relevance of the formulation and nature of the causation requirement becomes evident where there is the intervention of a third party, as described in the *locus classicus Gouws v Jester Pools (Pty) Ltd* 1968 3 SA 563 (T):

> "A enters into a contract with B, the performance of which involves expenditure or labour by A in respect of property which A believes to be that of B; in fact C is the owner and not B; being unaware of this and looking solely to the credit of B . . . A performs the contract; having performed, A is entitled in terms of the contract to claim counter-performance (payment) from B . . .; for some reason (eg B is a man of straw, or disappears) A's contractual claim against B is useless; is C in any way liable to A? If so, what are the precise requisites for and the limits of such liability? Obviously there can be no question of contractual liability . . . the problem is whether there is any liability based on *quasi*-contract or the so-called doctrine of unjust enrichment (if the two may be legitimately distinguished)" (per Jansen J 568C – E).

It is clear that the facts upon which the case fell to be decided brought plaintiff squarely within the confines of the third-party causation complex as described above. The plaintiff's chances were therefore contingent upon whether or not his actions *caused* the defendant to be enriched; or, put another way, whether or not the defendant bank's enrichment was at his, the plaintiff's, expense.

In circumstances such as those *in casu*, where there has been the intercession of a third party between plaintiff and defendant, there is no question of liability in terms of the principles of *negotiorum gestio* –

> "the *quasi*-contract giving rise to . . . reciprocal actions not based on enrichment . . . [I]t seems clear enough that the performance by A of his contract with B cannot constitute a true *negotiorum gestio vis-à-vis* C, despite the fact that the latter's property is involved. The intention of A can hardly be described as an *animus negotia aliena gerendi*: his interests is to further his own interests by performance of his contract with B and he does not look to the credit of C for compensation. This seems to have been assumed in *Knoll v SA Flooring Industries* [1951 (1) SA 404 (T)]. In a note dealing with this case Prof Scholtens (1951 *SALJ* at p 137) writes: 'It is submitted that the *actio negotiorum gestorum* should not lie where an act done by a person finds its justification in his furthering exclusively his own interests under a bilateral contract with another person, even although a third party may have derived some benefit therefrom. The question whether an action can be brought against such a third party should be decided on the basis of unjust enrichment only.' *Hahlo and Kahn, op cit*, pp 564 – 565, are of the same view" (*Gouws v Jester Pools supra* 571A – D).

In this instance the *animus negotia aliena gerendi* was totally absent in so far as plaintiff believed that he was improving his own property – he believed he owned the truck himself – and not the property of another.

Wright J had no hesitation in concluding that had plaintiff been in possession of the vehicle he would have been able to retain possession in the face of all claims made by the bank unless and until they compensated him for the enrichment they would otherwise enjoy by virtue of the improvements effected by plaintiff. The right to retention as against the vindicatory claims of C, however, was not a right enjoyed by virtue simply of the fact of enrichment but derived solely from the fact of possession: the possession of the property conferred on A a real right which was enforceable against the world including the true owner. The right to acquire possession derived from the enrichment of B who had originally given A possession – notwithstanding the fact that B had never had the authority to give that possession. That the plaintiff might thereby indirectly be entitled to a right to compensation did not entitle him to recover under an enrichment action as against the third party (C in Jansen J's example) either the value of the improvements or his impoverishment. His redress against C – such as it might be – was confined solely to his right to retain possession

and to demand, as against surrendering possession, compensation for the improvements effected:

> "As uitgangspunt moet aanvaar word dat die blote feit dat 'n retensiereg aan die persoon wat die verbeterings aangebring het toegeken word, hom nie geregtig maak om te dagvaar nie en dat die aksiegrondslag as sulks in die elemente van verryking geleë is: 'The holder of a real security never has a right of action *because* he has a real security, he can never sue on the basis of a security. The position is rather that a security is accessory to a pre-existing debt or to a debt which arises at the same time as the security . . . Thus, the holder of a mortgage bond can sue the owner only on account of the contract which gave rise to the bond, the holder of a pledge can sue the owner only on account of the debt for which the pledge serves as security, and the holder of an enrichment lien can sue only on the basis of unjustified enrichment. There can, of course, be cases where a lien exists but where the holder of the lien has no right against the owner of the property, namely where the lien is older than the ownership. *Thus, where A is in possession of the property of B against whom he has an enrichment action because he has improved the property, and the ownership of the property passes to C, who owes A nothing, A will retain his lien but he will not have an action against C.*' (De Vos (1974) *THRHR* op 313, my kursivering)". (*Van der Burgh v Van Dyk* 319E – H.)

Thus according to Wright J, it did not follow as a natural consequence that because plaintiff would have had a lien had he retained possession he automatically enjoyed an enrichment action against second defendant.

It was quite clear therefore that, had the plaintiff retained possession of the vehicle his right to be compensated for the improvements effected to it – albeit indirectly by virtue of his right to retain possession unless and until the bank afforded him compensation for them – would not have been in doubt. Unfortunately for plaintiff, however, having surrendered possession, the only possible way in which he could recover compensation for the losses he had suffered was to satisfy – independently of any right of retention that he might have had – all of the elements of a specific enrichment action, including the requirement that there must be a causal *nexus* between his impoverishment and defendant's enrichment. In *Gouws v Jester Pools supra* 574H it was decided that the requirement of causation demanded that the enrichment of the defendant flow directly from the impoverishment of the plaintiff or *vice versa* – for example, where there was an antecedent legal relationship between them which had subsequently fallen away. The *mere fact* of enrichment coupled with the *mere fact* of impoverishment is not sufficient. "On this basis A . . . has no action based on enrichment against C. C is enriched, not at the expense of A, but at the expense of B" (*Gouws supra* 574H). Thus the requirement of causation implies a species of legal causation.

Wright J found this reasoning compelling and, given that Van der Burgh was in a position analogous to that of A, and the bank in the same position as C, it followed that on the *Gouws* test Van der Burgh must fail. Plaintiff had failed to satisfy the requirement of causation and therefore there could be no liability against the bank whatsoever.

There are three substantive objections to the relaxation of the causation requirement on principle – none readily apparent in the reasoning of either *Gouws* or *Van der Burgh*. These are first, that it could lead to "double jeopardy"; secondly, that a debtor is entitled to determine who his creditors are to be; and thirdly, that allowing a claim in circumstances such as these would defeat the *paritas creditorum* principle of insolvency and therefore work hardship on other creditors.

The first objection operates from the premise that if we allow A an enrichment action against C on the basis that A improved the property of C believing it to be that of B (or in terms of a contract with B to perform the work as a sub-contractor to B), then the potential arises for C to be held doubly liable: to A and B. That is, A could recover from C on the basis that he had improved C's property as a result of which C has been enriched to the value of the improvements at his, A's, expense. Secondly, C could be held liable to B, on the basis either that B improved the property of C in terms of a contract as a result of which B is entitled to counter-performance; or that B, in the guise of a *bona fide possessor*, improved C's property as a result of which C has been enriched at B's expense. If C pays A first, he exposes himself to double jeopardy at the hands of B, and vice versa.

Upon closer analysis, however, the "problem" reveals itself to be illusory. There are two distinct aspects to the problem. The first is where C has concluded a contract with B to improve his property and B sub-contracts to A; and the second is where there is no contract between B and C (the factual paradigm in both the *Gouws* and *Van der Burgh* cases) but where the value of the property is enhanced by A at the instance of B. Where there is no contract between B and C, B would have to recover compensation from C in terms of an enrichment action for the improvements effected to the property. All the requirements of enrichment would therefore have to be satisfied. Similarly, A's only possible claim against C would be based on unjustifiable enrichment of C to A's detriment. Again, all the requirements of enrichment liability would have to be proved against C – including, in both instances, the requirement that C must in fact have been enriched, and the plaintiff impoverished. The extent of C's enrichment would be the extent to which the improvements increased the value of the property in question; or, in respect of necessary improvements, the cost of effecting those improvements. If C was not enriched at all, or if the extent of his enrichment was less than the impoverishment of the plaintiff, there can be no liability. Therefore, the maximum extent to which C could be liable to A, B or both A and B, would be the enhancement of the value of his property. Were an action to be brought against C by A he would have an absolute defence akin to *res judicata* if he could show that he had answered (and satisfied to the full extent of any amount by which he had been enriched) a claim brought by B – or vice versa.

Where C had contracted with B to effect the improvement, and B had in turn sub-contracted to A, C's maximum potential liability to either A or B would be to the value of the contract price, and his minimum liability the amount by which he had been enriched. If a second action were to be brought by B after C had compensated A, C's defence would be based on *negotiorum gestio*; if a second action were to be brought by A after C had rendered his performance to B his defence to A's claim would be that he had not been enriched. There could, in circumstances such as those in *Gouws* and *Van der Burgh*, therefore be no question of "double jeopardy" (Scholtens "Enrichment at whose expense?" 1968 *SALJ* 371).

The second objection to allowing A an action in circumstances such as these, is that to do so would expose C to an action from a creditor whom he would otherwise have chosen not to deal with. The simple answer to this objection is that the principles of unjustifiable enrichment are premised upon considerations of equity and fairness. The enrichment action is motivated – albeit merely

as a guiding principle and not as rule of law – by the equitable notion that no person should be enriched at another's expense without good reason (in law). It seems curious that it should only be where considerations of causation come into play that this equitable basis of enrichment liability should be overridden by the rights of the individual to choose his debtors. Indeed, even more so when we are on the verge, once again, of recognising a general enrichment action premised solely on those selfsame equitable considerations.

The third objection is based on the rule of *paritas creditorum* in the law of insolvency: a coming together, or parity of creditors, to share equally in the proceeds of the insolvent estate (De Vos *Verrykingsaanspreeklikheid* 340 ff; "Enrichment at whose expense? – a reply" 1969 *SALJ* 229). If we allow A to claim from C on the basis that B has been declared insolvent, then A alone will recover the full amount (if any) owed by C to B, whereas C should in fact be held liable to B's estate for anything owing, and that which is recovered by the estate be divided amongst all B's creditors – including A. This objection is a sound one, but one which can be overcome. The rule of *paritas creditorum*, like the law of enrichment, is based primarily on equitable considerations: the desire that no single creditor should enjoy an unfair advantage over the other creditors in collecting from the debtor. The relative interests at stake, and the ultimate determination of which claim is to be the stronger, are therefore dependent on the relative equitable considerations at stake. There is no reason why the rule of *paritas creditorum* should be elevated above the equitable principles of enrichment liability when common sense and our inherent notions of fair play would seem to cry out for the opposite. The preference of an enrichment action over adherence to the rule of *paritas creditorum* is even more compelling in circumstances such as the case in point, where the property which had formed the subject matter of the dispute had never formed an asset in the insolvent estate – for whatever reason.

