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Planning law – Will Cinderella emerge a princess?*

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OPSOMMING

Beplanningsreg – word Aspoestertjie 'n prinses?

Tot op hede het beplanningsreg in Suid-Afrika nog weinig erkenning geniet. Die redes hiervoor is verbonde aan die land se apartheids- en koloniale verlede. Die nuwe Suid-Afrikaanse Grondwet bring egter 'n ander benadering mee. Sekere uitsprake van sowel die howe as nuwe wetgewing maak dit noodsaaklik om nou 'n regswetenskaplike analise van hierdie nuwe dissipline te maak.

Die Grondwet het belangrike gevolge vir beplanningsreg op drie vlakke – struktureel, fundamentele regte en die onderliggende waardesisteem. Binne hierdie raamwerk moet 'n konsepsualisering van die dissipline plaasvind. Dit begin met 'n definisie en terminologie. Perspektief word verkry deur beplanningsreg se historiese oorsprong te ondersoek. Teen hierdie agtergrond kan die struktuur van die dissipline skematies gesien word as 'n driehoek wat die verhouding tussen die staat, die individuele eienaar van grond en bure aandui. Hierdie drie komponente word afsonderlik uitgelig. Ten slotte word die effek van beplanningsreg op die onderskeid tussen die privaatreg en die publiekreg ondersoek.

1 INTRODUCTION

From time to time a situation presents itself where legal developments require large-scale systematisation. Such opportunities arise infrequently, but when they do, they result in some reconsideration, some adjustment and mostly, some uncertainty and hesitation.

Such a situation is now in the process of presenting itself. It is concerned with what is generally known as "planning law".

Since the use of the term "planning law" is not undisputed, I should like to introduce the conceptualisation of this emerging discipline with terminology and a definition. Thereafter, the cocoon within which planning law now functions, the new constitutional framework, is opened to reveal its structure. The Appellate Division neatly summed up this structure in a recent decision dealing with the question whether a local authority is delictually liable for negligence in the exercise of its statutory functions where it had erroneously granted an application for a subdivision to develop a cluster housing complex.[1] I quote from the decision of Botha JA:

> "[T]here are potentially conflicting interests at stake: those of the applicant owner who wishes to use his property to his own best advantage; those of neighbouring

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* Inaugural lecture delivered on 1995-06-15 at the University of South Africa, Pretoria.

1 *Knop v Johannesburg City Council* 1995 2 SA 1 (A).

> owners in the locality who may be adversely affected by the subdivision; and those of the local authority itself which is charged with the supervision of the orderly, harmonious and effective . . . development of the area . . ."[2]

This structure clearly positions planning law in both public and private law, a dichotomy presently experiencing some re-examination.

2 TERMINOLOGY

At the outset the term "planning law" needs clarification. Derived from the noun "plan", "planning" is defined as "a formulated or organised method according to which something is to be done, a scheme of action".[3] Consequently, "planning", and with it "law" as the system of control,[4] can embrace almost anything.[5]

It may be questionable to apply the broad term "planning law" to a discipline which is perceived to comprise only the regulation of land use at the various levels of government by means of guide plans, structure plans and town planning schemes. In terms of this view it would be preferable to circumscribe the discipline as "land-use planning" or "physical planning".

In order to accommodate the land aspect which is its central theme the Americans speak of "land-use planning".[6] German and Dutch terminology is *Raumordnung*[7] and *ruimtelijke ordening*[8] respectively, which translates as "spatial regulation". I prefer the United Kingdom usage – planning law[9] – not because it is better than the others, but because it is easier on the ear, because English terminology is part of our planning heritage and because it is not inaccurate. Most significantly, though, it is wide enough to accommodate the strong, ever-increasing, social element which manifests itself in the purpose of land-use plans,[10] which is to improve the quality of life of those affected by them.

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2 30E–F.

3 *Oxford English dictionary*. See also Claassen and Milton "Land-use planning" in Fuggle and Rabie (eds) *Environmental management in South Africa* (1992) 715–738 715; Cloete "Benaderings tot beplanning" 1968 *Saipa Journal* 129–135.

4 Hosten *et al Introduction to South African law and legal theory* (1995) ch 1; Williams "Planning law and democratic living" 1955 *Law and Contemporary Problems* 317–350 317.

5 Cloete (fn 3) 129.

6 See eg Haar & Wolf *Land-use planning* (1989).

7 This term is the one used in the Basic Law (*Grundgesetz*) a 75(4). It reads "Der Bund hat das Recht . . . Rahmenvorschriften zu erlassen über . . . die Bodenverteilung, Raumordnung . . ." See further Ernst & Hoppe *Das Öffentliche Bau- und Bodenrecht, Raumplanungsrecht* (1981) 2; Koch & Hosch *Baurecht, Raumordsnungs- und Landesplanungsrecht* (1988) 27.

8 The *Wet op de Ruimtelijke Ordening* enacted in 1965 and amended in 1985. See Grossman and Brussard "Planning, development, and management: three steps in the legal protection of Dutch agricultural land" 1988 *Washburn LJ* 86–149 for a concise picture of the Dutch system. See further Van Splunder *Hoofdlijnen van ruimtelijke ordening en volkshuisvesting* (1985); Van Wyk *Restrictive conditions as urban land-use planning instruments* (LLD thesis Unisa 1990) 405–413.

9 Examples are Heap *An outline of planning law* (1991); Telling and Duxbury *Planning law and procedure* (1993); Moore *A practical approach to planning law* (1987).

10 The purpose is set out more or less similarly in the Ordinances as follows: "The co-ordinated and harmonious development of the area to which it relates in such a way as will most effectively tend to promote health, safety, good order, amenity, convenience and general welfare, as well as efficiency and economy in the process of development" –

continued on next page

3 DEFINITION

The label "planning law" having been adopted, a determination of where the boundaries of this emerging discipline must be drawn, is necessitated. A few attempts have been made to define it,[11] and different approaches to providing a definition exist.[12] Although planning law can, in many respects, be approached in the same way as environmental law, the not-so-popular subject-matter approach utilised there will not be followed here.[13] Instead the point of departure is a contextual one.[14]

In terms of this approach planning law may be defined as

> "that area of the law which provides for the democratically-based[15] creation and implementation of comprehensive plans[16] to regulate land use, with the purpose[17] of ensuring the health, safety and welfare of society as a whole and taking into account environmental factors".[18]

This definition cannot be a hard and fast one since the parameters of this emerging discipline are still evolving.

4 REASONS FOR THE EMERGENCE OF "PLANNING LAW" AS A DISCIPLINE

Planning law has thusfar not been afforded much recognition in South Africa. In exceptional cases is it taught as a subject at university law schools.[19] Where it

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Town Planning and Townships Ordinance 15 of 1986 (T) s 19; Town Planning Ordinance 27 of 1949 (N) s 40(1); Townships Ordinance 9 of 1969 (O) s 25(1). The Cape Land Use Planning Ordinance 15 of 1985 s 5(1) has a similar purpose. See also the policy plans (including national and regional policy plans – s 4) in terms of the Physical Planning Act 125 of 1991 and s 5 where the object is stated as "to promote the orderly physical development of the area to which it relates for the benefit of all its inhabitants". The Development Facilitation Act 67 of 1995 s 3 sets out general principles relating to land development. See further Van Wyk (fn 8) 161–164 and the decisions mentioned there; Van Zyl "Broadening the scope of planning" 1983 *Town and Regional Planning* 23–24.

11 Claassen and Milton (fn 3) 726; Van Wyk "Into the 21st century with the reform of planning law" 1991 *THRHR* 278–288 279–280.

12 Cowen "Toward distinctive principles of South African environmental law: some jurisprudential perspectives and a role for legislation" 1989 *THRHR* 3–31.

13 Cowen (fn 12) 7–10. Used to define environmental law some two decades ago its point of departure is the extraction of similar relevant legal principles to be found in conventional branches of the law.

14 Principles are applicable to the discipline as a discipline. Within this context are such factors as history, etc. See further Van Wyk (fn 11) 283.

15 In terms of the interim Constitution of the Republic of South Africa Act 200 of 1993 and its value system.

16 Planning is concerned with the allocation of different land uses which has as its purpose the ordering of the community. The only way to allocate land uses is by plans.

17 See fn 10.

18 Environmental issues are intimately tied up with planning issues and no planning should take place without recognition being given to environmental issues. The submission of environment impact assessments (EIA's) in terms of the Environment Conservation Act 73 of 1989 s 21–22 and 26 is important. See Preston, Robins and Fuggle "Integrated environmental management" in Fuggle and Rabie (eds) (fn 3) 748–761; Claassen "Stadsstreekbeplanning binne die konteks van 'n nasionale beleid vir omgewingsbestuur" 1987 *Town and Regional Planning* 4–12; Lyster "'Protected natural environments': Difficulties with environmental land use regulation and some thoughts on the property clause" 1994 *De Jure* 136–153; Van Wyk (fn 11) 284.

19 It is taught at the Universities of Pretoria, Venda, Potchefstroom and Unisa as electives for the LLB degree.

has found a niche, it is as a university course for town and regional planners.[20] No textbooks exist and other literature is only now appearing. The reasons for its non-recognition are ideologically based. A blight on planning law globally is that it generally mirrors a political ideology.[21] In South Africa this has had particularly serious consequences.

Many of the ills of our apartheid[22] and colonial past,[23] which were so keenly felt in all issues relating to land[24] were impediments to the proper planning of land use. Planning must be total planning.[25] In South Africa it was never applicable as one system in all areas and, as the apartheid network spread its tentacles land, and by implication planning, was the first to suffer.[26]

Planning cannot take place in a vacuum. Its central focus is its purpose or aim. This requires articulation.[27] In all planning instruments the purpose of planning is broadly described as the improvement of the quality of life and welfare of the community involved.[28] In South Africa the actual impact of planning control only partially achieved this idealistic aim.[29] The chief reason is that planning was bent mostly on control and not on development. Consequently development was restricted – and in South Africa development is necessary.[30]

These impediments are being eradicated and new structures erected. The recent past has seen serious efforts to make planning more development-oriented and less control-oriented, more pro-active and less reactive, more process-oriented and less blueprint-oriented.[31] Legislation has now been proposed which contains the idea of efficient and integrated land development in the interests of

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20 It is taught as a compulsory course to final year town and regional planning students at the University of the Witwatersrand. It is also taught at the University of Cape Town.

21 McAuslan *Ideologies of planning law* (1980) 268; Bayles and Polden "Protecting the urban heritage: Lessons learned from the United Kingdom and the United States experience" 1988 *Washburn LJ* 51–85 57.

22 Land-use planning in South Africa was fragmented because the land was fragmented for racial purposes. There never really was a legitimate planning law since there was always a racial bias to all the planning instruments, whether those planning instruments or devices were in the form of restrictive covenants, conditions of title or legislation such as the Land Acts of 1913 (Black Land Act 27 of 1913) and 1936 (Development Trust and Land Act 18 of 1936).

23 South Africa has inherited its planning law from the British, as did the other colonies in Africa. Many of the English traditions still applicable were never really suitable. See further Van Wyk "ICPLA II, public participation in planning and the South African connection" 1993 *SAPL* 205–217.

24 See eg Van der Walt "Land reform in South Africa since 1990 – an overview" 1995 *SAPL* 1–30.

25 Götz *Bauleitplanung und Eigentum* (1969) 13.

26 Pienaar "Fisiese beplanning in Suid-Afrika" 1995 *TSAR* 81–105 92–93; Van Wyk (fn 11) 283–284.

27 Bayles and Polden (fn 21) 80.

28 McAuslan (fn 21) 1–7; Claassen and Milton (fn 3) 715; Cloete (fn 3) 129–131; Battiss *Öffentliches Baurecht und Raumordnungsrecht* (1992) 16; Telling and Duxbury (fn 9) 26. See fn 10 for text.

29 Only partially, because planning law provided a good system for only a certain part of the population – the white population. Blacks and black areas were largely excluded (Van Wyk (fn 8) 162).

30 Claassen and Milton (fn 3) 716.

31 *Ibid.*

all inhabitants,[32] and which sets out to apply uniform land legislation.[33] The courts are now tackling planning issues with more insight, first of all applying the statement of purpose to accentuate the equal rights of all inhabitants of an area,[34] secondly to put into perspective the structure within which planning law operates[35] and thirdly to place a social perspective on issues relating to land.[36] Further recognition has come just recently with the Third International Conference on Planning Legislation in Africa being held in Johannesburg.[37]

This process of transformation should enable planning law in South Africa to emerge. Momentum to increase its recognition and to give it a legitimate place among all the other legal disciplines should increase as we, to borrow a phrase from Cowen, put the subject "into jurisprudential perspective".[38]

5 CONCEPTUALISATION

Conceptualisation of a discipline usually follows its emergence. In England, comprehensive land-use control was implemented on the enactment of the Town and Country Planning Act of 1947,[39] followed during the 1950s with an examination of planning law as a discipline.[40] No comparable legislation marks the beginnings of land-use control in the United States,[41] but it may be said that its inception there is marked by the landmark decision of *Village of Euclid v Amber Realty Co* in 1926[42] where, for the first time, zoning was viewed as a legitimate regulation of property which is non-compensable. Conceptualisation followed during the 1950s.[43] Germany saw the introduction of the Federal Building Code (*Bundesbaugesetz*)[44] in 1960, followed a decade later by jurisprudential analysis.[45]

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32 Development Facilitation Act 67 of 1995 s 3.