Even if we were to prefer the rule of *paritas creditorum* over the equitable principles of enrichment liability, however, the *Gouws* formulation of causation would apply in all situations, including those where the third party has not been declared insolvent but had simply absconded or had disappeared for some other reason – a not unlikely prospect given that the property may have been stolen although A was a *bona fide possessor*. Given the possibility of this occurring, it is preferable to deny A a claim against C in the circumstances of B's insolvency (or to make A's claim contingent upon the final distribution of B's insolvent estate) rather than to deny A a claim altogether. Indeed, to do so would not be unduly difficult, for the proceedings against C could be stayed pending final distribution; or the trustee of the insolvent estate could be joined under the third party procedure contained in rule 13 of the Uniform Rules of Court. If C is held liable to the insolvent estate of B, then A will have no claim against C, for C will not have been enriched. If C is not held to account to B's insolvent estate – again, a not unlikely prospect – then it is highly inequitable that C should enjoy the benefits of the improvements effected to his property without having to account to A for them.

The objections based on principle to the application of the *Gouws* causation requirement therefore would appear, on closer inspection, to be without substance and should not be considered in determining whether an action should lie in these circumstances.

It seems clear that the decision in *Gouws v Jester Pools* came about partly as a reaction to the decision in *Nortje v Pool* 1966 3 SA 96 (A) which, decided just two years prior to *Gouws's* case, had rejected the possibility of a general enrichment action in South African law. Referring to his abstract of the problem of causation quoted above, Jansen J stated expressly:

> "By some of the contemporary writers . . . it is assumed that there is, however, scope for an action based on enrichment (presumably a general action) – but this was before the decision in *Nortje en 'n Ander v Pool, NO, supra. In the circumstances the matter must be reviewed afresh*" (57H – 573A; my italics).

The question that immediately comes to mind, therefore, is that if the rejection of a general enrichment action weighed so heavily in the mind of the court in applying the requirement of a causal *nexus*, should recent trends towards the recognition of a general action not militate in favour of a relaxation of the causation requirement?

The answer to this question would seem to depend on the impetus for recognition of a general enrichment action. If the impetus derives from a striving for a broadening of and a more equitable basis to enrichment law in South Africa, then the answer must be in the affirmative. By all admission, the requirement of causation will often work hardship where it is applied in the *Gouws* scenario – even the most ardent supporters of the causation requirement would admit to this.

If the desire for recognition of a general enrichment action is being carried forward simply for the sake of historical correctness, then there is ample authority that an action was recognised in these circumstances in Roman-Dutch law (Scholtens 1968 *SALJ* 376 – 378; De Vos 1969 *SALJ* 230). The granting by the Hooge Raad of the action, would very clearly seem to have been premised upon the belief that to disallow a remedy in circumstances of third-party intervention would lead to great inequity and hardship. The fact that the action was recognised in Roman-Dutch law therefore serves to demonstrate further the equitable nature of enrichment in general, and lends credence to calls for the abandonment of the requirement of causation in these circumstances on the basis that it would be inequitable to do otherwise.

But if the movement towards a general action is driven instead by the desire simply to consolidate or codify the law of unjustifiable enrichment as it stands, then there is little room for an abandonment of causation – it must rather be incorporated and enforced as one of the general requirements that must be satisfied by the plaintiff on a balance of probability for him to succeed. Whether this is desirable or not depends ultimately on one's conception of equity and fairness; I would submit, however, that equity demands that a remedy be conferred.

Considerations of equity aside, however, there is a more obvious and damning problem with the application of a causation requirement which has been formulated in this way: the *Gouws* formulation of the requirement of causation begs the question, for it fails positively to identify how the requirement of causation is satisfied. Rather, it states negatively when the causation requirement will not be satisfied, namely, where there is the intervention of a third party. It also states that the requirement of causation is not satisfied by factual causation: the mere fact of a transfer of enrichment from the estate of the impoverished party to that of the enriched party is not sufficient, notwithstanding the fact that, in the absence of the intervention of a third party, it is the fact of transfer of enrichment that is the basis for an enrichment action

in all other enrichment claims. De Vos *Verrykingsaanspreeklikheid* 340 formulates the causation requirement thus:

> "Daar is betoog dat waar 'n prestasie fisies aan iemand gelewer is, hy verryk is ten koste van die persoon wat fisies die prestasie gelewer het, *tensy daar regsverhoudings aanwesig is wat aandui dat die prestasie regtens aan 'n ander persoon, die sg tussenpersoon, gelewer is, dat die tussenpersoon regtens die solvens teenoor die fisiese ontvanger van die prestasie was, en lg die recipiens van die prestasie van die tussenpersoon was.* In so 'n geval kan die fisiese presteerder nie 'n verrykingsaksie teen die fisiese ontvanger instel nie omdat laasgenoemde nie op sy koste verryk is nie."

This formulation of the requirement of causation does not explain what form the requirement of legal causation takes, but rather avoids the formulation of any requirement save to say that it is not the fact of enrichment *per se*. Neither does it explain when a legal relationship ("regsverhouding"), which determines that the fact of enrichment is not sufficient to found an enrichment action, will be present. It is not satisfactory to formulate the requirement of causation negatively in this way by saying that factual causation is not sufficient, and that legal causation will not be present in this type of (amorphous) legal relationship because the enrichment of the defendant was not at the expense of the plaintiff.

The sophistic nature of the formulation is more readily apparent when one considers De Vos's statement (*loc cit*) that "the holder of an enrichment lien can sue only on the basis of unjustified enrichment". In the same way that the pledgee's right to retain possession is premised upon a valid contract of pledge entered into between pledgee and pledgor, it would stand to reason that the right to retain retention is premised upon a valid claim of enrichment between plaintiff and defendant. The right to retain possession is premised upon a right enjoyed by virtue of the fact of enrichment (or impoverishment). Were there no valid claim of enrichment then the possession itself would be unlawful and could not be protected by means of an enrichment lien. The mere fact of possession cannot give rise to a right to retain possession until compensated, but is rather a concomitant of the rights flowing from the relative enrichment and impoverishment of the parties. The fact of impoverishment is therefore sufficient to found the obverse of an enrichment claim – a right of retention; it is illogical that it is not sufficient to establish the right upon which retention is premised. Therefore, the *Gouws* formulation, which denies a claim where enrichment has occurred thanks to the intervention of a third party, must be incorrect; or the recognition of an enrichment lien in exactly the same circumstances but where possession has been retained, must be correct. The two approaches are mutually irreconcilable.

BE LEECH
Johannesburg Bar

ASPEKTE VAN DIE REG OP PRIVAATHEID

Jooste v National Media Ltd 1994 2 SA 634 (K);
Motor Industry Fund Administrators (Pty) Ltd v Janit 1994 3 SA 56 (W)

Die beskerming van die reg op privaatheid het in hierdie twee beslissings ter sprake gekom. In die een saak was die eiseres 'n natuurlike persoon en in die

ander was die applikant 'n regspersoon. Die tersaaklike feite was kortliks soos volg:

In *Jooste* het die verweerders tydskrifartikels gepubliseer aangaande die verhouding tussen 'n bekende rugbyspeler en sy beweerde minnares (die eiseres) en die buite-egtelike kind wat hy na bewering by haar verwek het. Die kernfeite oor hierdie verhouding is deur die eiseres self aan die pers bekendgemaak. Die betrokke artikels het egter belangrike en hoogs intieme besonderhede bevat wat nooit voorheen gepubliseer is nie. Dit het geblyk dat die eiseres 'n ooreenkoms met die eienaar en redakteur van die twee tydskrifte *Huisgenoot* en *You* aangegaan het ingevolge waarvan sy tot publikasie toegestem het onderworpe aan die voorwaarde dat sy die finale artikels en foto's eers moes goedkeur en dat daar oor 'n publikasiedatum ooreengekom moes word. Die verweerders het egter nie die voorwaardes behoorlik nagekom nie waarna die eiseres haar toestemming tot publikasie teruggetrek het. Die verweerders het nietemin voortgegaan met publikasie. Die eiseres stel 'n eis op grond van privaatheidskending in waarteen die verweerders die verwere opper dat die eiseres nie 'n privaathoudingswil gehad het nie (op grond daarvan dat daar voor publikasie van die betrokke artikels reeds wye publisiteit aan die beweerde verhouding gegee is en dat sy 'n gewillige medewerker tot die voorbereiding van die artikels was), en dat sy tot die publikasie toegestem het (*volenti non fit iniuria*). In die landdroshof word haar eis van die hand gewys. In hoër beroep slaag sy egter en R5 000 genoegdoening word toegeken.

In *Janit* het 'n ontevrede voormalige werknemer van die twee applikante (maatskappye) bandopnames van sekere direksievergaderings van die applikante gesteel. Hierdie bandopnames het vertroulike inligting aangaande litigasie tussen die respondente (as eisers) en die applikante (as verweerders) bevat, asook ander vertroulike inligting aangaande onder meer die pensioenfonds wat deur die eerste applikant geadministreer is en die fonds se beleggings. Die inligting is deur die werknemer aan die eerste respondent, wat ook eienaar van die tweede respondentmaatskappy was, oorhandig. Alhoewel nie betrokke by die diefstal van die bandopnames nie, het die eerste respondent beoog om die bandopnames in vermelde litigasie te gebruik en het voorts gedreig om die bande deur die media te laat publiseer. Eerste respondent het geweier om 'n onderneming te gee om nie die bande aan derde partye beskikbaar te stel nie. Die applikante doen aansoek om 'n interdik om die respondente te verbied, eerstens om die bandopnames aan derde partye beskikbaar te stel, en tweedens om die inhoud van die bandopnames as getuienis in vermelde litigasie te gebruik. Die aansoek slaag.

Beide beslissings bring interessante fasette van die reg op privaatheid na vore, onder andere met betrekking tot die aard en omskrywing van privaatheid as regsgoed, die wyses van privaatheidskending, die onregmatigheid van sodanige skending en regverdigingsgronde wat in hierdie verband ter sprake kan kom.

1 Grondwetlike beskerming

Alvorens hierdie aspekte aandag geniet, moet onderstreep word dat die reg op privaatheid as fundamentele mensereg uitdruklik in artikel 13 (hoofstuk 3) van die Grondwet van die Republiek van Suid-Afrika 200 van 1993 erken word. Die artikel lui soos volg:

> "Elke persoon het die reg op sy of haar persoonlike privaatheid, waarby inbegrepe is die reg om nie aan visentering van sy of haar persoon, woning of eiendom, die beslaglegging op private besittings of die skending van private kommunikasie onderwerp te word nie."

Hierdie beskerming geld in beginsel vir sowel natuurlike as regspersone (sien a 7(3) van die Grondwet). Artikel 13 van die Grondwet bevestig die belangrikheid van privaatheid wat as beskermingswaardige regsgoed reeds lank in ons reg ten aansien van natuurlike persone ingeburger is (sien Neethling *Persoonlikheidsreg* (1991) 223 ev) en onlangs ook deur die appèlhof na regspersone uitgebrei is (*Financial Mail (Pty) Ltd v Sage Holdings* 1993 2 SA 451 (A); sien ook Neethling, Potgieter en Visser *Law of delict* (1994) 312–313).