33 Land Administration Act 2 of 1995.

34 See eg *Vereeniging City Council v Rhema Bible Church, Walkerville* 1989 2 SA 142 (T) where the court held that since a town planning scheme should have as its general purpose the co-ordinated and harmonious development of the municipality, it should be designed for the common good and not only the good of one class or race in the community.

35 See eg *Knop* (fn 1) 30E–F.

36 One sees the emergence of that social purpose in the decisions in *Diepsloot Residents' and Landowners' Association v Administrator, Transvaal* 1993 1 SA 577 (T); *Diepsloot Residents' and Landowners' Association v Administrator, Transvaal* 1993 3 SA 49 (T); *Diepsloot Residents' and Landowners' Association v Administrator, Transvaal* 1995 3 SA 336 (A). For detailed commentary on these decisions see Roux "Balancing competing property interests; *Diepsloot Residents' and Landowners' Association v Administrator, Transvaal*" 1993 *SAJHR* 539–548; Van der Walt (fn 24) 26–28; Van der Walt "Marginal notes on powerful(l) legends: Critical perspectives on property theory" 1995 *THRHR* 396–420 408–410 419–420.

37 From 1995-05-08 to 10. ICPLA I was held in Maseru in December 1991; ICPLA II was held in Windhoek from 1993-03-29 to 1993-04-02. See further *Proceedings* of both conferences and a commentary on ICPLA II by Van Wyk (fn 23).

38 Cowen (fn 12) 4.

39 Bayles and Polden (fn 21) 51; Telling and Duxbury (fn 9) 8.

40 McAuslan (fn 21) 2–7 states that planning law is not one concept but it is available to implement three distinct ideologies. See further McAuslan *Land, law and planning* (1975); Foley "British town planning: One ideology or three?" 1960 *British Journal of Sociology* 211–231.

41 Bayles and Polden (fn 21) 51.

42 272 US 365. See further Claassen and Milton (fn 3) 716.

43 See eg Haar "In accordance with a comprehensive plan" 1955 *Harv LR* 1154–1175. See further Wright and Gitelman *Cases and materials on land use* (1991) 270–372.

44 Replaced by the *Baugesetzbuch* (*BauGB*) in 1987.

45 Schmidt-Assmann *Grundfragen des Städtebaurechts* (1972).

In Africa, most of the British colonies adopted the English model[46] and planning law as an indigenous system never really developed. To a large extent South Africa counted itself among these countries which accepted the English model, making systematisation unnecessary.

Conceptualisation of a discipline generally follows a set pattern. Cognisance must, therefore, be taken of similar developments in other fields and in South Africa the example par excellence is environmental law, which was the subject of some conceptualisation during the 1970s.[47] In 1983 Fuggle and Rabie introduced the theme,[48] but in 1989 Denis Cowen felt compelled to review the then "nature, scope and role of environmental law".[49] That subject has now taken its rightful place in the South African legal system. Despite the view that conceptualisation is undesirable because it hampers development of a discipline,[50] some moulding is necessary. Now is the time to investigate the distinctive legal criteria which make planning law just as much of a coherent and logical body as environmental law or the law of property.[51]

Like environmental law, planning law is a multi-faceted discipline straddling both private and public law. It sits securely in property law, administrative law and criminal law. But, providing the props on which its entire foundation now rests is the Constitution of the Republic of South Africa Act 200 of 1993. This has set in place a fundamentally new order in South Africa. It has initiated a process of transformation, being indeed the "historic bridge between the past of a deeply divided society . . . and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans . . ."[52] The Reconstruction and Development Programme and resultant legislation are supplementary to the Constitution.

6 THE FUNDAMENTALLY NEW ORDER

The Constitution has significant consequences for planning law on three levels – the structural level, fundamental rights and the underlying value system.

6 1 Structure

Structurally the Constitution puts in place a new regional dispensation[53] with specified competences for the provinces.[54] Regional and local planning were

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46 Van Wyk (fn 23) 211.

47 Rabie *South African environmental legislation* (1976).

48 Fuggle and Rabie *Environmental concerns in South Africa* (1983).

49 Cowen (fn 12) 4.

50 See eg Alexander "The concept of property in private and constitutional law: The ideology of the scientific turn in analysis" 1982 *Col LR* 1545–1599.

51 Cowen (fn 12) 5 10, especially his quote of Holmes on agency as a separate branch.

52 Constitution of the Republic of South Africa Act 200 of 1993 Postamble. See further Mureinik "A bridge to where? Introducing the interim Bill of Rights" 1994 *SAJHR* 31–48 31.

53 See generally Erasmus "Provincial government under the 1993 Constitution. What direction will it take?" 1994 *SAPL* 407–429; Beukes "Governing the regions: or regional (and local) government in terms of the Constitution of the Republic of South Africa Act 200 of 1993" 1994 *SAPL* 393–406; Van Wyk "Introduction to the South African Constitution" in Van Wyk *et al* (eds) *Rights and constitutionalism* (1994) 131–170 165–167.

54 S 126.

always primarily provincial matters.[55] This thread has not been broken, since the Constitution provides that a provincial legislature[56] is competent to make laws for a province with regard to all matters which fall within the functional areas specified in Schedule 6.[57] Regional planning and development are included in the functional areas. In terms of an amendment to the Constitution made shortly before it came into operation, provincial legislation prevails over a national law inconsistent with it except in five cases,[58] the most relevant of which, for planning purposes, is where

> "an act of Parliament deals with a matter that, to be performed effectively, requires to be regulated by uniform norms or standards that apply generally throughout the Republic".[59]

The legislative competence of the provinces was considerably extended by this amendment to the Constitution,[60] resulting in some confusion.[61] The implications for planning legislation are crucial since planning procedures need to be uniformly regulated throughout a country,[62] and cannot be left entirely to the provinces. The idea contained in the Development Facilitation Act that provinces will be able to implement their own legislation once this Act has served its purpose must, therefore, be questioned.[63]

6 2 Fundamental rights[64]

As far as fundamental rights are concerned, the Constitution completely changes the face of any prior planning law. Numerous clauses apply directly to planning, others indirectly.

The clause which features most prominently is the property clause, which guarantees the right to acquire, hold and dispose of "rights in property".[65] Like

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55 Booysen and Van Wyk *Die 83 Grondwet* (1984) 53.

56 Each province has its own legislature – s 125(1).

57 S 126(1). Amended by s 2(a) of the Constitution of the Republic of South Africa Amendment Act 2 of 1994. Parliament is also competent to make laws on the same matters – see s 2A.

58 S 126(3). These are where: (a) an act of parliament deals with a matter that cannot be regulated effectively by provincial legislation; (b) (see fn 59); (c) the act of parliament is necessary to set minimum standards across the nation for the rendering of public services; (d) the act of parliament is necessary for the determination of national economic policies, the maintenance of economic unity, the protection of the common market in respect of the mobility of goods, services, capital or labour, or the maintenance of national security; or (e) the provincial law materially prejudices the economic, health or security interests of another province or the country as a whole. See in general Beukes (fn 53) 398–399.

59 S 126(3)(b). Amended by s 2(c) of the Constitution of the Republic of South Africa Amendment Act 2 of 1994.

60 Erasmus (fn 53) 416–417.

61 *Idem* 416–419; Beukes (fn 53) 398–399.

62 In the past there were problems where there was no uniformity in all the provinces. See further Van Wyk (fn 8) ch 3.

63 Act 67 of 1995. See the Bill (B60–95) Explanatory Memorandum 2.3.3 on the implementation of own legislation.

64 See in general Van Wyk *et al* (eds) *Rights and constitutionalism* (1994); Du Plessis and Corder *Understanding South Africa's transitional Bill of Rights* (1994); Rautenbach *General provisions of the South African Bill of Rights* (1994).

65 S 28. See commentary by Chaskalson "The property clause: Section 28 of the Constitution" 1994 *SAJHR* 131–139; Murphy "Property rights and judicial restraint: A reply to

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any other fundamental right, a right in property is subject to limitation. An unfortunate wording of section 28's own limitation clause, confuses rather than elucidates the matter.[66] Section 28(2), called the regulation clause, when applied to planning, determines that zoning constitutes a legitimate deprivation of property for which no compensation is payable. Zoning is planning's central theme.

Closely connected, because planning interfaces with environmental matters in the submission of environment impact assessments, is the right to an environment which is not detrimental to one's health or well-being.[67]

The Bill of Rights considerably liberalises *locus standi* for the purposes of human rights enforcement.[68] It now extends to an association acting in the interest of its members,[69] for example, where a ratepayers' association aims to stop the construction of a road through a park.[70] A so-called class action is acknowledged.[71] Moreover, standing is granted to a person acting in the public interest, thereby re-instituting the *actio popularis*[72] where any person may, for example, question the siting of an open cast mine.

We have traditionally been subject to bureaucratic behaviour which made *ad hoc* decisions in planning matters and was under no obligation to provide reasons for those decisions, despite many calls for doing so.[73] The Constitution now introduces principles of administrative justice which provide every person with the right to lawful and procedurally fair administrative action where rights are affected.[74] Moreover, the furnishing of reasons in writing is mandatory.[75] These provisions could introduce a culture of justification, fairness and accountability into administrative decision-making.[76]

Chaskalson" 1994 *SAJHR* 385–398; Van der Walt "Notes on the interpretation of the property clause in the new Constitution" 1994 *THRHR* 181–203; Kroeze "The impact of the Bill of Rights on property law" 1994 *SAPL* 322–331; Lyster (fn 18) 146–147; Murphy "Interpreting the property clause in the Constitution Act of 1993" 1995 *SAPL* 107–130.

66 S 28(2). It reads as follows: "No deprivation of any rights in property shall be permitted otherwise than in accordance with a law." The use of the term "deprivation" is not unproblematical. It follows the United States Fifth Amendment. See further Van der Walt (fn 65) 192–199; Du Plessis and Corder (fn 64) 132 182–184; Kroeze (fn 65) 327–328.

67 S 29. For commentary see Bray "The liberation of *locus standi* in the interim Constitution: an environmental angle" 1994 *THRHR* 481–487; Loots "Standing to enforce fundamental rights" 1994 *SAJHR* 49–49; Du Plessis and Corder (fn 64) 184–185.

68 S 7(4)(b). See further Bray (fn 67) 481–87; Du Plessis and Corder (fn 64) 117–118. Relief will be available only when a right entrenched in ch 3 is encroached upon or threatened. The *locus standi* requirement will have to be read together with a determination of the right, eg property or environmental, which is infringed.

69 S 7(4)(b)(ii).

70 Reminiscent of the decision in *Johannesburg City Council v Tugendhaft* 1987 1 SA 16 (A).

71 S 7 (4)(b)(iv). This expands the principle followed in *Bamford v Minister of Community Development and State Auxiliary Services* 1981 3 SA 1054 (C).

72 See further Bray (fn 67) 485.

73 Van Wyk (fn 8) 303; Cowen "Planning for both development and environmental conservation: a broad overview of the South African scene" 1981 *Planning and Building Developments* Supplement 10–11.

74 S 24(a)–(b). See further Du Plessis and Corder (fn 64) 165–7; Mureinik (fn 52) 38–43; Rautenbach (fn 64) 62–64.

75 S 24(c).

76 Mureinik (fn 52) 38.

Government accountability finds further expression in the right of access to official information.[77] Its effect should restrict the corruption prevalent in many town planning sections of local authorities.[78]

The equality clause features pre-eminently in the Bill of Rights for obvious reasons.[79] Applied to a planning situation, it guarantees the impossibility of setting aside separate areas for separate race groups such as provided for in the erstwhile Group Areas Act[80] or the Land Acts.[81]

The right to freedom of association[82] has already made a direct impact on planning legislation with an amendment to the Town and Regional Planners Act.[83] No longer is it necessary to be a member of a town and regional planning institute before one may apply to register as a town and regional planner.[84]

In terms of section 33(1), fundamental rights may be limited.[85] Planning legislation, in certain respects, represents clear limitations on such rights. There are three standards of scrutiny under which limitations are tested.[86] The least protected category of rights may be limited by a law of general application to the extent that the limitation is reasonable, justifiable in an open and democratic society and does not negate the essential content of the right.[87] A limitation on a right in the most protected category, such as rights to human dignity,[88] or religion, belief and opinion,[89] must also satisfy these criteria as well as be necessary.[90] Between the standard and the stricter tests lies a hybrid category. Where rights in this category relate to free and fair political activity they enjoy the higher level of protection that limitations on them must be necessary.[91]

The significance of the provisions in a bill of rights depends on their interpretation.[92] Constitutional interpretation is an art.[93] It is an art which our courts,

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77 S 23. See further *idem* 43–44; Du Plessis and Corder (fn 64) 54–55 164–165.

78 See the comments by Barrie and Carpenter "Ethics and insider trading in local government – a case of the law and the profits" 1994 *SAPL* 74–80; Burns "Administrative justice" 1994 *SAPL* 347–359 357. See further Claassen "Recent trends in thought on planning legislation" 1984 *Town and Regional Planning* 8–12 12.

79 S 8. See further Du Plessis and Corder (fn 64) 138–146. A sub-clause provides for any dispossessed person or community to be entitled to claim restitution of rights in land. See discussions of restitution in Van der Walt (fn 65) 199–201.

80 36 of 1966.

81 See fn 22.

82 S 17. See further Du Plessis and Corder (fn 64) 160–161.

83 19 of 1984, amended by the Town and Regional Planners Amendment Act 3 of 1995 s 4.

84 See Explanatory Memorandum of the Town and Regional Planners Amendment Bill B 58–94.

85 See also Rautenbach (fn 64) 81–11.

86 Mureinik (fn 52) 33.

87 S 33(1)(a). See further Du Plessis and Corder (fn 64) 125–6; Rautenbach (fn 64) 86–93.

88 S 10.

89 S 14.

90 S 33(1)(aa).

91 S 33(1)(b). See further Mureinik (fn 52) 33.

92 S 36 regulates the interpretation of the chapter. See further Marcus "Interpreting the chapter on fundamental rights" 1994 *SAJHR* 92–102; Du Plessis and Corder (fn 64) 62–107 119–122; Rautenbach (fn 64) 17–34; Botha "Interpretation of the Constitution" 1994 *SAPL* 257–264.

93 Du Plessis and Corder (fn 64) 119; Rautenbach (fn 64) 21–23.

judging by the law reports, are acquiring at an impressive pace. In interpreting provisions of the chapter the courts "shall promote the values which underlie an open and democratic society based on freedom and equality".[94] This statement echoes those found throughout the Constitution and is of singular importance. Not only does it support the purposive approach to interpretation[95] but it underlies a whole new set of values in this new order.

6 3 Values

The values underpinning the Constitution derive from the various provisions in the Bill of Rights, the Preamble, the "Postamble" entitled "National Unity and Reconciliation" and the Constitutional Principles.[96] These values include democracy, constitutionalism, freedom, equality, transparency, accountability, checks and balances, responsiveness and openness. They are embodied in the constitutional state or *Rechtsstaat* concept, providing the framework which determines how state power should be exercised as well as the legal values which direct state action.[97] Since they are contained in a supreme constitution, they are binding and, therefore, support the entire transformation process.

6 4 Supplementary matters

In order to direct the progress of the transformation strategy, a Reconstruction and Development Programme has been introduced.[98] It relies on six basic principles, the democratisation of the country being central. An integrated and sustainable programme, which is people driven and closely bound up with peace and security, is required. As peace and security are established, nation building must be embarked upon. Building the infrastructure and meeting basic needs are necessary to develop the programme. Assessment of goals must take place and there must be accountability.[99]

To advance the RDP, each government department has set a programme.[100] Emanating from the Department of Land Affairs, chiefly responsible for planning at the national level, are the determination of policy objectives, programmes for tenure and land administration reform, the restructuring of the department and the institution of a land commission and a land claims court. New legislation also features as part of the programme. Important enactments are the Restitution of Land Rights Act,[101] the Land Administration Act[102] and the Development Facilitation Act.[103]

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94 S 35(1). See further Marcus (fn 92) 102.

95 Or teleological approach. See Du Plessis and Corder (fn 64) 74; Davis *et al* "The role of constitutional interpretation" in Van Wyk *et al* (eds) (fn 53) 1–130 127. See also Erasmus "Limitation and suspension" in Van Wyk *et al* (eds) (fn 53) 629–663 633; Marcus (fn 92) 94–95.

96 See further Erasmus (fn 95) 634.

97 *Idem* 635.

98 *GG* 16084 1994-11-23 – *White Paper on Reconstruction and Development.* See further *The Reconstruction and Development Programme: A policy framework* (1994).

99 *GG* (fn 98) 8–9.

100 *GG* (fn 98) 70.

101 22 of 1994.

102 2 of 1995. The long title to the Act reads as follows: "To provide for the delegation of powers and the assignment of the administration of laws regarding land matters to the provinces: to provide for the creation of uniform land legislation . . ."

103 67 of 1995.

This new order sets the stage for an examination of the structure of planning law in South Africa. The approach is a comparative one, taking cognisance of those jurisdictions with a well-developed planning law such as Germany and the United States. Since we are part of Africa and many African countries have their roots in English law, English law cannot be ignored.

A return to roots is, perhaps, the logical starting point.

7 ROOTS OF PLANNING LAW

Talk of planning can be traced back to biblical times.[104] The Greeks and Romans limited specific land uses to specific areas.[105] By the end of the sixteenth century, certain towns on the European continent attempted to regulate development.[106] However, it was the Industrial Revolution in England which was the catalyst for the introduction of modern urban planning measures.[107] These included, on the one hand, restrictive covenants, based on contract and property.[108] On the other hand, legislative measures aimed at improving living conditions and, by implication, urban development, were enacted to alleviate insanitary and unhealthy conditions in towns which were caused by overcrowding, poor housing and pollution.[109] The first Planning Act was passed in 1909.

On the African continent, and closer to home, in South Africa, the earliest inhabitants – the Bushmen and Hottentots – practised planning, but in accordance with needs of a different order. Since they were pastoralists, they moved about from place to place and built dwellings which could be easily dismantled. Consequently, they never resided for too long in a particular place and there was little order in their settlements. However, where there was permanency, for example the Zulu royal village at uMgungundlovu, urban planning was evident in the order of the placing of dwellings, open spaces and rights of way.[110]

Very soon after Jan van Riebeeck's arrival, the refreshment station grew into a town, planned with gardens, a town square and streets between blocks of dwellings.[111] All the early towns in South Africa, such as Cape Town, Graaff Reinet and Malmesbury, applied the same gridiron pattern.

South Africa followed the example of England in virtually all planning. First of all, it employed restrictive covenants widely to regulate land use, often with a racial bias,[112] from the second half of the 19th century, going so far as to apply English court decisions to the South African situation. Notable is *Elliston v*

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104 Ezekiel 48. See further Faccio "The development of planning controls in Britain and South Africa" 1973 *Planning and Building Developments* 33–39 33.

105 Adams *Outline of town and city planning* (1935) 52–70; Floyd *More about town planning in South Africa* (1966) 13; Burke *Towns in the making* (1971) 14–33; Pienaar (fn 26) 81.

106 Faccio (fn 104) 33.

107 Milton "Planning and property" 1985 *Acta Juridica* 267–288 267; McAuslan (fn 21) 2–3; Claassen and Milton (fn 3) 716.

108 Faccio (fn 104) 33; Van Wyk (fn 8) 317.

109 Telling and Duxbury (fn 9) 1–2; Milton (fn 107) 267.

110 Floyd *Town planning in South Africa* (1960) 12–13.

111 *Ibid.*

112 Van Wyk (fn 8) 7–12.

Reacher[113] which laid down the requirements to determine whether or not a restrictive covenant[114] is enforceable.[115] This decision is still applied by our courts.[116]

Secondly, the earliest town planning Ordinance in South Africa, that of the Transvaal,[117] showed remarkable kinship to its 1925[118] and 1932[119] English town planning counterparts. The Transvaal example was followed in the other provinces.[120]

The 1930s saw the emergence of a racial zoning lobby, but efforts were restricted to Commissions of Enquiry.[121] World War II and the post-war period were characterised by an atmosphere of reconstruction, but reconstruction in the sense of implementing a powerful national policy.[122] Ideas for the national planning of land use emerged,[123] planning became more centralised, a social and economic planning council was created in 1942 and the Natural Resources Development Act 51 of 1947 was introduced. In 1975, the National Physical Development Plan was hailed as the first step in the attempt to provide an orderly purposive physical structure at national level.[124] Physical planning legislation was enacted in 1967[125] and 1991.[126] The former Act provided for guide plans while the latter Act provides for a hierarchy of policy and structure plans.[127] Although still on the statute books, the 1991 Act, and with it, the negative features of the system it represented, as well as the fact that it does not fit into the new constitutional system, make its future uncertain.[128]

Within the framework of the fundamentally new order, planning law is concerned with the relationship between the state, the individual owner of land and third parties, in the form of neighbours, the community or society.[129]

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113 1908 2 Ch 374.

114 From early in the 19th century restrictive covenants became legislatively regulated conditions of title (see Van Wyk (fn 8) 12).

115 *Idem* 80–81.

116 Pienaar "Die regsaard van beperkende voorwaardes" 1992 *THRHR* 50–66.

117 The Transvaal Townships and Town Planning Ordinance 11 of 1931.

118 Town Planning Act.

119 Town and Country Planning Act.

120 The Cape Townships Ordinance 33 of 1934; the Natal Private Township and Town-Planning Ordinance 10 of 1934 and the Orange Free State Townships Ordinance 20 of 1947. See further Price and Cameron *The evolution and application of town planning legislation in South Africa: a record of discussions in the Cape Province and Natal* (1982); Van Wyk (fn 8) 47.

121 Mabin "Origins of segregatory urban planning in South Africa, c. 1900–1940" 1991 *Planning History* 8–15.

122 *Ibid.*

123 Floyd "National planning of land use" 1943 *SA Institution of Civil Engineers. Minutes of Proceedings* 93–112.

124 *National Physical Development Plan* (1975) "Introduction". See further Visagie "Planning for the year 2000" 1976 *Town and Regional Planning* 1–2.

125 The Physical Planning Act 88 of 1967.

126 Physical Planning Act 125 of 1991. See further Claassen and Milton (fn 3) 715–731; Pienaar (fn 26) 85–91.

127 See discussions by Van Wyk (fn 23) 214–216; Pienaar (fn 26) 85–91.

128 Pienaar (fn 26) 102–104.

129 Schmidt-Assmann (fn 45) 66.

8 THE PLACE OF PLANNING LAW IN THE LEGAL SYSTEM

8 1 Introduction

Schematically, then, the planning law system may be viewed as a triangle, each of the parties operating as separate entities as well as in their interrelationship with the others. It is customary to commence with the state, its place, rights and responsibilities *vis-à-vis* the other parties involved.

8 2 State

8 2 1 Authority

In terms of their competence, provinces have the power to create plans, determine zoning, lay down procedures for establishing townships and give permission for consent uses and rezonings. Since zoning forms the backbone of our entire land-use planning system, and our new Constitution has introduced a novel dimension on it, we cannot ignore its consequences.

8 2 2 Regulation and expropriation

Zoning[130] constitutes a legitimate limitation or regulation of property provided for by article 28(2) of the Constitution.[131] By contrast, article 28(3) provides for the expropriation of "rights in property".[132]

The problematic wording of section 28(2), the differing interpretations of sections 28(2) and (3), and the fact that South Africa has no precedent in this matter, makes comparative examination necessary. The Constitution provides that in interpreting the Bill of Rights the courts must have regard to public international law and may have regard to comparable foreign case law.[133] The latter provision is a mixed blessing. Its negative influence could be pertinently felt if foreign, especially United States case law pertaining to their regulation and takings doctrine were to be injudiciously employed.[134]

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130 In *Village of Euclid v Ambler Realty Co* (1926) (fn 42) the United States Supreme Court ruled with a majority of 5 to 4 that a local government has the right to control the use of land. See further Neiderbach "Transferable public rights: Reconciling public rights and private property" 1988/89 *Buff LR* 899–928; Ellis "Neighbourhood opposition and the permissible purposes of zoning" 1992 *Journal of Land Use and Environmental Law* 275–298 276. This decision determined that zoning was a legitimate non-compensable regulation of property and did not constitute a so-called "taking" or expropriation for which compensation is payable.

131 See fn 66.

132 S 28(3) provides that "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, to the payment of such compensation and within such period as may be determined 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". For comments see Van der Walt (fn 65) 195–99.

133 S 35. See further Rautenbach (fn 64) 3.

134 Chaskalson (fn 65) 136; Murphy (fn 65) 385; Lyster (fn 18) 147.

The Fifth Amendment to the United States Constitution forbids the taking of private property for public use without just compensation.[135] Under the Tenth Amendment to the Constitution, the states retain the police power which authorises them and their political subdivisions to regulate land use in order to protect the health, safety and welfare of their citizens.[136] Valid exercises of the police power are not takings, even if they reduce a property's value.[137] There is a great difficulty in distinguishing satisfactorily between takings for which compensation is obligatory and exercises of police power for which no compensation is payable.[138]

Six decades of litigation in the United States have produced an array of celebrated cases, discussed, analysed and reanalysed, but seldom understood, in the unending attempt to define the apparently indefinable content of a "taking".[139] The future seems bleak, for the past ten years has seen the introduction of even more uncertainty in the takings decisions on planning law.[140] It is confusing and described as "one of the toughest contemporary jurisprudential puzzles in American law".[141]

The very real danger exists that United States case law is going to play a role in interpretation, mainly because lawyers generally read English more readily than they read German, for example.[142] This does not augur well for South Africa and we should, therefore, guard against too much assistance from the United States takings jurisprudence.

Perhaps German law can offer guidance. The *Grundgesetz* provides that expropriation is for the public good ("Enteignung ist nur zum Wohle der Allgemeinheit")[143] only when absolutely necessary and no alternative exists.[144] The purpose and legitimation of expropriation lies therein that the expropriated property is for public use.[145] Expropriation is permitted only as a last resort. It is not permitted when its purpose can also be achieved by less burdensome intrusions on the rights of others.[146]

United States jurisprudence can play a role by illustrating how the takings doctrine prevailing at a particular point in time goes hand in hand with the

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135 Neiderbach (fn 130) 899.

136 *Idem* 900; Wadley "The emerging 'social function' context for land use planning in the United States: A comparative introduction to recurring issues" 1988 *Washburn LJ* 22–50 30.

137 Neiderbach (fn 130) 901.

138 Sax "Takings, private property and public rights" 1971 *Yale LJ* 149–186 149. See also Bayles and Polden (fn 21) 71.

139 Bayles and Polden (fn 21) 65.

140 Neiderbach (fn 130) 928.

141 Lyster (fn 18) 148 150.

142 Particularly because it also has a constitution and because of the language factor – see Lyster (fn 18) 147. See further Van der Walt (fn 65) 203; Chaskalson (fn 65) 388; Murphy (fn 65) 386.

143 A 14 3.

144 Nawroth "Privateigentum als Problem der Raumordnungspolitik" in *Raumordnung und Eigentumsordnung. Festschrift für Werner Ernst zum 70 Geburtstag* (1980) 319–333 322.