In verband met die grondwetlike beskerming van die reg op privaatheid moet die volgende goed voor oë gehou word: Dié reg geld nie absoluut nie maar mag deur ander algemeen geldende reg beperk word in die mate waarin die beperking redelik is, regverdigbaar is in 'n oop en demokratiese samelewing gebaseer op vryheid en gelykheid, en die wesenlike inhoud van die reg nie ontken word nie (a 33(1)). In *Qozeleni v Minister of Law and Order* 1994 3 SA 625 (OK) 640 verduidelik die hof hierdie bepalings in die algemeen soos volg:

> "The fundamental rights protected by the chapter [3] . . . are not absolute rights. Apart from the possibility of these rights conflicting with each other in a given situation, they are all also subject to a general limitation clause (s 33) . . . Any alleged breach of the fundamental rights set out in chap 3 therefore necessitates a two-pronged enquiry . . . viz, firstly, whether there has been an infringement of the fundamental right, and, secondly, if so, whether that infringement of the right is justified in terms of the limitation clause . . . The person alleging an infringement of a fundamental right would initially bear the *onus* of proving such an infringement, but, having done so, the *onus* of proving the justification for such an infringement in terms of s 33 would be on the person or entity relying on such justification" (sien ook *S v Smith* 1994 3 SA 887 (SOK) 898; *Rudolph v Commissioner for Inland Revenue* 1994 3 SA 771 (W) 774).

By die uitleg van hoofstuk 3 moet die howe waardes bevorder wat 'n oop en demokratiese samelewing gebaseer op vryheid en gelykheid ten grondslag lê. In hierdie verband moet 'n hof relevante volkereg in ag neem en het 'n diskresie om vergelykbare buitelandse hofbeslissings te oorweeg (a 35(1)). Daarbenewens moet die hof by die uitleg van enige wet of by die toepassing en ontwikkeling van die gemenereg en die gewoontereg, die gees, strekking en oogmerke van hoofstuk 3 behoorlik in ag neem (a 35(3)).

Howe sal by die toekomstige beslegting van privaatheidskendinggeskille dus deeglik kennis moet neem van hierdie bepalings van die Grondwet. Dit geld eerstens wat staatsoptrede betref waar die fundamentele regte *direk* geld: So 'n geval het in *Rudolph v Commissioner for Inland Revenue supra* 773–775 voorgekom. Die applikante het aangevoer dat visentering en beslaglegging ingevolge artikel 74(3) van die Inkomstebelastingwet 58 van 1962 'n aantasting van die grondwetlik verskanste reg op privaatheid daarstel, en 'n tussentydse interdik aangevra om sodanige toekomstige optrede te verbied totdat die konstitusionele hof uitsluitsel oor die aangeleentheid gegee het. Die aansoek word egter van die hand gewys omdat die applikante volgens regter Goldblatt nie 'n *prima facie* beskermingswaardige reg kon aantoon nie.

Afgesien van staatsoptrede, word die bepalings van hoofstuk 3 ook met betrekking tot privaatregtelike gedinge oor privaatheidskending *indirek* betrek in die sin dat alle privaatregtelike beginsels, reëls of norme onderworpe is aan, en dus inhoud gegee sal moet word in die lig van die basiese waardes vervat in hoofstuk 3 (vgl Van Aswegen "The future of South African contract law" 1994 *THRHR* 451–452; Burchell *Principles of delict* (1993) 13–14; Neethling, Potgieter en Visser 34 vn 22). Laasgenoemde geld in die besonder by die toepassing van die *boni mores* of redelikheidsmaatstaf ten einde die deliktuele onregmatigheid al

dan nie van 'n privaatheidskending te bepaal (sien oor die *boni mores*-toets *infra* par 4).

2 Aard en omskrywing van privaatheid

Wat *privaatpersone* betref, aanvaar regter Olivier (in *Jooste* 645E – F) Neethling *Persoonlikheidsreg* 34 se omskrywing van privaatheid:

> "Privaatheid is '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" (sien ook *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376 (T) 384).

Uit hierdie definisie blyk dat 'n persoon se privaathoudingswil 'n belangrike komponent van sy privaatheid is: ontbreek die privaathoudingswil, ontbreek terselfdertyd die betrokkene se *belang* in sy privaatheid (Neethling *Persoonlikheidsreg* 33; sien ook *Jooste* 640A – B). Anders as die landdros in die hof *a quo*, bevind regter Olivier by implikasie dat die eiseres steeds 'n privaathoudingswil ten opsigte van sekere feite gehad het wat nog nie voorheen gepubliseer is nie. Die verweerderes was naamlik daarop gesteld om beheer oor die uiteindelike publikasie uit te oefen: dit blyk onder meer uit die feit dat sy eers die finale weergawe van die artikels en meegaande foto's wou goedkeur; sodoende wou sy as 't ware die inhoud en omvang van haar privaathoudingsbelang self bestem, welke *selfbestemmingsfunksie as die wese van die individu se belang in privaatheid* beskou word (sien Neethling *Persoonlikheidsreg* 33). Die eiseres het gevolglik ongetwyfeld die wil gehad om die gewraakte gedeeltes privaat te hou totdat aan haar voorwaardes voldoen is.

Die feit dat 'n skending van 'n persoon se privaatheid strydig met sy wil geskied, beteken uiteraard nie noodwendig dat sodanige skending sonder meer onregmatig is nie. Ten einde die reg op privaatheid aan te tas, moet, soos by alle subjektiewe regte die geval is, *normskending* ook teenwoordig wees – die privaatheidskending moet gevolglik nie alleen in stryd met die reghebbende se *subjektiewe* bestemming en wil wees nie, maar moet terselfdertyd ook *objektief* normstrydig wees (sien hieroor Neethling *Persoonlikheidsreg* 226; *infra* par 4). Soos ook regter Olivier tereg opmerk (645F – H):

> "'n Oomblik van nadenke sal . . . aantoon dat die grense van die reg op privaatheid nie uitsluitlik deur die betrokkene se eie wil bepaal kon word nie. Net soos in die geval van enige ander subjektiewe reg, word die strekkingswydte van die reg op privaatheid in die laaste instansie bepaal deur objektiewe norme . . . Aldus kan 'n openbare figuur, byvoorbeeld 'n politikus, wel in 'n bepaalde geval 'n privaathoudingswil hê, maar as sy of haar optrede binne sekere parameters val, is publikasie daarvan nie onregmatig nie . . . Om daardie rede meen ek dat pogings om die toets vir die onregmatigheid van 'n handeling wat *prima facie* op privaatheidskending neerkom volkome te subjektiveer, onaanvaarbaar is."

Wat *regspersone* betref, is dit in hierdie stadium nog onseker welke feite of inligting aangaande 'n regspersoon op sy privaatheid betrekking het. Laasgenoemde begrip is by regspersone dus steeds vaag en ongedefinieerd. Ook hoofregter Corbett wou hom in die *Financial Mail*-saak *supra* 462 nie hieroor uitlaat nie. Gevolglik moet die beskerming van 'n regspersoon se persoonlikheidsreg op privaatheid met omsigtigheid benader word (sien Neethling, Potgieter en Visser 313 vn 42). In hierdie verband moet veral gewaak word om hierdie regsgoed nie te verwar met byvoorbeeld vertroulike bedryfsinligting ten aansien waarvan 'n selfstandige immaterieelgoederereg op die handelsgeheim kan bestaan

nie (sien Neethling "Die reg aangaande onregmatige mededinging sedert 1983" 1991 *THRHR* 574). Daar word voorlopig aan die hand gedoen dat die kern van die onderskeid tussen hierdie twee regte (op privaatheid en die handelsgeheim) geleë is in die feit dat 'n handelsgeheim altyd ekonomiese waarde het (sien Van Heerden en Neethling *Onregmatige mededinging* (1983) 133), terwyl privaatheid – synde 'n aspek van die regspersoon se persoonlikheid – nie sodanige waarde besit nie.

3 Wyses van privaatheidskending

Privaatheid as 'n individuele lewenstoestand van afsondering van openbaarheid impliseer 'n afwesigheid van kennisname met die persoon of sy persoonlike aangeleenthede in daardie toestand. Dienooreenkomstig kan privaatheid slegs deur 'n ongeoorloofde kennismaking met 'n persoon of sy persoonlike sake deur buitestanders geskend word. Sodanige kennismaking kan weer op twee wyses geskied: enersyds wanneer 'n buitestander self met 'n persoon of sy persoonlike sake kennis maak (kennisname- of indringingsgevalle); en andersyds wanneer 'n buitestander derdes laat kennis maak met die betrokkene of sy persoonlike sake wat, alhoewel dit aan die buitestander self bekend is, steeds privaat is (kennismededelings- of openbaarmakingsgevalle) (Neethling *Persoonlikheidsreg* 34; Neethling, Potgieter en Visser 333 – 334).

Hierdie benadering word in die *Janit*-saak gevolg. Regter Myburgh verklaar (60H):

> "The applicants have a right to privacy. They are entitled to protection from invasion of their right to privacy. Invasion of the right to privacy may take two forms: (i) the unlawful intrusion upon the privacy of another; and (ii) the unlawful publication of private facts about a person."

Ons vertrou dat die regspraak hierdie suiwer benadering in die toekoms sal navolg sonder om die deur oop te laat vir ander gewaande wyses van privaatheidskending, soos die sogenaamde "false light"- en "appropriation"- gevalle van die Amerikaanse reg (sien McQuoid-Mason *The law of privacy in South Africa* (1978) hfst 5 – 8), wat in werklikheid op identiteitskending neerkom (sien Neethling *Persoonlikheidsreg* 38; Neethling en Potgieter "Die reg op privaatheid: regspersone, onregmatigheid en die openbare inligtingsbelang" 1993 *THRHR* 706).

4 Onregmatigheid van privaatheidskending

Hierbo is reeds aangetoon dat bloot feitelike indringing in en openbaarmaking van privaatheid nie op sigself onregmatig is nie maar dat sodanige krenking met normskending gepaard moet gaan. Gevolglik was die openbaarmaking van private feite deur die media in die *Jooste*-saak, en die indringings- en openbaarmakingshandelinge deur middel van die diefstal en inbesitplasing van die bandopnames in die *Janit*-saak nie sonder meer onregmatig nie, maar word in beide sake tereg beklemtoon dat bedoelde handelinge ook met skending van 'n regsnorm (hier die *boni mores* of regsopvattinge van die gemeenskap) gepaard moet gaan. Dit impliseer 'n afweging van die betrokkenes se reg op privaatheid teenoor die belang(e) wat die verweerders/respondente in die onderskeie sake wou bevorder (vgl in die algemeen Van der Merwe en Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 57 – 58; Neethling, Potgieter en Visser 32 – 33).