145 Rengeling "Das Grundeigentum als Schutzobjekt der Eigentumsgarantie (Art 14GG) und als Gegenstand verwaltungsrechtlicher Planung, Gestaltung und Schrankensetzung" 1980 *AöR* 422–465 438–439.

146 *Idem* 439.

existing property theory. The prosocial takings doctrine versus the proacquisitive may be seen as the two extreme points on a continuum,[147] the prosocial indicating the progressive social view of property, resulting in more regulation and the proacquisitive reflecting the traditional unlimited view of property, resulting in more takings. The view of ownership at a given time reflects at which point on the continuum one is and how the courts will determine a takings issue.[148] The way in which takings are viewed will affect the concept of ownership.

8 3 Owner

The regulation and expropriation clauses in the South African Constitution place some perspective on the introductory clause which provides that "every person shall have the right to acquire and hold rights in property ...",[149] a phrase fraught with possibilities.

As far as the owner of land is concerned, the point of departure is that owners are not absolutely free to do with their property what they choose.[150] In planning, one is dealing with two fundamentally opposed concepts, namely the sanctity of individual ownership and the necessity of public control without regard to ownership.[151]

In the United States it has been argued that the 1926 Supreme Court decision in *Village of Euclid v Ambler Realty Co* moved that system in the direction of defining ownership in terms of its social function.[152] There was a growing awareness that the members of the population must come to grips with the problems of living next to one another. A comparison of important court decisions prior to 1987 reveals that the public interest in land had expanded and the private interest had retreated.[153] In 1987, however, a trilogy of Supreme Court decisions emphasising the private interest once again has had some negative repercussions for this trend.[154]

In Germany, the *Grundgesetz* guarantees ownership,[155] meaning that in principle an owner can use her property as she desires but subject to the provisions of the law.[156] In particular, city planning with its countless limitations on building,

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147 Wadley (fn 136) 29–30.

148 *Idem* 30.

149 S 28(1). See comments and references above 6 2.

150 Neiderbach (fn 130) 900.

151 Or the ideology of private property and public interest versus the ideology of public participation (see McAuslan (fn 21) 2–7 267–270; see further Wadley (fn 136) 42).

152 Wadley (fn 136) 27. For case reference see fn 42.

153 Bayles and Polden (fn 21) 68; Wadley (fn 136) 29.

154 *Keystone Bituminous Coal Ass'n v De Benedictis* 480 US 470 (1987); *First English Evangelical Lutheran Church v County of Los Angeles* 482 US 304 (1987); *Nollan v California Coastal Commission* 483 US 825 (1987). See commentary by Roddewig "Recent developments in land use, planning and zoning law" 1990 *The Urban Lawyer* 719–831.

155 A 14. The article reads: "Das Eigentum und das Erbrecht werden gewährleistet. Inhalt und Schranken werden durch Gesetze bestimmt." See further Wilhelm *Sachenrecht* (1993) 71; Wolf *Sachenrecht* (1987) 14.

156 The guarantee of ownership comprises ownership both as a legal institution and as a fundamental right of the citizen vis-à-vis the state. See Peine *Öffentliches Baurecht* (1993) 95.

has the effect that the *Baufreiheit*[157] – or right (freedom) to build – is merely a restricted right to build.[158] Ownership also entails a social responsibility,[159] the relevance of which for planning law is clear. In densely populated areas the common good and public interest require a socially sensitive use of property. Besides the constitutional guarantee of ownership, article 903 of the Civil Code (*BGB*) provides for ownership in the "private law" sense.[160] In terms of this article, ownership is the most comprehensive right in respect of a thing, giving the owner every possible entitlement within the limits of statutory law and the rights of others.[161]

This view is echoed in South Africa, where the traditional approach to ownership proceeded from the private rights of the landowner rather than from society.[162] This approach seems to assume that a private property right is virtually sacrosanct, with only a minimal opportunity, if any, for a governmental entity to assert any dominant social interest.

In the South Africa of the present, the view of ownership has of necessity to be redefined to one of a more socially-oriented ownership or property.[163] The social function suggests that the fundamental concern of the analysis is to determine the extent to which the private property interest is subject to a dominant public or social interest asserted by the regulation.[164] Recent calls to democratise the process by bringing "planning to the people where it belongs",[165] decisions such as *Diepsloot*,[166] which looked at the larger social policy structure, and *Knop*,[167] which emphasised the public over the individual interest, the adjustment in the imbalances of the past as well as constitutional and legislative provisions emphasise the social approach.[168] This can only be positive since, in

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157 Battiss, Krautzberger and Lohr *Baugesetzbuch Kommentar* (1994) 27. The *Baufreiheit* has been drastically eroded by statute. See also Schulte "Das Dogma Baufreiheit" 1979 *DVBl* 133–142 134.

158 Breuer *Die Bodennutzung im Konflikt zwischen Städtebau und Eigentumsgarantie* (1976) 162. As Peine (fn 156) 95 states "Bauen ist nich frei".

159 As expressed in a 14 2: "Eigentum verpflichtet. Sein Gebrauch soll zugleich dem Wohle der Allgemeinheit dienen." See further Wolf (fn 155) 2.2.

160 Wolf (fn 155) 14; Wilhelm (fn 155) 71.

161 "Der Eigentümer einer Sache kann, soweit nicht das Gesetz oder Rechte Dritter entgegenstehen, mit der Sache nach Belieben verfahren und andere von jeder Einwirkung ausschliessen." See Hagen "Privates Immissionsschutzrecht und öffentliches Baurecht" 1991 *NJW* 817–823 817; Wolf (fn 155) 38; Peine "Öffentliches und privates Nachbarrecht" 1987 *JuS* 169–180 170.

162 See eg Lewis "The modern concept of ownership of land" 1985 *Acta Juridica* 241–266; Cowen *New patterns of landownership: The transformation of the concept of ownership as plena in re potestas* (1984). See further Wadley (fn 136) 28.

163 Claassen and Milton (fn 3) 738; Van der Walt (fn 65) 189.

164 Wadley (fn 136) 28.

165 *Idem* 36.

166 See fn 36.

167 *Knop v Johannesburg City Council* (fn 1) 35A–B. Botha JA stated: "The purpose of the supervisory powers conferred on the Council . . . is to promote orderly township development in the public interest, and not to safeguard the plaintiff against pure economic loss . . ."

168 Eg the Restitution of Land Rights Act 22 of 1994; the Development Facilitation Act 67 of 1995.

terms of this view, planning may be seen as providing a structure of expectation in relation to the use of land.[169]

The increasing socialisation of property of necessity leads to more limitations. This raises the question of the position of neighbours in planning decisions.

8 4 Neighbour protection

8 4 1 Introduction

Neighbours, and here is meant neighbours in the wide sense,[170] stand in a relationship to the authorities as well as to owners.[171] One of the most difficult contemporary land-use issues is how to balance the desires of one landowner against the desires of another, while ensuring that one's use of land will neither cause harm to the other nor jeopardise legitimate public interests in land use.[172] In this lies the justification for neighbour protection within the context of a more socially-oriented concept of property.

The rights of neighbours are addressed in two respects,[173] first by their participation in drawing up plans and, secondly by their protection where the use of the land is altered by for example its rezoning subsequent to initial planning decisions.

8 4 2 Public participation

Protection of the rights of the public affected by planning decisions cannot be limited to judicial intervention after development has taken place. Protective measures should be integrated into preceding planning procedures.[174] This is where public participation[175] in planning becomes relevant.

Public participation evolved essentially from the democratisation of society which was the hallmark of the 1950s and the 1960s[176] in the United States of America and the United Kingdom. During this period, criticism of traditional planning arose, the response to which consisted in attempts to ascertain public goals, and to allow the public veto of plans.[177] Measures taken to implement more participation were generally unsuccessful because the process of producing

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169 Milton (fn 107) 276.

170 Not only citizens, or direct neighbours, but all persons living in a particular area.

171 Schmidt-Assmann (fn 45) 99.

172 Wadley (fn 136) 24.

173 Schmidt-Assmann (fn 45) 99.

174 Ortloff "Nachbarschutz durch Nachbarbeteiligung am Baugenehmigungsverfahren" 1983 *NJW* 961–966 961; Schrödter *Baugesetzbuch Kommentar* (1992) 111.

175 Defined in the following terms: "Public participation is the right of members of an informed community to be actively involved in the planning process which affects them." See further Burdzik *The effect of public participation in land-use planning on the concept of ownership in South Africa* (LLM dissertation University of the Witwatersrand 1987) 14–17; Van Wyk (fn 23) 205–207.

176 Boden "Public participation and the planning process" 1979 *Planning and Building Developments* 14–19 49–51 14; Arnstein "A ladder of citizen participation" 1969 *American Institute of Planners Journal* 216–224 216; Fagence *Citizen participation in planning* (1977) 58.

177 Tomlinson "Some doubts regarding planning theory and professionalism" 1983 *Saipa Journal* 64–73 64 67.

plans was made longer and more cumbersome and little improvement was ascertained in the quality of the plans or in the public's confidence in the planning system.[178] Consequently, moves are afoot to reduce the participatory element in the preparation of plans. A new approach includes engaging participation at an earlier stage in the process so that it becomes one of the inputs of the production of the plan rather than challenges to the draft proposals. The idea is more one of representative than of participatory democracy.[179]

A similar approach exists in Germany. An innovation, operative since 1977, is the early two-phase procedure, whereby the public is involved at the plan-preparation phase.[180] This has had numerous advantages such as the strengthening of the democratic participatory rights of the public, increasing the quality of planning because the local authority is forced to defend its plans from the very earliest stages, and accelerating planning.[181]

In many African countries, public participation is not effective.[182] Moreover, it has remained static and has not taken note of developments elsewhere.[183] Since it is assumed that public participation should be an integral part of the planning process in South Africa,[184] one should determine what is the best way of achieving this. Developments in the United States, England and Germany towards a representative democracy at an earlier stage of planning, may serve as a guide,[185] keeping in mind that the proper vehicle for the South African situation must be developed.[186]

Besides their involvement in the planning process, neighbours also require more recognition of their rights where they, as neighbours, are detrimentally affected by planning decisions. This is the realm of neighbour law.

8 4 3 Neighbour law

Neighbour law as we know it is the traditional or private law neighbour law. This has existed for hundreds of years and in South Africa is derived from both

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178 Bayles and Polden (fn 21) 78; Heap "Ambience and the environment – the shape of things to be" 1973 *Journal of Planning and Environmental Law* 201–205 201 209.

179 Bayles and Polden (fn 21) 78–79.

180 A 3 *Baugesetzbuch*.

181 Schrödter (fn 174) 110–111 where the general view is that participation delays the planning process with disadvantageous implications.

182 Planning legislation is derived from English law. That system is not necessarily the best vehicle for enacting African planning legislation. It also happens that despite the existence of specific participatory provisions, they are often ignored in practice and are not taken seriously by the authorities, who often turn them a blind eye. See further Van Wyk (fn 23) 216–217.

183 In some African countries, new planning legislation has recently either become operative, eg South Africa (Physical Planning Act 125 of 1991), Malawi (Malawi Town and Country Planning Act of 1988) and Lesotho (Lesotho Town and Country Planning Act of 1980), or has been drafted, eg Kenya (Kenya Draft Physical Planning Bill published in 1992). Except for the South African Development Facilitation Act 67 of 1995, few innovative measures have been introduced.

184 See eg Pienaar (fn 26) 94–96.

185 *Idem* 95–96.

186 Van Wyk (fn 23) 216–217.

Roman-Dutch and English law.[187] Neither common law, nor the contentious "Norms and Standards" chapter VII of the Abolition of Racially Based Land Measures Act[188] now assigned to the provinces, nor the increasingly important role played by neighbourhood associations[189] is sufficient to protect neighbours in a planning law context.

Some adjustments are necessary. German law, which contains some of the most progressive neighbour protection provisions, can possibly assist.

What existed there before the introduction of the Federal Building Code (*Baugesetzbuch*) in 1960 was pure private law neighbour law.[190] This was ineffective in coping with the problems which arose as a result of planning decisions and a so-called *öffentliches Nachbarrecht* developed.[191] The Federal Administrative Court (*Bundesverwaltungsgericht*) granted a public law neighbour action for the first time in 1960.[192]

In planning, conflicts essentially result from a neighbour's suffering injury by a development on an adjacent property. In private law terms, this entails a relationship between two parties acting on equal terms, namely owner and neighbour, and a solution is achieved by an action against the owner of the land for an injury caused by the development. A public law aspect is introduced by the fact that a permit which allows the development, has been granted by a building authority acting in terms of a statutory power. Here there are three parties to the relationship, namely the building authority, the owner and the neighbour. Where the neighbour is injured by the development allowed by the permit, in principle a different action lies against the authority.[193]

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187 Van der Merwe *Oorlas in die Suid-Afrikaanse reg* (LLD thesis Unisa 1982) 601 provides a definition of neighbour law as "where the conduct of a person in occupation of property causes unlawful harm or annoyance, actual or potential, to neighbouring occupiers of property in the use and enjoyment of their property".

188 Act 108 of 1991. The provisions of this chapter have now been made applicable in all (9) new provinces. See *GG* 16049 of 1994-10-31. See further Van Wyk "The role of neighbourhood committees in maintaining norms and standards in residential areas" in Heyns *et al* (eds) *Discrimination and the law in South Africa* (1994) 198–208.

189 Van Wyk "Removing restrictive conditions and preserving the residential character of a neighbourhood" 1992 *THRHR* 369–385.

190 For the drafters of the *BGB* in 1888, any neighbour issue was to be regulated in terms of private law and conflicts between neighbours had to be decided in the civil courts.

191 Development was, however, slow. It was not until 1949 with the enactment of the *GG* that a change could be discerned. A 19 of the *GG* grants an action to anyone whose rights have been infringed by the authorities. It eliminated the procedural obstacles which had previously prevented a public law neighbour action and paved the way for the development of public neighbour law. See further Kleinlein *Das System des Nachbarrechts* (1987) 4; Schwarzer "Nachbarschutz im öffentlichen Baurecht" 1989 *UPR* 201–209 201.

192 *BVerwGE* 11, 95. See further Kleinlein (fn 191) 4; Schwarzer (fn 191) 201; Kleinlein "Neues zum Verhältnis von öffentlichem und privatem Nachbarrecht" 1982 *NVwZ* 668–670; Steinberg "Grundfragen des öffentlichen Nachbarrechts" 1984 *NJW* 457–464 458. This decision was confirmed in 1965 by the recognition of an independent public law action against the provisions of a building permit regardless of the rights of private neighbours – *BVerwGE* 22, 129.

193 Schwarzer (fn 191) 201; Breuer "Baurechtlicher Nachbarschutz" 1983 *DVBl* 431–440 431 433.

Today the private[194] and the public law[195] neighbour law exist side by side, the affected neighbour having a choice of remedies.[196]

The dual neighbour law system in Germany underpins the entire legal system where a very clear distinction exists between public and private law. Right now the debate there concerns the *Annäherung* between public and private law,[197] with planning law the example par excellence demonstrating that the dichotomy is not as strict as many would like to see it. In England the attitude was always that the expressions public law and private law were foreign imports which had to be treated with caution, if not suspicion.[198] Yet recently it has witnessed a radical and confusing change in the public law/private law divide recognising for the first time that there is a distinction.

In general terms, planning law may be said to have its feet in both public and private law. What does this fact hold for South African legal writing and practice? And what role does the Constitution play in this debate?

9 PUBLIC/PRIVATE LAW DEBATE

In South Africa, the acceptance of the distinction between public law and private law reflects both the English/American common law approach and the European civil law approach.[199] What is taking place in other countries – that one must

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194 The private neighbour law is contained mainly in a 906 *BGB*. There is a choice of three remedies, viz: (1) abatement and prohibitory actions in terms of a 1004 1 *BGB* and a 1004 2 *BGB*, fault not being required; (2) (no fault) claims for compensation in terms of a 906 2(ii) *BGB* (intrusions); a 912 2 *BGB* (building over the boundary); a 917 2 *BGB* (way of necessity) – fault likewise not being a requirement; (3) a claim for damages, based on fault, from an impermissible act in terms of a 823 2 *BGB* (protective statutes) and a 823 1 *BGB*.

195 Public law neighbour law is contained in building planning law (*Bauplanungsrecht*), federal and regional immission protection law (*Bundesimmissionsschutzrecht & Landesimmissionsschutzrecht*) and in a 17 of the Federal Roads Act (*Bundesfernstrassengesetz*). The remedies include: (1) the *Anfechtungsklage*, aimed at setting aside an administrative act – a 42 1 *Verwaltungsgerichtsordnung*. In building law, it would be available to a neighbour against the building authority for any administrative decision, eg the granting of a permit, where the owner-builder is unduly advantaged and the rights of the neighbour infringed. The rights of neighbours may be affected when either (a) a constitutionally protected right, eg a 14 1 *GG*, or (b) the neighbour protective provisions of the building law are infringed. Whether a provision is neighbour protective and the extent of its protection are determined in terms of the so-called *Schutznorm* theory. This theory entails that a provision is protective when it is also intended to protect the private interests of neighbours; (2) the *Verpflichtungsklage* is employed to compel an administrative authority to make a valid decision to ensure compliance with its decisions. In building law this remedy may be used by an owner to direct an authority to issue a permit to which she is entitled or by a neighbour to compel an authority to act against a person who, without a permit, nevertheless erects a building which contravenes neighbour protective provisions; (3) the *Leistungsklage* (preventive prohibitory action); (4) the *Feststellungsklage* (declaratory order); and (5) *Normkontrollverfahren*.

196 See Breuer (fn 193) 433 and authorities mentioned there.

197 I had the privilege of attending discussions in this regard at the Institut für deutsches und europäisches Verwaltungsrecht at the University of Heidelberg in 1994.

198 Woolf "Public law – private law: Why the divide?" 1986 *Public Law* 220–238.

199 Ferreira "Enkele gedagtes oor die onderskeid tussen publiek- en privaatreg in die Suid-Afrikaanse reg" 1990 *SAPL* 50–65 65; Erasmus "Thoughts on private law in a new South Africa" 1994 *Stell LR* 105–132.

accept that there are differences but that there is a continuous interaction between the two – must apply equally here. However, this argument is incomplete. To complete it requires an examination of the effect of the Constitution on the distinction.

The Constitution is a supreme law.[200] All law is subject to its provisions and all law must be interpreted with due regard to the spirit, purpose and object of the Fundamental Rights chapter. The interpretation clause states specifically that in any interpretation of chapter 3 a court of law must promote the values which underlie an open and democratic society based on freedom and equality.[201] This means that all existing law, including private law, is open to being influenced and shaped by the values enshrined in chapter 3, albeit by way of seepage of the provisions of the chapter into horizontal relationships.[202] This negates the idea that the human rights chapter is vertical in operation only.[203] Moreover, it accentuates the presence of a continual osmosis between these divisions.

Perhaps an emergent planning law, which clearly indicates that a strict dichotomy no longer exists, can contribute to this debate.

10 CONCLUSION

In conclusion, and to place some perspective on the future of planning law in South Africa, it is significant to refer to a particularly severe indictment by JF Simmie, who wrote in 1971 that English planning had failed because of its narrow outlook, the lack of competence and the predominantly upper class and paternalistic ideology.[204]

These words ring equally true for previous South African planning law – if such a thing existed.

Now, however, Cinderella is on her way to the ball. Never before have circumstances been more favourable for a revitalised, conceptualised, development-oriented planning law. For Cinderella to emerge a princess, the lawyers, the planners, the owners, the neighbours and the authorities will have to put their heads together now.

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200 S 4 provides: "This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency."

201 See above 6. See further Du Plessis and Corder (fn 64) 52.

202 Du Plessis and Corder (fn 64) 112–113. See also Rautenbach (fn 64) 75–80; Van der Walt (fn 65) 194–195.

203 See further Du Plessis and Corder (fn 64) 110–114.

204 Simmie "Physical planning and social policy" 1971 *Journal of the Royal Town Planning Institute* 450–453.

Die beslegtingsproblematiek in geval van mediese wanpraktyksgeskille

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SUMMARY

Problems regarding the settlement of disputes in cases of medical malpractice

This article deals with the importance of medical expert evidence and the problems experienced in obtaining a medical expert witness mainly because of the strangeness of the court, hostile cross examination and insufficient witness fees. The available civil procedures, for example assessors (in the magistrate court), arbitrators (in the supreme court), expert witness summonses and pre-trial conferences are also dealt with. Finally, this article serves to suggest alternative means of settling a dispute such as the ombudsperson, screening panels, arbitration and mediation.

1 INLEIDING

Eise voortspruitende uit mediese wanpraktyk bied van die grootste bewys- en prosesregtelike kopsere vir 'n regspraktisyn.

Veral twee opvallende opvattings oor medici word in die gemeenskap aangetref. 'n Ouer, meer konserwatiewe benadering beskou die geneesheer as verhewe bo die reg, byna 'n heilige. In Suid-Afrika word hierdie opvatting vergestalt in 'n traagheid en selfs 'n botweg weiering om teen 'n beweerde nalatige geneesheer te ageer. 'n Tweede en nuwer, meer verligte denkrigting word veral in Amerika aangetref en is al as die sogenaamde "unruly horse" getipeer.[1] Astronomiese eisbedrae wat toegestaan word, tref die beskikbaarheid, kwaliteit en koste van mediese sorg uiteindelik nadelig. Hierdie opvattings baat nóg medici nóg hul pasiënte.

Ondanks fenomenale uitbreiding en ontwikkeling op die gebied van die mediese wetenskap en tegnologie, sal desondanks selfs die mees gesoute geneesheer toegee dat dit bloot menslik is om te fouteer in die diagnostiese, prognostiese en behandelingsproses van 'n pasiënt. Gesien vanuit die medici se oogpunt, is voorkoming beter as genesing en die beste beskerming teen mediese wanpraktykseise is juis voorkoming. Voorkomende maatreëls word geneem uit hoofde van professionalisme, wat op sigself die hoeksteen van die geneesheer-pasiëntverhouding vorm.[2] Dit is gerieflik om 'n leunstoel-kritikus te wees en by

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1 Strauss *Doctor, patient and the law* (1984) 292–294; Havard "Medical negligence litigation adversarial system: a battleground for expert witnesses" 1989 *The Law Soc Gaz* 4–5.

2 Carstens "Prophylaxis against medical negligence – a practical approach" 1988 *De Rebus* 346 ev doen sekere wenke aan die hand om die regslaggate in 'n mediese praktyk te voorkom. Hoewel hy meld dat daar geen kitsklare oplossings en vaste reëls tov mediese

vervolg op volgende bladsy

nabaat wys te wees. Die mediese wetenskap hou geweldige groot voordele vir die mens in; voordele wat tesame met die risiko's daaraan verbonde op die koop geneem moet word.[3]

In hierdie artikel word eerstens die rol van medies-deskundige getuienis uitgewys, asook probleme met die bekombaarheid van 'n medies-deskundige getuie, hoofsaaklik as gevolg van die hofatmosfeer, "vyandige" kruisondervraging en lae getuiegelde. Voorts word die beskikbare en toepaslike prosedures van die siviele prosesreg, waaronder assessore in die landdroshof, skeidsregters in die hooggeregshof, opsommings van die medies-deskundige getuies en voorverhoorsamesprekings behandel. Ten slotte val die soeklig op alternatiewe geskilbeslegtingsmetodes, naamlik die ombudspersoon, keuringspanele, arbitrasie en bemiddeling.

2 DESKUNDIGE GETUIENIS

Deskundige getuienis eerder as die konserwatiewe benadering in Suid-Afrika kan as rede aangevoer word vir die betreklik min mediese wanpraktykeise wat uiteindelik ingestel word. 'n Stygende of dalende tendens in die gehalte van gesondheidsorg sal 'n afname of toename in wanpraktyklitigasie meebring.[4] So pessimisties oor die kanse op welslae is 'n Engelse regsgeleerde[5] dat hy dit prontuit stel dat, tensy die saak so opvallend van nalatigheid of 'n wanpraktyk spreek (byvoorbeeld 'n pasiënt verlaat die operasietafel sonder 'n ledemaat in plaas van 'n blindederm of met 'n skalpel vergete in sy liggaam), die eiser-pasiënt probleme sal ondervind om 'n saak tot bevrediging van die verhoorregter uit te maak.

Die eiser-pasiënt sal die hof op 'n oorwig van waarskynlikheid moet oortuig dat die verweerder-geneesheer afgewyk het van die sorg en vaardigheid wat in die betrokke omstandighede van 'n redelike geneesheer in die betrokke praktyksveld verwag word.[6] 'n Geneesheer tree nalatig op indien die redelike geneesheer in die betrokke omstandighede die waarskynlikheid van nadeel redelikerwys sou voorsien en voorkom het.

Die graad van vaardigheid en sorg wat redelikerwys te wagte kan wees, hang grootliks van die getuienis af. Omdat die hof in staat is om sy eie opinie in die

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wanpraktyk is nie, doen hy baie bruikbare wenke vir die geneesheer aan die hand ter voorkoming van wanpraktykseise.

3 *Roe v Ministry of Health* [1954] 2 All ER 131 137: "It is easy to be wise after the event and to condemn as negligence that which was only a misadventure. We ought always to be on our guard against it, especially in cases against hospitals and doctors. Medical science has conferred great benefits on mankind, but these benefits are attended by considerable risks. We cannot take the benefits without taking the risks. Doctors like the rest of us have to learn by experience and experience often teaches in a hard way."

4 Daar word verwag dat die pasiënt in die toekoms baie meer ingelig behoort te wees tov sy fundamentele regte op gesondheidsorg en reg van toegang tot die howe, soos vervat in hfst 3 van die Grondwet van die Republiek van Suid-Afrika 200 van 1993. Vgl *Castell v De Greef* 1994 4 SA 408 (K) veral 426.

5 Lewis "Medical negligence: the difficulties of proof" 1983 *The Law Soc Gaz* 1647.

6 *Mitchell v Dickson* 1914 AD 519; *Buls v Tsatsarolakis* 1976 2 SA 891 (T); *Esterhuizen v Administrator, Transvaal* 1957 3 SA 710 (T); *Blyth v Van den Heever* 1980 1 SA 191 (A).

lig van die beskikbare getuienis te vorm, is die opinie van 'n getuie ingevolge die gemenereg ontoelaatbaar.[7] Dog, vanweë sy besondere vaardigheid en kennis van 'n onderwerp, is 'n deskundige getuie beter daartoe in staat om gevolgtrekkings te maak en 'n opinie te vorm op grond van die feitestel of ondersoek as die hof en is die opiniegetuienis toelaatbaar.[8]

Wanneer 'n geneesheer byvoorbeeld versoek word om mediese getuienis af te lê in 'n hof, word hy as 'n deskundige op die gebied van die geneeskunde beskou. Voordat die hof bereid sal wees om sy mediese getuienis aan te hoor, sal die geneesheer die hof moet oortuig dat hy 'n deskundige is.[9] Hy moet die hof as deskundige getuie inlig wat sy bevinding is en die feite waarop hy sy opinie grond, asook die redes (gronde) vir sy opinie aandui.[10]

Die vraag ontstaan hoe die hof deskundige getuienis moet benader:

> "Expert evidence presents peculiar difficulties in the assessment of its probative value. The court does not usually have any means by which it can verify the witnesses' conclusions, and if there is a conflict of expert testimony it may be thrown back upon doubtful factors such as the rival witnesses' reputations and experience. A court which relies upon an expert's opinion is therefore, to greater or lesser extent, taking a step in the dark – something which should be done only *with considerable caution*."[11]

Die primêre taak van 'n deskundige is om aan die hof leiding te gee om 'n juiste beslissing te maak ten opsigte van vrae wat binne sy gespesialiseerde veld ontstaan; sy persoonlike bevinding dien nie as plaasvervanger vir die bevinding

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7 *R v Vilbro* 1957 3 SA 223 (A) 228–229.