In *Janit* 60I word dit soos volg gestel:

> "Not all such invasions or publications are unlawful. In demarcating the boundary between the lawfulness and unlawfulness, the Court must have regard to the particular

facts of the case and judge them in the light of contemporary *boni mores* or the genuine sense of justice of the community."

En in *Jooste* 645G H – 646A verklaar die hof:

"Dit is . . . objektiewe regsnorme ('wat op hul beurt terugvoerbaar is tot die opvattings en *mores* van die gemeenskap') wat bepaal waar die grense tussen die belange van die pers en die elektroniese media aan die een kant en die belange van die privaatindividu aan die ander kant lê . . . Dit is juis hierdie objektiewe benaderingswyse, gebaseer op die gemeenskapsopvatting wat heers van tyd tot tyd en plek tot plek, wat aantoon dat publikasie van die intieme en private aangeleenthede van iemand wat andersins onregmatig sou gewees het nie op regskrenking neerkom nie . . ." (sien ook *Financial Mail supra* 462 – 463; Neethling *Persoonlikheidsreg* 226; Neethling, Potgieter en Visser 334; Neethling en Potgieter 1993 *THRHR* 707).

Nou behoef dit 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, *prima facie* (in die afwesigheid van 'n regverdigingsgrond) die benadeelde se reg op privaatheid skend (sien Neethling *Persoonlikheidsreg* 232; *Financial Mail supra* 463; Neethling en Potgieter 1993 *THRHR* 705 708). Dit was dan ook in *Janit* 61B – E baie duidelik dat enige openbaarmaking (ook deur die media) van die inligting op die bandopnames wat op 'n onregmatige wyse van die voormalige werkgewer bekom is, in die afwesigheid van 'n regverdigingsgrond (die openbare inligtingsbelang) onregmatig sou wees. In die *Financial Mail*-saak 463 465 het hoofregter Corbett aangedui dat die openbaarmaking van sodanige feite net in hoogs uitsonderlike omstandighede weens 'n oorheersende openbare belang in inligting ("overriding considerations of public interest") geregverdig sal wees. In *Janit* 61E bevind die hof dan ook dat daar "no overriding considerations of public policy in this case which would permit publication of the information on the tape recordings" was nie.

Die openbare inligtingsbelang as regverdigingsgrond het, afgesien van *volenti non fit iniuria*, ook in die *Jooste*-saak ter sprake gekom. (Onses insiens was die massapublikasie van die gewraakte private feite *prima facie* onregmatig (sien Neethling en Potgieter 1993 *THRHR* 707; vgl egter die *Financial Mail*-saak *supra* 463).) In hierdie verband onderskei regter Olivier tereg tussen openbare figure en persone wat bloot as gevolg van 'n sensasionele gebeurtenis tydelike belangstelling wek. (Dieselfde onderskeid word ook in die Amerikaanse en Duitse reg gemaak tussen "public figures" of "absolute Personen der Zeitgeschichte" en "public persons for a season" of "relative Personen der Zeitgeschichte" (sien vir besonderhede Neethling *Persoonlikheidsreg* 252 – 257; sien ook McQuoid-Mason 218 – 224; *La Grange v Schoeman* 1980 1 SA 885 (OK) 892 ev).) Die hof bevind onses insiens tereg dat die publiek *in casu* geen geregverdigde belang gehad het in die hoogs persoonlike besonderhede wat in die betrokke twee artikels voorgekom het nie. Die regter verklaar onder meer soos volg (646A – F):

"Die eiseres in die huidige geval is . . . geen openbare figuur nie . . . Eiseres val eerder in daardie kategorie van persone wat teen wil en dank vir 'n vlietende oomblik op die verhoog van die lewe gestoot word. Sommige van diesulkes word gewillige medespelers, blakend in die gloed van openbare belangstelling. Andere rem teensinnig terug na die duisternis van vergetelheid. Volgens respondente val eiseres in die eerste kategorie van lewensakteurs en kan sy haar nie bekla as sy deur die gloed van die vloedligte geskroei word nie . . . [Dit is egter so] dat belangrike en hoogs intieme detail wat in die twee gewraakte artikels voorkom, nog nooit voorheen gepubliseer is nie . . . Tensy aangetoon kan word dat eiseres tot die openbaarmaking van hierdie feite toegestem het, sou die publikasie daarvan onregmatig wees. Die publiek het geen geregverdigde belang om hierdie feite te wete te kom nie: morbiede belangstelling skep immers geen regsaanspraak nie."

(Terloops kan vermeld word dat die reg op vryheid van spraak (as "voedingsbron" van die openbare inligtingsbelang) – net soos die reg op privaatheid – uitdruklik as fundamentele reg in artikel 15(1) van die Grondwet verskans word; hierdie regte staan dus op 'n gelyke voet in die Grondwet. Dit bring logieserwys mee dat waar die twee regte in konflik is, die een nie op onredelike wyse bo die ander gehandhaaf moet word nie (vgl Neethling en Potgieter "Laster: die bewyslas, media-privilegie en die invloed van die nuwe Grondwet" 1994 *THRHR* 518). In die lig hiervan, asook die feit dat die huidige stand van die afwegingsproses van vryheid van spraak en privaatheid in ons reg aan die hand van die redelikheidsmaatstaf (*boni mores*-kriterium) bereik is (vgl die kwalifikasie "redelik" in die beperkingsartikel 33(1)(a)(i) van die Grondwet), en ons regsposisie in ieder geval vergelykbaar is met die posisie in lande soos die VSA en Duitsland (vgl bv Neethling *Persoonlikheidsreg* 252 – 257 oor die openbare inligtingsbelang as regverdigingsgrond by privaatheidskending), en daarom regverdigbaar is in 'n oop en demokratiese samelewing gebaseer op vryheid en gelykheid (sien a 33(1)(a)(ii) van die Grondwet) soos by uitstek in dié twee lande aangetref word, kan die *status quo* goedskiks gehandhaaf word.)

Wat die verweer *volenti non fit iniuria* in die *Jooste*-saak betref, is dit duidelik dat toestemming tot benadeling (hier tot privaatheidskending) 'n eensydige regshandeling is wat te eniger tyd deur die toestemmende party herroep kan word (Neethling, Potgieter en Visser 90 – 91; *Jooste*-saak 647B). Hierdie beginsel geld in die reël ongeag die bestaan al dan nie van 'n ooreenkoms tussen die partye. Regter Olivier verduidelik dit soos volg (647D – F):

> "Dit is relevant dat die onderhawige toestemming in die vorm van 'n ooreenkoms gegee is. Hierdie feit kan in gepaste gevalle meebring dat die toestemming nie teruggetrek mag word nie . . . Maar waar die reg waarom dit gaan van hoogs persoonlike aard is, soos die persoonlikheidsregte, geld 'n ander benadering. In daardie gevalle, meen ek, kan die toestemming herroep word mits dit tydig is. Die teenparty se remedie is om skadevergoeding weens kontrakbreuk te verhaal" (sien ook Neethling, Potgieter en Visser 92 vn 349).

Weens die eiseres se herroeping van haar toestemming tot publikasie – welke toestemming in elk geval onderworpe aan voorwaardes was wat die verweerders nie behoorlik nagekom het nie (sien *Jooste* 646H – 647A) – was daar dus nie sprake van *volenti non fit iniuria* nie. Die kwessie van moontlike kontrakbreuk aan haar kant is vir ons doeleindes nie van belang nie en word daarom daargelaat.

5 Toelaatbaarheid van getuienis wat op onregmatige wyse bekom is

In aansluiting by die voorgaande, ontstaan die vraag na die toelaatbaarheid van getuienis in 'n siviele geding wat deur middel van 'n onregmatige privaatheidskending bekom is. *De lege lata* kom dit voor of ons reg nog nie klaarheid in hierdie verband het nie. In die *Janit*-saak moes regter Myburgh bepaal of die respondente geregtig sou wees om die inligting op die bandopnames in die litigasie tussen die partye te gebruik. Hy is van mening dat 'n hof in siviele verrigtinge 'n diskresie behoort te hê om selfs relevante inligting as ontoelaatbare getuienis uit te sluit. Hy motiveer dit soos volg (63G – 64A):

> "Modern technology enables a litigant to obtain access to the most private and confidential discussions of his opponent: his telephones can be tapped, a listening device can be planted in the board room (or bedroom) of the opponent, documents can be photostated, tape recordings of meetings stolen . . . It is poor solace to the litigant whose privacy has unlawfully been invaded by those means that the perpetrator of

> the wrong may face criminal prosecution if the evidence so obtained can be used in the civil proceedings in which they are engaged. In my view, as a matter of public policy, a Court should have a discretion to exclude evidence which was unlawfully obtained."

Die standpunt dat 'n hof die diskresie – waarna regter Myburgh verwys – behoort te hê, kan ondersteun word. 'n Soepele benadering is verkieslik bo 'n rigiede reël dat alle relevante inligting sonder meer as getuienis in 'n hof toelaatbaar is. Insgelyks is 'n summiere afwysing van alle inligting wat op onregmatige of onwettige wyse bekom is, onaanvaarbaar. Dit behoort tog van die omstandighede van elke geval af te hang hoe 'n hof hierdie diskresie sal uitoefen. In die onderhawige geval, na oorweging van verskeie faktore (sien 64B – 65F), kom die hof tot die volgende slotsom (65E – F):

> "Weighing up the various factors, particularly the method of obtaining the tape recordings, the confidential and privileged nature of the information on them and the lack of any material admissible evidence on the tape recordings I have come to the conclusion [dat die inligting op die bande ontoelaatbaar as getuienis is]."

J NEETHLING
JM POTGIETER
Universiteit van Suid-Afrika

TOEGANG TOT KINDERS, LESBIANISME EN DIE KONSTITUSIE

Van Rooyen v Van Rooyen 1994 2 SA 325 (W)

In hierdie saak nader die applikant die hof om haar toegangsregte tot haar twee kinders uit 'n huwelik wat ses jaar vantevore ontbind is, te omskryf. Die kinders is 'n seun van elf en 'n half jaar en 'n dogter twee jaar jonger. Die applikant is betrokke in 'n lesbiese verhouding.

Uitspraak in hierdie aansoek is op 12 Maart 1993 gegee, dit wil sê voordat die Grondwet van die Republiek van Suid-Afrika 200 van 1993 op 27 April 1994 in werking getree het.

Dit was waarskynlik nie vir die applikant onverwags dat die respondent die aansoek op grond van die applikant se lesbianisme opponeer het nie. Schäfer *The law of access to children* (1993) 118 noem homoseksualiteit (en lesbianisme) as voorbeelde van gronde waarop die Engelse howe die nie-toesighoudende ouer toegang tot 'n kind kan weier. Regter Flemming is egter veel meer in voeling met die gangbare moraliteit en gaan nie so ver soos die Engelse howe met sy verdoeming van lesbianisme nie. Daar is nietemin gedeeltes van 'n *obiter dictum* asook die hofbevel self wat anders kon gelui het, en veral in die lig van die Grondwet nie herhaal behoort te word nie.