8 *Coopers SA (Pty) Ltd v Deutsche Gesellschaft für Schädlungsbekampfung mbH* 1976 3 SA 352 (A) 370; Hoffman *South African law of evidence* (1970) 97; Schmidt *Bewysreg* (1989) 429.

9 'n Deskundige moet homself as 'n deskundige kwalifiseer: sy ondervinding, kwalifikasies en vermoë om 'n opinie te vorm, moet uitdruklik gestel word: *Menday v Protea Insurance* 1976 1 SA 565 (OK). Die geneesheer se kwalifikasies, die universiteit waar en wanneer die kwalifikasies verwerf is en die aantal jare ondervinding word voorgelê.

10 *S v Gouws* 1967 4 SA 527 (OK); *S v Adams* 1983 2 SA 577 (A) 586; *S v Januarie* 1980 2 SA 598 (K); Hoffman *South African law of evidence* 79–88; *R v Basson* 1946 CPD 479; *S v Harris* 1965 2 SA 340 (A). Die deskundige getuie lewer sy eie getuienis en daarna mag hy aanhaal uit mediese handboeke, tydskrifartikels, proefskrifte, ens om sy standpunt te staaf. Daar bestaan geen algemene reël dat die deskundige getuie kennis van die saak waaroor hy getuienis lewer, moet hê uit hoofde van persoonlike ervaring eerder as die van die lees van data verskaf deur andere nie. Opinies oor wetenskaplike aangeleenthede is normaalweg gebaseer op inligting verskaf deur andere in handboeke, tydskrifartikels, proefskrifte, ens. Waar 'n deskundige na boeke of artikels verwys om sy standpunte te steun, vir sover hy dit as getuienis aangeneem het, met of sonder kommentaar daarop, vorm dit deel van sy getuienis. Die hof mag nie gebruik maak van aanhalings waarna die deskundige getuie nie verwys het nie, of aanhalings wat nie aan hom in kruisondervraging gestel is nie. In *R v Mofokeng* 1928 AD 132 is 'n skuldigbevinding ter syde gestel omdat die voorsittende beampte aan die jurie 'n aanhaling voorgehou het uit 'n werk wat oor mediese reg gehandel het, welke aanhaling in stryd was met die getuienis wat die deskundige getuie afgelê het, maar nie aan hom gestel is in die loop van sy getuienis nie. 'n Getuie se opinie sal waardeloos wees tensy daar bewys is van die aanvaarde feite waarop die opinie gebaseer is. Eweneens mag die getuie die hof nie mislei deur 'n opinie op 'n valse premis te baseer nie. Hierdie is 'n aspek wat in kruisondervraging sal uitkom.

11 Eie kursivering. Hoffman *South African law of evidence* 81; *Keeton v R* 1906 EDC 56.

van die hof wat tot 'n beslissing moet kom oor die aangeleentheid voor hom nie.[12]

Om as 'n deskundige getuie op te tree in 'n siviele of strafsaak kan vanuit 'n finansiële oogpunt vir die geneesheer uiters nadelig wees. In siviele sake word vereis dat die getuie *viva voce* getuienis aflê.[13] Benewens die ondersoek van 'n pasiënt, die bestudeër van mediese verslae, 'n diepgaande studie van medieswetenskaplike en medies-tegnologiese literatuur, asook deeglike konsultasies met regsverteenwoordigers voor die verhoor, neem die verhoor self, vanweë die adversatiewe stelsel in Suid-Afrika, baie tyd in beslag.

Die appèlhofbeslissing in *Van Aswegen v Lombaard*[14] het dit boonop vir medici bemoeilik om vergoeding vir dienste, voorbereiding, verlies aan inkomste en tyd en die daadwerklike optrede as deskundige getuie te eis.[15] 'n Ooreenkoms tussen 'n gedingsparty en 'n getuie ingevolge waarvan die getuie vergoeding ontvang vir die lewering van getuienis of selfs vergoeding ontvang wat die maksimum getuiegelde oorskry, is *contra bonos mores* en gevolglik nietig.[16] Getuiegelde is skandalig laag en hou hoegenaamd nie verband met die mark waarin 'n geneesheer werksaam is nie.[17] Daar word gevrees dat getuies wat toegelaat word om 'n groter vergoeding by wyse van ooreenkoms te beding, in die versoeking kan kom om getuienis van watter aard ook al te versin.[18] Die lewering van getuienis deur medici as deskundige getuienis teen voorgeskrewe vergoeding volgens wet, word beskou as 'n verpligting wat die burger teenoor die gemeenskap en die staat het:[19]

> "It has been said that the duty of a witness, if subpoenaed to testify in court, is an obligation which the citizen owes to the community and the state; and that while today its discharge may embarrass and encumber them, tomorrow it may be his right and safeguard himself to demand such sacrifices from his fellow citizens in the interest of justice."[20]

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12 *Maritime and General Insurance Company Ltd v Sky Unit Engineering (Pty) Ltd* 1989 1 SA 867 (T) 876I–877H: "The duty of experts is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or jury to form their own independent judgment by the application of those criteria to the facts proved in evidence . . ." Sien ook *Abdo v Senator Insurance Company Ltd* 1983 4 SA 721 (OK) 725F–726E; *William Grant and Sons Ltd v Cape Wine Distillers Ltd* 1990 3 SA 897 (K) 912F; *Reyneke v Mutual and Federal Insurance Company Ltd* 1991 3 SA 412 (W).

13 In uitsonderlike omstandighede word wel toegelaat dat getuienis by wyse van 'n beëdigde verklaring afgelê word, mits die ander party nie die deskundige getuie wil kruisondervra nie. Wat strafsake betref, word getuienis normaalweg in 'n verklaring afgelê – *R v Manda* 1951 3 SA 158 (A); *R v Qwabe* 1939 PH H15 (A). Waar die klag een van moord is, is dit verkieslik dat deskundige getuienis persoonlik afgelê word.

14 1965 3 SA 613 (A).

15 Strauss *Doctor, patient and the law* 433.

16 *Knox v Koch* (1883) 2 SC 382; *Marais v Pilkington* 1905 TS 650; *Van Aswegen v Lombaard supra*.

17 Aanhangsel A: Tarief van toelaes ingevolge a 42 van die Wet op die Hooggeregshof 59 van 1959 en a 51*bis* van die Wet op Landdroshowe 32 van 1944.

18 Gordon, Turner en Price *Medical jurisprudence* (1953) 316.

19 *Van Aswegen v Lombaard supra* 619 623.

20 *Kruger v De Bruyn* 1943 OPD 38. 'n Getuie mag egter beding vir 'n kwalifiserende fooi vir die instudeer van sy onderwerp ten einde na die beste van sy vermoë te kan getuig –

vervolg op volgende bladsy

3 KRUISONDERVRAGING

'n Verdere struikelblok vir die medies-deskundige getuie is dat hy aan kruisondervraging blootgestel word, 'n wesenlike faset van die adversatiewe stelsel.

Hoewel die geloofwaardigheid van 'n getuie wel deur die teenparty aangeval mag word, het die hof 'n wye diskresie om irrelevantheid of misbruik uit te skakel. Dit is die plig van die voorsittende beampte om 'n getuie in te lig dat dit onnodig is om 'n inkriminerende of vernederende vraag te beantwoord. Die getuie het die reg om beswaar te maak teen die beantwoording van so 'n vraag en kan die hof vra of hy verplig is om die vraag te beantwoord. Indien die getuie uitdruklik versoek word om die vraag te beantwoord en hy dan sou weier, doen hy dit op eie risiko en stel minagting van die hof daar. Voor die hofverrigtinge kan die geneesheer weier om inligting oor sy pasiënt te gee, as sou dit professioneel oneties wees, maar in 'n getuiebank kan hy aangesê word om die vraag te beantwoord, in welke geval hy dit dan moet doen.[21]

Kruisondervraging is al bestempel as "the greatest legal engine ever invented for the discovery of truth".[22] Wanneer 'n regspraktisyn met sy kruisondervraging begin, is sy hoofdoel om getuienis aan die lig te bring wat sy party se saak steun en die juistheid van die teenkant se getuienis te betwyfel; ten tweede het hy voor oë om die getuie van die teenkant se geloofwaardigheid te toets. Kruisondervraging is dus gerig op 'n getuie se geloofwaardigheid en op feite relevant vir die regsvraag.[23] Die regspraktisyn sal op sy hoede wees vir die sogenaamde "partisaan"- (of partydige) getuie, 'n aanhanger of voorstander van 'n betrokke party se saak – gewoonlik die party vir wie daar opgetree word as deskundige getuie.[24]

> "The nature of the witness oath should be ever present before him: he is not there to take sides, but to tell the truth, the whole truth, and nothing but the truth."[25]

Kruisondervraging bring soms 'n vyandigheid by die medies-deskundige getuie na vore omdat sy professionele en persoonlike integriteit aangeval word.[26] Omdat daar na sekerheid gesoek word, word voortdurende druk op medies-deskundige getuies uitgeoefen om sonder aarseling gegronde en juiste getuienis af te lê. Vir medici beteken dit om op 'n vreemde wyse tot 'n wetenskaplike

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Marais v Pilkington supra. Die deskundige getuie is ook geregtig om 'n voorlopige konsultasie en 'n verslag te doen: Gordon *et al Medical jurisprudence* 316–317.

21 *Parkes v Parkes* 1916 CPD 702. Sien ook die SAGTR se etiese reël 16.

22 Wigmore *Evidence* 5 par 1367 soos aangehaal deur Hoffman *South African law of evidence* 321 vn 3.

23 Hoffman *South African law of evidence* 322.

24 Geneeshere wat normaalweg optree as deskundige getuies vir sekere partye, bv versekeringsmaatskappye of die distriksgeneesheer vir die staat, moet met versigtigheid hanteer word. Daar kan 'n geneigdheid of versoeking wees om, uit die mag van die gewoonte of uit misplaaste lojaliteit, sy eie saak partydig te steun of bevooroordeeld teenoor die teenkant te wees, sonder om objektief medies-wetenskaplik deskundige getuienis te lewer.

25 Gordon *et al Medical jurisprudence* 331.

26 *S v Booi* 1964 1 SA 224 (OK); *S v Makaula* 1964 2 SA 575 (OK); *Mechanical and General Inventions Company and Lehwess v Austin and the Austin Motor Company* [1935] AC 346 360; [1935] All ER 22 27 28; Hoffman *South African law of evidence* 323.

gevolgtrekking te kom, 'n wyse waaraan hulle glad nie gewoond is nie en wat ook nie binne hulle alledaagse werkswyse val nie.

> "A court of law may be the workroom for the attorney but it is the torture chamber for the doctor."[27]

Om met 'n vooraf uitgewerkte, vooropgestelde teorie as deskundige getuie in die hof te staan, beteken vir die geneesheer dat hy onder kruisondervraging aan die kaak gestel kan word. Hoewel die howe altyd in die verlede vryheid ten opsigte van kruisondervraging[28] toegelaat het en dit so min as moontlik onderbreek het,[29] sal hulle tog ingryp waar 'n getuie of kruisondervraer sy humeur verloor of in 'n argument betrokke raak of woorde in die mond van 'n teenstander wil plaas.

Nie net kruisondervraging is medici se nemesis nie, maar ook die onderlinge onenigheid tussen deskundiges:

> "The spectacle of such disagreement is often very unedifying, and tends to bring the profession concerned, particularly medicine, into disrepute. In accident cases, for example, it can often be seen how the medical evidence is coloured according to the 'side' the witness is on. In such a case, evidence given by a hospital practitioner is often the most impartial. It is easy to see how the same symptoms and complaints by a patient may tend to take on rather different characteristics, according to whether the examining physician is the patient's own doctor, or is the medical advisor to an insurance company. It is possible to allow oneself to take an optimistic view or a pessimistic one, to be sympathetic or unsympathetic. Difficult as it may be in practice, the practitioner who is to give evidence must endeavour to steer a middle course between all these extremes."[30]

Regspraktisyns vind dit moeilik om beskikbare, bekwame medies-deskundige getuienis vir 'n hofsaak te vind, veral in optrede teen 'n verweerder-geneesheer. Die aantyging van die "King of Torts" in Amerika, Belli, waarin hy die medici van 'n "conspiracy of silence" beskuldig, word deur Strauss verwerp.[31] Strauss voer aan dat geneeshere nie koudbloedige lede van 'n esoteriese broederbond is wat opsetlik swyg ten einde gesamentlike voordeel te bereik en geensins ag slaan op die belange van pasiënte wat as gevolg van gebrek aan vaardigheid wel benadeel word nie.