Regter Flemming is deurentyd bewus van die hof se tweeledige rol, naamlik dié van geskilbeslegter (326A – B F – G 327B F – G) en dié van oppervoog van die kinders (326B – C). (Ingevolge a 30(3) van die Grondwet beteken 'n kind

'n persoon onder die ouderdom van 18 jaar.) Die applikant moet volgens die hof 'n keuse maak tussen "those [lesbian] activities or part thereof" aan die een kant, "and having access [to the children] on a wider basis" (329F – H). Die gelyktydige uitoefening van die twee opsies is volgens die hof nie moontlik nie. Die indruk word hiermee geskep dat daar 'n – vir die kinders – benadelende verhouding, blykbaar weens veronderstelde promiskue gedrag, tussen die applikant en haar vriendin bestaan: trouens, die feit van hulle lesbianisme dui blykbaar reeds op sodanige verhouding/promiskuïteit, ondanks die advokaat se versekering "that there has been no explicit sexual intimacy in front of the children or in the presence of the children" (329H – I).

'n Kind het die reg om te vra dat sy of haar beste belang vooropgestel word in alle aangeleenthede wat hom/haar raak (a 30(3) van die Grondwet). Daarteenoor het elke persoon die reg dat daar nie teen hom of haar onbillik gediskrimineer sal word op grond van seksuele georiënteerdheid nie (a 8(2) van die Grondwet).

Die hof het egter nog nie die mite afgeskud wat homoseksuele persone tipeer as primêr seksueel promiskue wesens wat voortdurend op die uitkyk vir nuwe seksmaats is nie. In werklikheid is homoseksuele persone "typically no more or no less (sexually) active than heterosexuals" (Midgley (red) *Sex: a user's manual* (1993) 318). Homoseksualiteit word trouens nie in die moderne tyd beskou as afwykende gedrag nie maar as 'n wisselvoorkoms van seksuele uitlewing (Sapire *Contraception and sexuality in health and disease* (1990) 393). In die Verenigde State van Amerika het die American Psychiatric Association reeds in 1974 besluit dat homoseksualisme op sigself nie 'n geestesafwyking is nie (Wilson "Are homosexuals illegal aliens?" 1979-08-27 *Newsweek* 25).

Die hof baseer sy siening op die moontlikheid van – vir die kinders – verwarrende gedrag tussen die moeder en haar vriendin. Volgens die verklarings van twee sielkundiges (328B – F) sal verwarrende gedrag nadelig op die kinders inwerk en is beveiliging ("safeguarding") nodig. Die hof gee sy eie voorbeelde van gedrag tussen die applikant en haar maat waarteen die kinders beveilig moet word: Twee vrouens wat 'n bed deel, die applikant wat mansklere dra, woorde van vertedering tussen die applikant en haar maat en die wyse waarop hulle na mekaar kyk (329I 330A – D). Dit is egter die regter se persoonlike uitbreiding van wat relevante "verwarrende gedrag" sou wees en is nie op die stukke gebaseer nie.

Die vraag is of hierdie gedrag van die moeder en haar maat deur die hof gesien word as van *algemeen verwarrende* aard, en of die hof net verwys na die moontlikheid van *benadeling van die seksuele ontwikkeling* van die kinders. Die egskeiding en wat daarmee gepaard gegaan het, was reeds "verwarrende gedrag" van monumentale omvang, wat beteken dat die moeder se lesbianisme slegs geringe addisionele negatiewe impak kan hê. Die voorgaande moet beoordeel word teen die agtergrond van die hof se mening dat die wedersydse band tussen die moeder en haar kinders verstewig behoort te word (326C – D). "Verwarrende gedrag" in die konteks van die aansoek kan gevolglik net "seksueel verwarrende gedrag" beteken.

Die applikant leef in 'n situasie wat sy as 'n "stable and secure family environment for the minor children" beskryf (326I). Daar is niks in die stukke wat die bestaan van die gestelde stabiliteit betwis nie, alhoewel die regter die moontlikheid dat daar werklik van 'n *gesin* gepraat kan word, klaarblyklik nie aanvaar nie. Daar moet oorweeg word of hierdie stabiele, selfs liefdevolle, omgewing

nie meer bevorderlik vir die kinders sou wees as die las wat die hof met sy gekwalifiseerde bevele oplê nie.

Hoe leer 'n kind seksuele gedrag aan? Hy boots grootliks die gedrag van sy ouers en andere in sy omgewing na (sien bv Forgus en Shulman *Personality – a cognitive view* (1979) 206). Daardie omgewing bevat egter verskeie mense en daar is 'n verskeidenheid stimuli wat vanuit verskillende rigtings, en aanvullend, op die jeugdige inwerk sodat 'n enkele persoon se gedrag, selfs dié van die moeder, nie deurslaggewend is nie. Daarby staan dit hoegenaamd nie vas dat *homoseksualiteit/lesbianisme* by wyse van nabootsing aangeleer word nie (Staats *Human learning: studies extending conditioning principles to complex behaviour* (1964) 382 – 383). Skrywers aanvaar wel dat *verleiding* 'n rol kan speel by die ontstaan van homoseksualisme, mits daar 'n neiging by die debutant(e) bestaan (Cronjé en Van der Walt "Die afwykende in die gemeenskap" 16 *Unisa Manualia* 105; Van Elfen *Mediese handleiding vir die vrou* (1985) 50) en die kind nog nie sy/haar derde lewensjaar bereik het nie (Badinter (vertaal deur Wright) *Man/woman – the one is the other* (1989) 182). Volgens die stukke by die aansoek word daar nie aangevoer dat enige verleiding voorgekom het of voorsien word nie.

Op grond van bostaande bestaan daar nóg 'n sielkundige nóg 'n regsbasis vir die gedeelte van die hofbevel wat vereis dat

> "the applicant shall be entitled to have the minor children with her every alternate school holiday on the basis that: (i) during such holiday G M [die vriendin] does not share the same residence and/or sleep under the same roof as the applicant and the children" (331H).

(Die alternatiewe in (ii) en (iii) van die hofbevel (331H – J) het in effek die gevolg dat (i) geen opsie is nie aangesien nakoming van die voorwaarde daarin feitlik onmoontlik is – die vraag met verwysing na (i) is: waar moet die vriendin tuisgaan/slaap, somtyds vir ses weke aaneen?) Minder drasties is die gedeelte van die bevel vervat in 1.1(a) wat vereis dat "when the children sleep at the applicant's residence, the applicant will not share a bedroom with G M" (331F – G); daarenteen is die gedeelte van die bevel ongevraagd wat vereis dat

> "the applicant is ordered to take all reasonable steps and do all things necessary in order to prevent the children being exposed to lesbianism or to have access to all videos, photographs, articles and personal clothing, including male clothing, which may connote homosexuality or approval of lesbianism" (332D).

Buitendien laat die bevel die deur wyd oop vir toekomstige teistering deur die respondent (wat volgens die feite van die saak baie moontlik is – sien 327B).

Die regter moet op sy eie kennis en wysheid kan steun, veral waar getuienis wat aangebied word onvolledig is of nie sin maak nie (Van Warmelo "Reg en moraal in die geregshof" 1974 (1) *Codicillus* 29). In die onderhawige saak wyk die hof egter van die beskikbare voorleggings af en is die hof self "sielkundige" (waarvan regter Flemming juis die advokaat beskuldig wat 'n verslag namens die gesinsadvokaat ingedien het – 327G – H). Volgens die regter moet die hof "assess according to what on prevailing views would be acceptable, desirable, preferable, and so forth" (327I – J). Die hof maak egter aannames en afleidings en gee bevele wat in belangrike opsigte onpraktiese gevolge meebring, vernederend vir die applikant en haar maat is, en die kinders meer kan benadeel as bevoordeel, terwyl die bevele in die mate wat hierbo aangedui is, waarskynlik onkonstitusioneel is.

JJ BRITS
Prokureur

BOEKE

PRINCIPLES OF DELICT

deur JONATHAN BURCHELL

Juta Kaapstad Wetton Johannesburg 1993; xxiii en 269 bl

Prys R78,00 (sagteband)

Die nuutste handboek oor die deliktereg kom uit die pen van die welbekende skrywer oor die strafreg en lasterreg en jarelange bydraer oor die deliktereg in die *Annual Survey of South African Law*, professor Jonathan Burchell van die Universiteit van Natal. Die oogmerk met dié nuwe werk was om 'n beknopte studentehandleiding daar te stel wat die grondbeginsels van die deliktereg in 'n kontemporêre konteks belig (vgl die Voorwoord en Erkennings).

Die teks is in vier dele ingedeel: 'n inleiding, en besprekings van die moderne Aquiliese aksie, die *actio iniuriarum* en spesiale vorme van aanspreeklikheid.

Eerste aan die beurt in die inleidende deel is 'n besinning oor die konsep *delik/onregmatige daad*. 'n Voorlopige omskrywing van die delikbegrip word verskaf, waarna die leser deur naasmekaarstellings van delik en misdaad, en dan weer delik en kontrakbreuk, gelei word tot by 'n slotsom waar twee omvattender definisies van 'n onregmatige daad aan die hand gedoen word. Die outeur skop in 'n lekker informele geselstrant af, maar twee bladsye later word die leser (wat 'n mens aanvaar normaalweg 'n regstudent sal wees wat vir die eerste maal met die deliktereg kennis maak) in redelike diep water gegooi met 'n gedetailleerde bespreking van *Lillicrap, Wassenaar and Partners v Pilkington Bros (SA) (Pty) Ltd* 1985 1 SA 475 (A). 'n Tweede hoofstuk plaas die deliktereg baie kortliks in historiese en huidige konteks. Hier roer die outeur die aktuele – en tot dusver grootliks onontginde – onderwerp aan van die invloed van 'n menseregte-akte op die deliktereg van die toekoms. 'n Volgende hoofstuk handel oor alternatiewe vir aanspreeklikheid gebaseer op skuld, en hier val die soeklig spesifiek op die voor- en nadele van geenskuldvergoeding vir fisiese beserings opgedoen in motorongelukke (geykte vorme van skuldlose aanspreeklikheid word later behandel). Die laaste inleidende hoofstuk, getitel "Elements of the law of delict", bevat drie kort paragrafies wat die leser met die Aquiliese aksie en die *actio iniuriarum* as boustene van die deliktereg bekend stel. (Die aksie vir pyn en lyding word deurgaans as inbegrepe by die uitgebreide Aquiliese aksie behandel.)

Deel twee handel oor die Aquiliese aksie en is in drie afdelings verdeel. Die eerste (hfst 5) is 'n kort oorsig van die elemente van die onregmatige daad, waarvan daar volgens die outeur se sistematiek ses is, te wete die tradisionele vyf (handeling, onregmatigheid, skuld, kousaliteit en skade) plus toerekeningsvatbaarheid wat as selfstandige element behandel word. In die tweede afdeling word Aquiliese aanspreeklikheid in besonderhede behandel. Agt hoofstukke (6-13) word aan hierdie onderwerp gewy en handel onderskeidelik oor die handeling, onregmatigheid, verwere wat onregmatigheid uitsluit, toerekeningsvatbaarheid, skuld, medewerkende skuld, kousaliteit en vermoënsverlies. Ten einde die volledige prentjie oor hierdie onderwerpe te kry, moet die leser telkens die toepaslike inleidende gedeelte in hoofstuk 5 saam met hierdie hoofstukke lees.

In die bespreking van die handelingselement (23 24 36 37) word al die standaardonderwerpe kortliks aangeroer: willekeurigheid, outomatisme, die *actio libera in causa*-beginsel, die late as 'n handeling en die aanhitsing van 'n dier of 'n ander persoon om skade te stig as handeling. Die outeur wys ook uit dat middellike aanspreeklikheid 'n uitsondering is op die algemene reël dat die dader net vir sy eie handeling Aquiliese aanspreeklikheid kan opdoen.

In die inleidende gedeelte oor onregmatigheid (24 – 29) val die klem veral op die redelikheidsgrondslag en soepelheid van dié element en die rol van regsbeleid in verband daarmee. Die aanpasbaarheid van die onregmatigheidskonsep by nuwe regsvraagstukke word aan die hand van kontemporêre hofsake – wat nie noodwendig delikteregsake is nie – geïllustreer. Verder word onregmatigheid ook getipeer as die aantasting van 'n reg of regsbeskermde belang, en word die belange-afwegingstaak van die hof belig. Die feit dat verbreking van 'n regsplig 'n grondslag van onregmatigheid kan wees, word nie in hierdie inleidende gedeelte in soveel woorde genoem nie, maar blyk wel implisiet uit 'n bespreking van beleidsoorwegings wat 'n late onregmatig kan maak (27 28).

In die gedetailleerde bespreking van onregmatigheid (hfst 7) gaan dit om besondere onregmatigheidsvraagstukke: lates, verbreking van statutêre pligte, suiwer ekonomiese verlies, onregmatige mededinging, emosionele skok, misbruik van reg (wat as regsoorskryding – "excess of right" – tipeer word), en oorlas ("nuisance"). In die besprekings van aanspreeklikheid weens 'n late en veroorsaking van suiwer ekonomiese verlies val die klem sterk op die verbreking van 'n regsplig as grondslag van onregmatigheid. Die gedeelte oor onregmatige mededinging sluit selfs 'n kort bespreking van sogenaamde *Anton Piller*-bevele as hulp vir die eiser in sy bewysnood in. 'n Interessante kritiese bespreking van Engelse hofsake na aanleiding van die Hillsboroughsokkerramp word in die afdeling oor emosionele skok ingesluit.

Hoofstuk 8 handel oor verwere wat onregmatigheid uitsluit. Die outeur beklemtoon dat hulle nie 'n geslote groep vorm nie, en behandel dan die volgende in besonderhede: toestemming en vrywillige aanvaarding van risiko, noodweer, noodtoestand, dissiplinêre tugbevoegdheid en statutêre bevoegdheid. Onmoontlikheid en (militêre of soortgelyke) bevel word ook aangeraak as verwere wat in die deliktereg van toepassing kan wees. Kort opmerkings oor die geaardheid van provokasie as verweer word later in die boek, in die bespreking van laster, gemaak. Die moontlikheid dat 'n verweerder se skuld uitgesluit is as hy meen dat 'n regverdigingsgrond aanwesig is terwyl dit objektief nie die geval is nie, word op 'n paar plekke genoem (bv 74 – putatiewe noodweer; 76 – putatiewe noodtoestand; 78 – gehoorsaming van 'n bevel wat nie aan die objektiewe standaarde voldoen om as regverdigingsgrond te dien nie).

Toerekeningsvatbaarheid word kortliks afgehandel (29 30, hfst 9) met verwysing na die invloede van jeugdigheid, geestesgebreke of -siekte, en dronkenskap.

In die inleidende gedeelte oor skuld (30 – 31) word opset en nalatigheid bekendgestel. Die outeur verskaf nie 'n definisie van opset nie, maar meld dat die toets daarvoor subjektief is en dat dit onregmatigheidsbewussyn insluit. Die verskillende verskyningsvorme van opset (*dolus directus, dolus indirectus, dolus eventualis*) word ook verduidelik. Verder word motief kortliks van opset onderskei en 'n paar opmerkings oor dwaling in die kousale verloop gemaak. Vervolgens word die nalatigheidstoets in eenvoudige taal uiteengesit en inleidende opmerkings oor medewerkende nalatigheid en skuldlose aanspreeklikheid gemaak.

In hoofstuk 8, wat oor die skuldelement by Aquiliese aanspreeklikheid handel, word nalatigheid in detail behandel. (Opset kom later, by die bespreking van laster, aan die beurt.) Die nalatigheidstoets word hier in meer besonderhede as in die inleidende deel bespreek. Onder andere lig die outeur die vereiste dat die redelike persoon in die posisie van die dader geplaas moet word, toe deur te verduidelik dat dié posisie slegs die eksterne omstandighede van die dader ten tyde van die beweerde delikpleging behels, en nie ook laasgenoemde se intellektuele, opvoedkundige, geestelike en emosionele omstandighede

nie. Die objektiwiteit van die nalatigheidstoets word belig met verwysing na die toepassing daarvan op deskundiges, beginners, fisiese gestremdes en kinders. In 'n kort bespreking van die moontlike onregverdigheid van 'n objektiewe nalatigheidstoets, neem die outeur die standpunt in dat, miskien anders as in die strafreg, so 'n toets wel in die deliktereg geregverdig is. Voorts word die standpunt in *S v Ngubane* dat opset en nalatigheid kan oorvleuel, kortliks belig.

Onder die opskrif "foreseeability" tipeer die outeur die nalatigheidstoets as konkreet/relatief in die sin dat die algemene aard van die skade en die algemene verloop van die intrede daarvan, redelikerwys voorsienbaar moet wees. Die presiese aard en die presiese omvang van die skade hoef nie voorsienbaar te wees nie. Sy standpunt sluit hier ten nouste aan by dié van Boberg (*The law of delict* (vol 1) 275: "[T]he defendant ought reasonably to have foreseen the *kind* of harm that he might cause: its *degree* or *extent* need not have been foreseeable"; 276: "The actor's liability therefore depends on whether the harm that he actually caused *falls within the class of harm* [my beklemtoning] that a reasonable man in the actor's position would have foreseen and guarded against. If it does, he is liable because he was negligent *in relation to that harm*; if it does not, he is not liable because he was not negligent *in relation to the harm which he caused*"; sien ook Neethling, Potgieter en Visser *Law of Delict* (1994) 131 – 132, ook vn 98) en staan teenoor die abstrakte siening van nalatigheid (skade moet in die algemeen voorsienbaar wees – vgl bv Van der Walt *Delict: principles and cases* (1969) 68). Burchell vind geen botsing tussen die relatiewe voorsienbaarheidstoets soos deur hom omskryf en die sogenaamde eierskedel-reël nie, aangesien dié reël syns insiens op die omvang van die skade betrekking het en nie op die aard van die skade nie. Hy meen verder dat die eierskedel-reël ook op saakskade van toepassing gemaak kan word: as die dader moes besef het dat sy optrede die eiser se eiendom gaan beskadig en hy doen geen voorkomende stappe nie, is hy vir die volle omvang aanspreeklik al is die eiendom 'n kosbare vaas uit die Ming-dinastie (tensy die skade op 'n onvoorsienbare wyse ingetree het). Aandag word ook geskenk aan die vraag of 'n "reasonably foreseeable plaintiff" in ons reg vereis word en die outeur neem die standpunt in dat dit in die algemeen ontkennend beantwoord kan word, met uitsonderings in die geval van suiwer ekonomiese verlies en ander spesiale gevalle.

Vervolgens val die soeklig op die verskillende faktore wat kan bepaal watter stappe in die omstandighede redelik sou wees en op die nie-doen van dié stappe. Verder word gewys op die belangrike rol van nalatigheid ten opsigte van vergoeding ingevolge die Multilaterale Motorvoertuigongelukkefondswet 93 van 1989. Laastens is daar 'n kort bydrae oor die bewys van nalatigheid, met 'n bespreking van die *res ipsa loquitur*-spreuk. Besonder baie besprekings van hofsake is in die hoofstuk oor nalatigheid ingewerk.

'n Volgende kort hoofstukkie word aan medewerkende nalatigheid gewy, met onder andere 'n bespreking van die "sitplekgordelsage" en 'n interessante diskoers oor die vraag of artikel 1(1)(a) van die Wet op Verdeling van Skadevergoeding 34 van 1956 ook vir 'n verweer van medewerkende opset voorsiening maak.

In die inleidende gedeelte oor kousaliteit (32 – 34) word omskryf wat met die begrip bedoel word, en die verskil tussen feitelike en juridiese kousaliteit verduidelik. Die leser maak ook kennis met die *conditio sine qua non*-formulering van feitelike veroorsaking, asook drie juridiese kousaliteitsteorieë: voorsienbaarheid, "direct consequences" en adekwate veroorsaking. Laastens word melding gemaak van die howe se huidige "smorgasbord-benadering" ten opsigte van die juridiese kousaliteitsteorieë in *S v Mokgethi* 1990 1 SA 32 (A) en *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A). In die gedetailleerde bespreking van kousaliteit (hfst 12) word op dié raamwerk voortgebou. Die skrywer verwys na die kritiek teen *conditio sine qua non*, maar spreek die mening uit dat dit onvanpas is om 'n "common sense mode of reasoning" aan streng filosofiese analise te onderwerp. As só 'n analise die norm sou word, meen hy, sou heelwat sinvolle regsreëls en riglyne van regsbeleid in die slag bly. Daar is by Burchell geen twyfel dat *conditio sine qua non* praktiese waarde vir die howe het nie en hy is gelukkig

om die posisie so te aanvaar. Wanneer dit oor die onderwerp van juridiese kousaliteit gaan, meen hy dat voorsienbaarheid nie 'n rol te speel moet hê nie; dié moet tot (konkrete) nalatigheid beperk word. Anders as Boberg 439 ev en Van der Merwe en Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 197 198 207 – 209, en nader aan Neethling, Potgieter en Visser 182 ev, meen hy egter nie dat konkrete nalatigheid die noodsaaklikheid van juridiese kousaliteit in alle gevalle uitskakel nie. Hy stel hom op die standpunt dat "direct consequences", adekwasie en ander relevante faktore volgens die "smorgasbord-benadering" van *Mokgethi* en *Bentley* gebruik kan word ten einde 'n juridies kousale verband te bepaal.