Daar word dikwels uit die oog verloor dat die geneeskunde nie 'n eksakte wetenskap is nie en dat ondanks intensiewe navorsing en ongekende vooruitgang ook die geneeshere dit moeilik vind om 'n keuse tussen omstrede teorieë te maak en dit boonop in eenvoudige taal aan leke te verduidelik.

4 SIVIELE PROSESREG

Die vraag kan gestel word of daar nie alternatiewe geskilbeslegtingsmetodes bestaan om 'n wanpraktyksgeskil op te los nie, eerder as om gebruik te maak van

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27 Lombardi *Medical malpractice insurance* (1978) 21.
28 *Chester v Oldman* 1914 TPD 67; *S v Cele* 1965 1 SA 82 (A).
29 *R v Amod* 1958 2 SA 658 (N) 661; *Jones v National Coal Board* [1957] 2 QB 55; [1957] 2 All ER 155; [1957] 2 WLR 760; 101 Sol Jo 319, CA; Digest Cont Vol A 518.
30 Gordon *et al Medical jurisprudence* 331.
31 Strauss *Doctor, patient and the law* 231.

die litigasieproses. Alvorens dié vraag beantwoord word, moet eers besin word oor welke middele die siviele prosesreg self bied om die probleem uit beide geneesheer en regspraktisyn se oogpunt aan te spreek.

4 1 Assessore in die landdroshof

Vir landdroshowe maak die Wet op Landdroshowe 32 van 1944 byvoorbeeld voorsiening dat die hof in enige aksie op aansoek van een van die partye die hulp kan inroep van een of twee persone wat kundig, ervare en bereid is om as assessore in 'n raadgewende hoedanigheid sitting te neem in die saak waarop die aksie betrekking het.[32] 'n Gedingsparty wat 'n verhoor met assessore verlang, moet van sy aansoek om 'n verhoor met assessore kennis gee.[33] Indien die gedingsparty die eiser is, moet hy die kennisgewing van aansoek om assessore tesame met die kennisgewing van ter rolleplasing vir verhoor aflewer; indien die gedingsparty die verweerder is, moet hy die kennisgewing van aansoek om assessore afgee nie later nie as vyf dae nadat hy kennisgewing van terrolleplasing vir verhoor ontvang het. Die kennisgewing moet óf die toestemming van die ander party bevat óf 'n kennisgewing waardeur die aansoek om aanhoor ter rolle geplaas word. Die aantal en name van die assessore wat in 'n saak sitting moet neem, word met die toestemming van die partye, of indien hulle nie kan ooreenkom nie, deur die hof bepaal.[34] Indien daar tot die aansoek toegestem word, of indien dit deur die hof toegestaan word, moet die klerk van die hof al die assessore wat in die toestemming genoem of deur die hof aangewys is, oproep deur 'n dagvaarding aan elkeen te beteken.[35] Indien enigeen van die assessore wat opgeroep is, hom nie by die verhoor aanmeld nie, kan die hof enersyds voortgaan met die verhoor met die hulp van die ander assessor (as daar een is) óf sonder hulp as geeneen hom aangemeld het nie; andersyds kan die verhoor verdaag word.[36] 'n Assessor is geregtig op die gelde betaalbaar soos voorgeskryf deur die wet,[37] welke gelde skandalig laag is en persone ontmoedig om as assessore op te tree.[38]

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32 A 34 en r 59 Wet op Landdroshowe 32 van 1944.
33 R 59(5).
34 R 59(4).
35 R 59(7).
36 R 59(8).
37 Tabel D Bylae 2.
38 Tabel D Bylae 2 bepaal oa die gelde vir elke bywoning wanneer die saak in sy geheel of gedeeltelik verhoor is: R70 vir elke uur of gedeelte van 'n uur van sodanige bywoning, maar nie minder as R140 of meer as R350 vir elke sodanige bywoning nie. Vir elke bywoning wanneer die saak nie verhoor word nie, maar uitgestel of geskik word, teen bg tarief maar met 'n minimum van R70. Bywoning word bereken vanaf die uur waarvoor die assessor gedagvaar is tot die uur waarop vonnis gegee of voorbehou word of tot die uur waarop die assessor uitdruklik deur die hof vrygestel word van verdere bywoning, watter van die twee ook al eerste plaasvind. Wanneer die saak verdaag, uitgestel of geskik word, word bywoning bereken vanaf die uur waarvoor die assessor gedagvaar is tot die uur waarop die saak verdaag, uitgestel of geskik word of tot die uur waarop die assessor uitdruklik deur die hof vrygestel word van verdere bywoning, watter van die twee ook al eerste plaasvind. 'n Assessor is ook geregtig op reistoelae teen 'n tarief van R1 per kilometer vir elke rit wat hy werklik en noodsaaklikerwys tussen die hofgebou en sy

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Dit sou ideaal wees om 'n algemene mediese praktisyn, 'n spesialis of 'n professor in geneeskunde as assessor aan te stel; persone wie se bekwaamheid, reputasie en kundigheid van wesenlike belang in die evaluering van die mediesdeskundige getuienis is. Ongelukkig ontmoedig lae assessorsgelde en onnodige vertragings in die hofprosedure persone om as assessore op te tree en word daar in die praktyk baie min van hulle gebruik gemaak.

Die hof stel 'n lys op van persone wat blyk bevoeg te wees om as assessor op te tree en ook gewillig is om na redelike kennisgewing en teen betaling van die voorgeskrewe gelde diens te aanvaar. 'n Assessor wat gedagvaar is om in 'n aksie op te tree, kan nie sonder toestemming van die hof gedurende die verhoor bedank nie.[39] Die hof kan ook met toestemming van al die partye, persone wat nie op die lys genoem is nie as assessore roep.[40]

4 2 Skeidsregter in die hooggeregshof

Bykans 'n eweknie van die assessore in die landdroshof, is die skeidsregter in die hooggeregshof.[41] Die hooggeregshof kan in 'n siviele geding, met toestemming van die partye, onder andere enige aangeleentheid wat 'n wetenskaplike of tegniese ondersoek verg en wat nie geredelik deur die hof gedoen kan word nie, vir ondersoek en verslag na 'n skeidsregter verwys, welke verslag in sy geheel of gedeeltelik aanvaar kan word, met of sonder wysigings. Dit staan die hof ook vry om so 'n verslag vir verdere ondersoek of verslag of oorweging na die skeidsregter terug te verwys.[42] Vir doeleindes van sy ondersoek beskik die skeidsregter oor die bevoegdhede wat deur 'n spesiale hofbevel of die hofreëls voorgeskryf word[43] en sy verslag word deur die hof aanvaar met die nodige uitwerking van 'n hofbevinding in 'n siviele geding.[44] 'n Ondersoek kragtens artikel 19*bis* van die Wet op die Hooggeregshof 59 van 1959 word geag 'n siviele geding te wees vir doeleindes van die verkryging van 'n getuie se aanwesigheid en die voorlegging van 'n dokument voor 'n skeidsregter.[45] Besoldiging waarop die skeidsregter geregtig is, word deur die hofreëls voorgeskryf. Indien geen sodanige besoldiging voorgeskryf word nie, word dit deur die hof bepaal. Voorsiening word onder andere gemaak vir enige redelike uitgawes deur die skeidsregter aangegaan vir ondersoekdoeleindes. Die takseermeester van die

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woning of besigheidsplek aflê, mits die woonplek of die besigheidsplek nie binne vyf kilometer van die hofgebou is nie. Die party wat 'n assessor verlang ingevolge r 59(6), moet 'n bedrag van R350 vir elke assessor waarom aansoek gedoen word by die klerk van die hof inbetaal.

39 R 59(1) en (2).

40 R 59(3).

41 A 19*bis* Wet op die Hooggeregshof 59 van 1959.

42 A 19*bis*(1)(c).

43 A 19*bis*(3).

44 A 19*bis*(2).

45 A 19*bis*(4). 'n Getuie wat sy samewerking weier (bv sonder voldoende rede in gebreke bly om aanwesig te wees of te bly, eed- of plegtige verklaringaflegging weier, onvolledig en onbevredigend vrae beantwoord, weier om 'n dokument in sy besit voor te lê) is aan 'n misdryf skuldig en by skuldigbevinding strafbaar met 'n boete van hoogstens R300 of met gevangenisstraf vir 'n tydperk van hoogstens 3 maande.

hooggeregshof is verantwoordelik vir die taksasie van die besoldiging en uitgawes en dit is koste in die geding.[46]

Daar word groter inisiatief aan die dag gelê by die gebruikmaking van 'n skeidsregter in die hooggeregshof as in geval van 'n assessor in die landdroshof aangesien die skeidsregter die afneem van medies-deskundige getuienis self hanteer. Die deskundige getuie behoort meer op sy gemak te wees by die aflegging van mediese getuienis tydens die ondersoek as binne formele hofverband. Daar dien op gelet te word dat artikel 19*bis* slegs voorsiening maak vir een skeidsregter, en nie soos in geval van die assessore in die landdroshof waar daar van hoogstens twee gebruik gemaak mag word nie. In *Montres Rolex SA v Kleinhans* wys regter Seligson op die volgende:[47]

> "*Semble*: a claim for an order directing an inquiry into the damages suffered by an applicant as a result of the respondent's infringement of the applicant's trade mark is a form of relief which enjoys some recognition in our law, and, in principle, its acceptance affords no difficulty as it is directed to a determination of the damages actually sustained by the plaintiff, can serve a useful purpose and is not inconsistent with any fundamental tenet of our legal system. It seems, however, that, in order to function as an effective remedy, an inquiry into damages will often necessitate the Court giving directions in connection with the conduct of the inquiry, eg as to pleadings, discovery and related questions and in a proper case to refer the investigation of damages to a referee for report back to the Court. There is no Rule of Court which deals with such matters. Moreover, s 19*bis* of the Supreme Court Act 59 of 1959 only applies where the parties have consented to the issues being referred to a referee. There is a real need in our practice for a Rule of Court which invests the Court with specific regulatory powers in respect of an inquiry into damages. There is also every justification for a legislative amendment extending the Court's powers under s 19*bis* of the Supreme Court Act so that, *irrespective of the parties' consent*, the Court, in an appropriate case, can delegate to a referee the investigation of damages – or of any other aspect which is likely to prove complex or protracted, as envisaged by that section."

Die regter wys heeltemal tereg op die leemtes in die Wet op die Hooggeregshof ten opsigte van die skeidsregter se ondersoek insake skadevergoeding. Hoewel dit hier om 'n handelsmerk gegaan het, kan dit eweneens op mediese wanpraktyksake toegepas word. Die uitbreidingsvoorstel ten opsigte van artikel 19*bis* van die Wet op die Hooggeregshof, ongeag die partye se toestemming, is te verwelkom.

4 3 Roep as getuie

Ingevolge die prosedure waarvolgens 'n deskundige getuie geroep word om te getuig, word deur middel van vooraf-kennisgewing en 'n opsomming van die opinie en redes, die moontlikheid grootliks uitgeskakel dat die teenkant onverhoeds betrap word en die mediese deskundige getuie "uitgelewer" voel aan vyandige kruisondervraging.[48] Die teenkant kry die geleentheid om aangeleenthede rakende mediese aspekte, byvoorbeeld mediese terminologie en ingewikkelde mediese begrippe, uit te klaar en redes te vind waarom daar verskil word met die opposisie se deskundige getuies.[49]

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46 A 19*bis*(6).
47 1985 1 SA 55 (K) – kopstuk (vgl 68–69).
48 Vgl par 3 hierbo.
49 R 36(9) Wet op die Hooggeregshof; r 24(9) Wet op Landdroshowe.

4 4 Voorverhoor

'n Stap wat ter voorbereiding van die verhoor van wesenlike belang in die verhoorstadium is, is die voorverhoorkonferensie/samespreking/onderhoud wat gebruik word om geskilpunte uit te klaar en wat bygewoon word deur die mediese getuies en regsverteenwoordigers.[50]

Hierdie konferensie word voor die verhoor gehou ten einde die tyd wat die verhoor in beslag kan neem soveel as moontlik te beperk deur sover moontlik die geskilpunte te beperk en uit te lig. Onder andere kan medies-deskundige getuies ooreenkom oor welke aangeleenthede wedersyds erken word en aandui oor welke twispunte getuienis aangebied moet word. Hierdie voorverhoorsamesprekings koop kosbare tyd vir alle betrokkenes en sorg vir groot besparing van gedingskoste.

Hoewel die geskilpunte in die pleitstukke geformuleer word, moet bewerings deur getuienis bewys word. Normaalweg word voorverhoorsamesprekings in die voorverhoorstadium gehou. Niks verhoed die landdroshof egter om in enige stadium van die geregtelike verrigtings na goeddunke, óf uit eie beweging óf op skriftelike versoek van 'n gedingsparty, te gelas dat partye voor hom (die landdros) in kamers moet verskyn vir 'n onderhoud vir doeleindes van voorverhoorsamesprekings nie.[51] Die hoofdoel van dié samesprekings is onder andere vereenvoudiging van die geskilpunte; die noodsaaklikheid of wenslikheid om pleitstukke te wysig; die moontlikheid om erkenning ter vermyding van onnodige bewyse te verkry; die beperking van die aantal deskundige getuies; en alle sake wat die geding spoedig en goedkoop kan afhandel.[52]

'n Versoek deur 'n gedingsparty word deur die klerk van die hof aan 'n regterlike amptenaar voorgelê. Indien laasgenoemde besluit om 'n voorverhoorsamespreking te belê, reik die klerk 'n opdrag uit om 'n voorverhoorsamespreking by te woon.[53] Na afloop van die samesprekings reik die hof 'n bevel uit wat die partye bind, tensy dit by die verhoor gewysig word om 'n klaarblyklike onreg te voorkom.[54] Die bevel handel met die stappe wat by die samespreking gedoen is, wysigings van pleitstukke en ooreenkomste wat gesluit is. Ten opsigte van voorverhoorsamesprekings in die hooggeregshof moet 'n prokureur so gou doenlik na *litis contestatio* en ter rolleplasing of versoek vir 'n verhoordatum, alle ander partye se prokureurs skriftelik versoek om 'n samespreking by te woon op 'n wedersyds geskikte tyd vir doeleindes van inkorting van die verhoor. Die hoofdoel van voorverhoorsamesprekings word baie meer omvattend in die Wet op die Hooggeregshof uiteengesit[55] en sluit die

50 A 54 en r 25 Wet op Landdroshowe; r 37 Wet op die Hooggeregshof; *Briel v Van Zyl; Rolenyathe v Lupton-Smith* 1985 4 SA 163 (T).