Hoofstuk 13 verskaf (saamgelees met 34 35) 'n kort inleiding tot vermoënskade as delikselement. Die derde afdeling van die bespreking van die Aquiliese aksie (hfst 14 en 15) handel dan oor die berekening van skadevergoeding. In hoofstuk 14 word die klassifikasie en berekening van skadevergoeding bespreek. In 'n kort inleiding word aandag aan die "once-and-for-all"-reël en die mitigasieplig gegee. Dan volg bydraes oor skade wat voortspruit uit beskadiging van eiendom, liggaamlike besering – waar veral aandag gegee word aan verlies van verdienvermoë, en "general" en "special damages". Laastens word ook, onder die opskrif "Non-patrimonial (non-pecuniary) damages", aandag gegee aan pyn en lyding, verlies aan lewensgenietinge en verlies aan lewensverwagting. (Soos gemeld is, word die aksie vir pyn en lyding as inbegrepe by die uitgebreide Aquiliese aksie behandel.) Hoofstuk 15 handel oor voordeeltoerekening.

Die derde deel van *Principles of delict* handel oor die *actio iniuriarum* en is in vier afdelings ingedeel. Die eerste (hfst 16) is 'n kort inleiding. Die tweede afdeling handel oor laster en bevat ses hoofstukke (17 – 22). Eerste aan die beurt (hfst 17) kom drie verskillende definisies van laster: een van laster gepleeg deur 'n individu, een van laster deur 'n verspreider van gepubliseerde materiaal en een van laster deur die media. Drie verskillende definisies word verskaf om die verskillende skuldvereistes in die drie gevalle te akkommodeer. In hoofstuk 18, onder die opskrif "Title to sue", word veral die vraag of 'n regspersoon weens laster kan ageer, ondersoek. Dan volg 'n bladsylange oorsig oor die elemente wat in 'n lasteraksie bewys moet word, met verwysings na die vermoedens wat die eiser te hulp kom en verwere ter beskikking van die verweerder (hfst 19). Dié elemente word dan in besonderhede in die volgende hoofstuk (20) behandel. Publikasie, lasterlike woorde of gedrag, betrekking op die eiser, kousaliteit, onregmatigheid en *animus iniuriandi* kom elk in 'n eie afdeling aan die beurt. In sy bespreking van kousaliteit spreek die outeur die standpunt uit dat die verweerder aanspreeklikheid kan ontduik deur aan te toon dat geen werklike verlaging in die eiser se aansien veroorsaak is nie. In dié opsig verskil hy met byvoorbeeld Neethling, Potgieter en Visser 321 wat leer dat die vraag of die eiser se goeie naam werklik aangetas is, irrelevant is; die enigste vraag is die abstrakte een of, in die oë van die (fiktiewe) redelike persoon met normale intelligensie en ontwikkeling, die eiser se goeie naam aangetas is. Die geykte regverdigingsgronde van die lasterreg word onder die opskrif "unlawfulness" behandel. Die implikasies van *Neethling v Du Preez* (saak nr 24659/89 24969/89 1991 (W)) vir die verweer van waarheid en openbare belang word in besonderhede oorweeg. (Sien egter nou *Neethling v Du Preez* 1994 1 SA 708 (A) (red).) Hoofstuk 21 handel oor die aanspreeklikheid van verspreiders van gepubliseerde materiaal en die media, en hoofstuk 22, onder die opskrif "damages for defamation", oor genoegdoening in 'n lasteraksie.

Die derde afdeling, oor die *actio iniuriarum*, is getitel "impairment of dignity" en bestaan uit twee hoofstukke. Die eerste (hfst 23) is 'n inleiding waarin die outeur onder meer die beskerming van die eer in bestaande menseregtedokumente en 'n toekomstige menseregte-akte aanroer. Verder maak hy 'n saak uit vir 'n breë "dignity"-begrip waarin belediging (*contumelia*) nie 'n rol speel nie en waaronder privaatheid ook beskerm kan word. In dié opsig sluit sy standpunt enersyds aan by dié van Neethling (*Persoonlikheidsreg* (1991) 191; vgl Neethling, Potgieter en Visser 309) insoverre laasgenoemde 'n wye *dignitas*-begrip – wat onder andere privaatheid insluit – voorstaan. Andersyds verskil die twee skrywers se terminologie insoverre Neethling (191 193 ev; vgl Neethling, Potgieter

en Visser 309 332 333) onder die wye *dignitas*-begrip 'n enger "dignity"-begrip (eer(gevoel)) erken, wat alleen deur (objektief sowel as subjektief beoordeelde) belediging aangetas word. (Burchell probeer nie te kenne gee dat 'n skending van die eer nie met belediging gepaard *kan* gaan nie – vgl 193; slegs dat belediging nie 'n onontbeerlike vereiste vir eerskending moet wees nie.)

Hoofstuk 24 handel oor die aantasting van die eer ("dignity") en privaatheid. Die outeur noem die elemente wat bewys moet word: onregmatigheid, aantasting van die eer en *animus iniuriandi*. Ten opsigte van laasgenoemde meen hy dat die beleidsoorwegings ten gunste van die skuldlose aanspreeklikheid van die media vir laster, eweneens skuldlose aanspreeklikheid van die media vir die aantasting van die eer regverdig. Dan volg 'n bespreking van die elemente. Eerste is onregmatigheid, waar die outeur onder andere sê dat die hof die reg van die individu op 'n onaangetaste eer moet afweeg teenoor die publiek se reg om oor dié individu en sy doen en late ingelig te word. Voorts volg 'n bespreking van regverdigingsgronde: openbare belang, toestemming, noodtoestand, statutêre magtiging. Vervolgens word gefokus op die aantasting van "dignity" en privaatheid. Onder "dignity" kyk die outeur na beledigende woorde of gedrag, inmenging met ouerlike gesag, troubreuk, owerspel, onregmatige arres en aanhouding (wat deur Neethling 111 ev en Neethling, Potgieter en Visser 317 ev as aantasting van die *libertas* geklassifiseer word), en kwaadwillige vervolging of aanstig van siviele verrigtinge (wat deur Neethling 170 ev en Neethling, Potgieter en Visser 329 ev as aantasting van die *fama* geklassifiseer word). In sy bespreking van privaatheid verwys die outeur ruimskoots na die Amerikaanse reg, en gebruik onder andere Prosser se indeling van vorme van privaatheidskending: onredelike indringing in die privaatsfeer van 'n ander, ongemagtigde openbaarmaking van privaat feite, ongemagtigde gebruik van 'n ander se naam of beeld, publisiteit wat 'n persoon in 'n vals lig stel. Die outeur wys daarop dat die laaste twee gevalle kan oorvleuel met ander deliksvorme soos aanklamping ("passing off") en laster. Sommige van dié gevalle sal onder Neethling 37 ev 263 ev se kategorie van *identiteitskending* tuisgebring kan word.

'n Kort laaste afdeling (hfst 25) handel oor die beskerming van die fisiese integriteit onder die *actio iniuriarum*.

Die vierde en laaste deel van die boek handel oor spesiale vorme van aanspreeklikheid. Eerste aan die beurt (hfst 26 – 29) is middellike aanspreeklikheid, met 'n afsonderlike bydrae oor staatsaanspreeklikheid (hfst 28). Verder besin die outeur aan die hand van 'n bespreking van *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 1 SA 1 (A) oor 'n werkgewer se aanspreeklikheid vir die delik van 'n onafhanklike kontrakteur (hfst 29). Volgende aan die beurt is die aksie van afhanklikes (hfst 30) en dan mededaders (hfst 31). Laastens is daar 'n kort hoofstuk oor skuldlose aanspreeklikheid (hfst 32), met bydraes oor statutêre en gemeenregtelike skuldlose aanspreeklikheid. Onder laasgenoemde word die leser weer na laster deur die media en middellike aanspreeklikheid verwys, en dan volg 'n bespreking van die *actio de pauperie* en *actio de pastu*. Die outeur betoog ook dat produkte-aanspreeklikheid, soos in die Amerikaanse reg, op 'n skuldlose grondslag geplaas moet word.

Principles of delict is in lekkerlees-Engels geskryf. Die trant is informeel en die outeur dra sy kennis in eenvoudige taal oor. Belangrike hofbeslissings word gewoonlik in die hoofteks behandel en dit sal vir die voorgraadse student nie nodig wees om baie in die voetnote rond te krap nie. Die outeur doen moeite om die teks interessant te maak. Saakbesprekings word nie altyd tot die droë essensie beperk nie maar sluit soms interessante kleinigheidjies in. Verder word die teks met kontemporêre voorbeelde (bv "bungee"-spronge – 73) en prikkelende vrae aan die leser – sonder dat die outeur noodwendig self antwoorde gee – verlewendig. Verwysings word tot die noodsaaklike beperk (met veral min tydskrifartikels). Dit sal miskien die nut van die boek vir die gevorderde navorser verminder.

Ek het 'n paar klein puntjies van kritiek. Die leser (wat 'n mens aanvaar normaalweg 'n regstudent sal wees wat vir die eerste maal met die deliktereg kennis maak) word reeds

in die eerste hoofstuk, soos gesê, met redelik ingewikkelde materiaal gekonfronteer (oa 'n gedetailleerde bespreking van *Lillicrap, Wassenaar and Partners v Pilkington Bros supra*), en maak sonder veel verduideliking kennis met tegniese begrippe soos suiwer ekonomiese verlies. Verwysings in die voetnote na die bespreking van die begrippe later in die boek sou hier vir die oningewyde leser nuttig wees.

Op 28 word gesê dat nie alle opsetlik en nalatig veroorsaakte skade ageerbaar is nie, maar dat aan die element van onregmatigheid ook voldoen moet word. Streng regstegnies kan daar egter nie sprake wees van regmatige opsetlike optrede nie, aangesien opset onregmatigheidsbewussyn insluit. Suiwer ekonomiese verlies word gedefinieer as verlies wat in geldelike terme bereken kan word, maar wat nie met fisiese besering of skade aan eiendom verbind is nie (47). Dit blyk egter uit sommige sake wat die outeur bespreek (*Shell and BP South Africa Petroleum Refineries (Pty) Ltd v Osborne Panama* SA 1980 3 SA 653 (D); *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D)) dat suiwer ekonomiese verlies wel uit die beskadiging van eiendom kan voortspruit, maar met die voorbehoud dat dit nie die eiser se eiendom is nie (vgl verder Neethling, Potgieter en Visser 280 281). 'n Aanval op "a legally protected interest of the defendant" (74) word as 'n vereiste vir noodweer gestel. Soos uit die teks blyk (73), is dit ook voldoende as daar 'n aanval op 'n regsbeskermde belang van iemand anders as dié van die verweerder is.

Die skrywer verwys nie altyd na standpunte wat met syne verskil nie. Dit was een van sy verklaarde oogmerke om 'n kritiese ingesteldheid by sy leser aan te wakker (vgl die Voorwoord). Ek meen dat hy dit nog beter kon bevorder het deur die leser aan die standpunte van minstens die standaardhandboeke oor die vakgebied bloot te stel.

Laastens het ek Van der Merwe en Olivier se *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) – wat immers 'n bewese agting in die howe geniet – in die literatuurlys gemis.

In die geheel slaag die skrywer uitmuntend in sy doelwit om 'n kort en kragtige, baie leesbare studenteteks oor die deliktereg daar te stel. Burchell se *Principles of delict* is 'n welkom toevoeging tot die reeds indrukwekkende literatuur oor 'n dinamiese deel van die reg.

JC KNOBEL
Universiteit van Suid-Afrika

BUSINESS TRANSACTIONS LAW

by ROBERT SHARROCK

Third edition; Juta Cape Town Wetton Johannesburg 1992; xx and 468 pp

Price R85,80 (soft cover)

The third edition of this well-known introductory work takes account of changes and developments in the law relating to business transactions, appearing, as it does, four years after the second edition. Some of the changes in the law reflected in the work are the 1991 amendments to the definition of an unfair labour practice and the extension of the Basic Conditions of Employment Act to cover farm workers. The chapters on cheques and suretyship have been revised, as has the section on insolvency law. Needless

to say, the book is, especially as far as the section on labour law is concerned, already out of date; but then, any attempt to keep up with changes in labour law is doomed.

Business transactions law really needs no introduction – it has become a standard prescribed text for many first year commercial law courses. The stated aim of the work is to provide a "basic text geared to the needs of students embarking for the first time on a study of business transactions law". The author indeed succeeds in covering all areas of the law relevant to this purpose.

Nor, for that matter, does the criticism levelled against the book need introduction. The first point of criticism is the extensive use of decided cases to illustrate principles of law. The basic question remains: does one need to burden a student who encounters the ostensibly terrifying confusion of legal principles for the first time with cases? The facts are often complicated, and explanation of the application of the principles to the cases may take up a lot of a lecturer's time in a class situation. But the question merely needs to be re-phrased in order to cast doubt on its own validity: what is the educational purpose of the cases in the book? This immediately brings to mind the choice many textbook writers face: to use actual decided cases or to use self-invented examples instead. The advantages of using actual cases are numerous: once understood, they inimitably illustrate the principles involved and the application of those principles, giving a student not only a sense of what the study and application of commercial law principles involve, but, for what it is worth, may also dispel the notion that all commercial law involves is parrot-fashion learning of a lot of complicated (but irrelevant, except for examination purposes!) principles. The proper use of the cases contained in the work may give a student a "feel" of the law which is often missing in other introductory works. Using a case underscores the fact that the principles involved are practical principles and that they are in fact applied by the courts. Giving a student an opportunity to sift through and evaluate a number of facts and then to apply the relevant principle is certainly a learning experience in its own right, and one that needs no justification. One may even go so far as to say that the use, and the extensive use, of the cases as illustration of principle is a feature which favourably distinguishes *Business transactions law* from other books in the market covering the same material.

Business transactions law is more suitable for a classroom or lecture theatre situation than for selfstudy. As such, it presents a lecturer with more than enough raw material from which to select a teaching curriculum. Another case-related point of criticism to which the work is often subjected, namely that it contains too many cases, also assumes that a student will be required to study each and every page of the book, including each and every case. It is important not to forget that a lecturer may structure his or her course either to exclude certain sections of the book totally, or to place emphasis on certain sections, leaving others for selfstudy or background reading. In other words, not all of the more than 350 cases may be essential for a specific course. But there is enough material contained between the covers to provide a lecturer with a wide choice of topics, and, furthermore, to provide the student with a basic first-port-of-call for reference purposes.

Criticism has also been levelled at the structure of the book. Here again, it should be remembered that in a class-room situation, a lecturer is free to adapt the structure as he or she prefers, and to prescribe the reading accordingly.

One very valid point of criticism against the book is that it is eminently unsuited for use by students who do not have the constant personal guidance of a lecturer or tutor. For the level at which the book is pitched, the complexity of the cases used as examples and the complicated nature of many of the principles involved make it difficult for a first-time student to find her way through the book unassisted. Few people in South Africa are in a position, upon leaving school, to sit at home and to acquire a knowledge of the law using this book without guidance and virtually step-by-step help. This should not, however, detract from the usefulness of this book in the classroom.

Generally, then, *Business transactions law* is a useful introductory work to what appears at first sight to be the nightmarishly confusing structures of law in this country. Students who are in a position to use it, and who can count on steady assistance and guidance in using it, should be able to come to grips with the basic principles quickly and relatively painlessly, and, at the end of the day, should have a thorough basic knowledge of the principles of South African commercial law.

CARL MISCHKE
University of South Africa

COMMENTARY ON THE CRIMINAL PROCEDURE ACT

by E DU TOIT, FJ DE JAGER, A PAIZES, A ST Q SKEEN and S VAN DER MERWE

Juta Cape Town Wetton Johannesburg 1993

Price R135,00 (soft cover)

When this *Commentary* was first published in 1987, it was stated in the Foreword and Preface that "(t)extbooks which cover the law of criminal procedure are . . . often outdated soon after publication" and that "a loose-leaf commentary on the Criminal Procedure Act is much needed in South Africa". The idea was that "replacement pages provide economically for regular amendments and legal change" and that

> "this publication will make it possible for both practitioner and student to possess – at a reasonable cost – a work on the South African Criminal Procedure Act which is regularly updated, with recent text amendments and law changes".

Since the *Commentary* was originally published in 1987 there has been a bi-annual updating service, resulting – not so economically – in the publication being updated eleven times. It follows that the economical aim of the loose-leaf work has not been fully realised. One can only add up the costs of this updating service. It is, however, impossible to have one's cake and eat it. A fact of life (and the law of the Transvaal) is that you are going to pay for a work which is regularly updated.

In the Preface to the soft cover edition, which is not a new book but simply a bound soft-cover edition of the loose-leaf publication of *Commentary*, it is stated that market forces seem to indicate that there is a need for a bound soft-cover edition. The contents, style, format and layout of the soft-cover edition are exactly the same as those of the loose-leaf work and neither revision services nor supplements will be issued in respect of the bound soft-cover edition.

It is, therefore, apparent that the important factor of economics has been addressed with the soft-cover edition. The nature of the binding and the paper used has enabled the publishers to produce the work at a substantially lower price than the loose-leaf volume. The buyer of this edition will, however, have to realise that the work is not going to be updated on a regular basis. This soft-cover edition will, therefore, become more and more outdated as soon as the South African Criminal Law Reports are published monthly and amendments to the relevant acts are effected. It is nowhere stated at what intervals new editions of the soft-cover edition will be published. A law student who is only going to use the work during the year he is studying criminal procedure will certainly be pleased but only if he takes this course in the year of publication.

However, the *Commentary* remains an excellent publication that can be used fruitfully by academics, students and practitioners and which has become an indispensable handbook on criminal procedure (1989 *THRHR* 615).

PEET BEKKER
University of South Africa

COLLECTIVE LABOUR LAW

by JOHN GROGAN

Juta Cape Town Wetton Johannesburg 1993; xxv and 139 pp

Price R79,00 (soft cover)

As its name indicates, *Collective labour law* deals with the law governing the collective dimension of management and labour relations. It is a companion volume to *Riekert's basic employment law* which, in turn, deals chiefly with the employment relationship between an individual employer and employee. Together, these volumes provide an overview of the entire field of labour law.

Both volumes are primarily aimed at students and industrial relations practitioners. Non-lawyers will find *Collective labour law* extremely user-friendly. The style of the author is uncomplicated and the law is explained in clear and unambiguous terms. Lawyers will, however, also find this book extremely useful. For them it will serve as a work of first reference which provides them with additional material and references in the footnotes to the text.

The structure of the book is logical. It is divided into nine chapters. The first discusses and explains the concept "collective labour law" and provides the reader with a brief overview of its historical development. Chapter 2 deals with the collective bargaining agents, namely trade unions and employers' organisations. In his discussion of trade union membership, the author deals fairly comprehensively with closed shops and the question whether they constitute an unfair infringement upon employees' freedom of association. The only point of criticism is that the concept "members in good standing", which plays an important role in the registration of trade unions, is not explained to the reader (12).

The different bargaining forums are discussed in chapter 3. The most important of the statutory forums are undoubtedly industrial councils. Their formation, registration, constitutions and functions are discussed. Non-statutory bargaining forums are also discussed fairly extensively and the author takes a standpoint on such thorny issues as whether a party can be compelled to bargain over the principle of recognition or to enter into a formal recognition agreement.

The bargaining process is discussed in chapter 4. The role which the industrial court has played in the development of the duty to bargain is set out succinctly. In addition, the different approaches for determining a trade union's bargaining entitlement are also discussed. The question whether a particular matter is suitable for bargaining is a controversial one and no clear-cut guidelines exist. The author has, however, provided some guidance by categorising bargaining topics into four groups. He distinguishes between topics which affect the employment relationship, those which constitute unreasonable demands, disciplinary matters and miscellaneous topics which the industrial court has

held to be suitable for bargaining. Bargaining tactics and their fairness are also discussed in this chapter.

Chapter 5 deals with collective agreements – particularly their enforceability and legal nature. Chapter 6 is entitled "dispute resolution". It sets out the various mechanisms by which disputes between collective parties can be resolved. Strikes are discussed in chapter 7. The different forms which strikes can take as well as their legality are considered. This chapter also deals with the legal position of dismissed strikers. The various factors which the industrial court takes into consideration when deciding on the fairness of strikers' dismissal are discussed in detail. Lock-outs are discussed in chapter 8.

In the last chapter the author discusses collective discipline and dismissal. This is a controversial matter. Employers often argue that employees acting collectively should be collectively disciplined. Grogan, however, appears to be of the view that such employees should be disciplined individually and that, where possible, pre-dismissal hearings should be held.

The four appendices to the book will be of great value to industrial relations practitioners in particular. Appendix A is a specimen recognition and procedural agreement. It contains clauses on access and union activities, shop stewards, union dues and the settlement of disputes. It also contains examples of a grievance, disciplinary and retrenchment procedure as well as a disciplinary code. An example of a union demand is set out in Appendix B and Appendix C contains a specimen substantive agreement. Appendix D provides practical hints on the conducting of wage negotiations.

In conclusion – this is an extremely well-written book. It sets out the various aspects of collective labour law succinctly and unambiguously. I have no reservations in recommending it to everyone involved in the labour field.

EML STRYDOM
University of South Africa