51 A 54 Wet op Landdroshowe.

52 A 54(1).

53 R 25(2).

54 A 54(3).

55 R 37(1)(a)(i)–(ix) Wet op die Hooggeregshof; *Papp v Legal & General Assurance Society Ltd* 1966 2 SA 113 (OK); *Techni-Pak Sales (Pty) Ltd v Hall* 1968 3 SA 231 (W); *Santam Versekeringsmaatskappy Bpk v Leibrandt* 1969 1 SA 604 (K); *Wessels v Johannesburg*

vervolg op volgende bladsy

volgende in: erkenning van feite en dokumente;[56] uitwissing van deskundiges se verslag;[57] blootlegging;[58] verskaffing van verdere besonderhede redelikerwys nodig vir verhoordoeleindes;[59] konsolidasie van verhoor;[60] en die *quantum* van skadevergoeding.[61]

Die samesprekings kan te eniger tyd na *litis contestatio* maar voor verhoor gehou word.[62] Selfs voor die verhoor kan die regter die advokate in sy kamers roep om 'n ooreenkoms te probeer verkry oor aangeleenthede waardeur die verhoor verkort kan word.[63] 'n Ondertekende minuut van die verrigtinge, wat aandui dat voorverhoorsamesprekings wel gehou is, word deur die advokate ingehandig.[64]

Hierdie stap ter voorbereiding van die verhoor is seker een van die belangrikste wyses waarop met deskundige getuienis omgegaan kan word omdat dit meer informeel dog meer doeltreffend is as die formele optrede binne die getuiebank.

Indien 'n party weier of versuim om die samesprekings by te woon, kan die hof, sonder om afbreuk te doen aan sy reg van bestraffing weens minagting van die hof, 'n bevel uitvaardig wat hy in die omstandighede billik ag en kan na afloop van die geding die party wat afwesig was, beveel om koste te betaal wat volgens die oordeel van die hof as gevolg van die afwesigheid opgeloop is.[65] Hoewel die hof oor hierdie wye bevoegdheid beskik, kan dit egter geen party verplig om 'n ooreenkoms aan te gaan ten opsigte van 'n aangeleentheid wat by die samesprekings bespreek word nie.

Ten einde die probleem rakende medies-deskundige getuienis en die aanbied daarvan te ondervang, maak regsverteenwoordigers gebruik van die tegniek wat in 'n paar Amerikaanse state gebruik word: die eisers word naamlik toegelaat om in gedinge teen geneeshere gebruik te maak van gesaghebbende medieswetenskaplike werke sonder om op *viva voce* medies-deskundige getuies te steun.[66] Strauss wys tereg daarop dat hierdie tegniek nie waterdig is nie aangesien die bepaling waarop gesteun word so tegnies van aard kan wees dat, sonder *viva voce* medies-deskundige getuies se verduideliking, dit waardeloos sal wees. Voorts wys Strauss tereg daarop dat die teenkant met behulp van mediese getuienis juis kan aandui dat die werke óf foutief óf verouderd is, en hierop kan die eisers nouliks antwoord.[67]

Municipality 1970 3 SA 633 (W); *Peele (Edms) Bpk v Die Administrateur, Oranje Vrystaat* 1982 3 SA 261 (O); *Grasso v Grasso* 1987 1 SA 48 (K); *Lobel v Simmons* 1969 4 SA 537 (W); *Tractor & Excavator Spares (Pty) Ltd v Groenedijk* 1976 4 SA 359 (W).

56 R 37(1)(a)(i) Wet op die Hooggeregshof.

57 R 37(1)(a)(iv).

58 R 37(1)(a)(iii); *Durban City Council v Minister of Justice* 1966 3 SA 529 (D).

59 R 37(1)(a)(v).

60 R 37(1)(a)(vii).

61 R 37(1)(a)(viii).

62 R 37(b).

63 R 37(4).

64 R 37(1)(c) en (3); *Bosman v AA Mutual Insurance Association Ltd* 1977 2 SA 407 (K).

65 A 54(4) Wet op Landdroshowe.

66 Strauss *Doctor, patient and the law* 289 vn 7; Steincipher 1964 *Washington LR* 704 724; Shepperd 1964 *Washington and Lee LR* 212 229.

67 Strauss *Doctor, patient and the law* 282–283.

'n Verdere tegniek wat eweneens in die Verenigde State van Amerika gebruik word, is om geneeshere voor die voet op 'n "mog 't troffe" basis as getuies te dagvaar.[68] Hierdie tegniek is egter geheel en al te riskant aangesien die verhoorpraktisyn heeltemal in die duister is oor die lojaliteit van die medies-deskundige getuie. Dit is in elk geval nie in Suid-Afrika toelaatbaar nie.

Ook Belli se stoomrollertegniek ingevolge waarvan kruisondervraging reeds tydens die blootleggingstadium afgehandel word, is eweneens onbetroubaar.[69] Die onderskeie regsverteenwoordigers sal juis gedurende die blootleggingstadium met die medies-deskundige getuies wil konsulteer oor sekere aangeleenthede voortspruitend uit blootgelegde stukke en uit opsommings deur die opposisie se medies-deskundige getuies wat ook in daardie stadium na vore kom. Om op hierdie blootleggingstadium reeds toe te laat dat 'n gedeelte van die verhoor, naamlik hoof- en kruisondervraging plaasvind, is nie aanvaarbaar nie aangesien geskilpunte juis gedurende die verhoor deur die getuienis weerlê of bewys moet word.

In Amerika word die vereiste dat 'n mediese praktisyn in dieselfde vertakking van die mediese wetenskap moet wees om vir of teen 'n verweerder-geneesheer medies-deskundige getuienis af te lê, verslap.[70] Die verslapping van die prosedurereëls bring nie verligting in die geval waar 'n mediese praktisyn sou weier om as 'n getuie op te tree nie.

Op welke wyse kan die beslegtingsproblematiek moontlik nog die hoof gebied word, met verwysing na metodes buite die hofprosedure self?

(*word vervolg*)

BUTTERWORTHS-PRYS

Dit doen die redaksie genoeë om aan te kondig dat die Butterworths-prys vir die beste eersteling-bydrae van 1995 toegeken is aan:

Christa Roodt

Universiteit van Suid-Afrika

68 *Idem* 282.
69 *Idem* 282 289 vn 3; Belli 1956 *Villa Nova LR* 275 ev.
70 Strauss *Doctor, patient and the law* 283 vn 8; McCoid 1959 *Vanderbilt LR* 615 ev.

The prospects for constitutional litigation in relation to the powers of the central and provincial governments as contained in the interim Constitution, and related issues

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OPSOMMING

Die moontlikheid van konstitusionele gedingvoering oor die magte van die sentrale en provinsiale regerings soos vervat in die tussentydse Grondwet, en verwante aangeleenthede

Twee kritieke aspekte van die tussentydse Grondwet kan konstitusionele litigasie ontketen. Die eerste hou verband met fundamentele regte soos vervat in hoofstuk 3. Die tweede raak die afbakening van magte tussen die provinsies en die sentrale regering. Hierdie artikel handel oor laasgenoemde en verbandhoudende aangeleenthede.

Provinsiale regering is 'n aspek van die nuwe konstitusionele bedeling. 'n Kommissie oor streeksafbakening is aangestel om aanbevelings te maak oor hoe Suid-Afrika in provinsies verdeel moet word. Die afbakening van magte tussen die sentrale regering en die provinsies was een van die mees kontroversiële aangeleenthede wat by die Onderhandelingsraad besleg moes word. Ten einde die omvang van die bevoegdhede van die sentrale regering te bepaal, is dit nodig om die bevoegdhede en status te ontleed wat aan die provinsies in die tussentydse Grondwet toegestaan is, en dit te vergelyk met die situasie in ander saamgestelde state, soos die Verenigde State van Amerika, Kanada en Australië.

In die VSA was die kwessie van staatlike regte 'n vrugbare bron van konstitusionele litigasie, veral die uitleg wat aan die sogenaamde "kommersiële klousule" in die Amerikaanse Grondwet geheg is. Artikel 126(3) van die tussentydse Grondwet stem ooreen met die Amerikaanse tussenstaatlike kommersiële klousule. Eersgenoemde kom egter meer uitgebreid as sy Amerikaanse eweknie voor, en kan daarom in die toekoms tot baie konstitusionele litigasie aanleiding gee.

Die Amerikaanse regspraak wat met die kommersiële klousule verband hou, is interessant en goed ontwikkel, maar dit moet met 'n mate van versigtigheid benader word. Die Suid-Afrikaanse regs-, politieke en sosio-ekonomiese konteks verskil grootliks van die van die Verenigde State. Die wyse waarop Amerikaanse juriste daarna streef om die probleme aan te spreek, is daarom belangriker as die uitsprake in spesifieke sake. In die besonder kan die menings van juriste oor teenstrydige beleidsbesluite van groot nut wees. Dit geld ook ten aansien van gelykluidende beslissings in Kanada, Australië, Indië en die Duitse Federale Republiek.

INTRODUCTION

Provincial government[1] is a seminal aspect of the new constitutional dispensation. A commission on regional demarcation was appointed[2] to recommend how South Africa should be divided into provinces. The latter term was decided on instead of either "region" or "state". The demarcation of powers between the central government and the provinces was one of the most controversial of issues to be negotiated at the Negotiation Council. In order to assess the extent of the powers of the central government it is necessary to analyse the powers and status accorded to the provinces in the interim Constitution.[3] Initially, the ANC desired a completely unitary state and the National Party Government advocated a federal dispensation. Inkatha, while professing allegiance to federalism, actually put forward proposals that virtually amounted to the secession of Natal/KwaZulu, and the Conservative Party demanded a confederal system.[4] It was this issue that contributed to the departure of Inkatha, the Conservative Party and the Freedom Alliance from the Multi-Party Negotiation Process at the World Trade Centre.

THE MERITS OF FEDERAL GOVERNMENT

A cogent argument for federation is that it tends to facilitate and foster democracy.[5] By devolving power to states or provinces government must, particularly in a vast country like the USA, become more accessible and therefore more accountable. The citizens of a country can also more easily influence and identify with a unit of government that is smaller and located in a centre closer to them. Federal government by its very nature accommodates and promotes diversity of culture, religion and language. Different patterns of economic and social activities emerge in a federation which are able to meet the needs of a heterogeneous community and the preferences it precipitates. From this flows the prospects of creative experimentation with different and innovative policies to meet the needs of citizens in a particular region. As Mureinik perceptively observes,[6] federations energise the democratic process by making it possible for "a cause lost in one [region] to be carried in another". This promotes and sustains public awareness and involvement in crucial debates relating to the economy and public policy. A federal system requires authentic autonomy, involving not merely the structures of provincial government, but effective self-government, which in turn requires fiscal and financial viability. According to Ardington "[g]overnment should be more transparent, accountable and relevant; federal structures improve the prospect of achieving this".[7]

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1 S 125 *et seq.*

2 *Report of Commission on Demarcation/Delimitation of SPRs* 1993-07-31. See *Race Relations Survey* 1993/1994 546 *et seq.*

3 Constitution of the Republic of South Africa Act 200 of 1993.

4 Ellmann "Federalism awry: the structure of government in the KwaZulu/Natal Constitution" 1993 *SAJHR* 165.

5 See Mureinik "How federal is this deal?" *The Star* 1993-11-05.

6 *Ibid.*

7 Ardington "Economic realities and the present constitutional proposals" in *Natal/KwaZulu Forum* 1994-02-24 26.

The advocates of federalism point out that it has been used as a means to unify multi-ethnic nations. In the states of post-colonial Africa and Asia, therefore, federal principles have been used to accommodate ethnic and linguistic diversity. These include India, Malaysia, Nigeria and the Cameroons.

Federalism as a manifestation of constitutionalism does, however, require a considerable measure of political tolerance and a profound sense of responsibility. Federalism is not merely a legalistic notion, but it has, according to Livingstone,[8] a sociological dimension, in that its inherent ideas and nature reside in the society itself with its cultural, religious, geographical and economic diversity.

A federal system is obviously more expensive than a unitary state. Because it involves a multiplication of functions at provincial level, it increases the possibility of corruption.

THE MERIT OF A UNITARY STATE AND THE DISADVANTAGES OF FEDERALISM

The protagonists of unitary government argue that South Africa requires a process of economic and social reconstruction, with a powerful central administration that will be able effectively to co-ordinate its policies in a way that is not hampered by regional idiosyncrasies. The essence of their argument is that what South Africa so urgently requires is a process of nation building and that federalism will exacerbate ethnic and racial divisions in South Africa, which could precipitate movements towards secession.

Furthermore, political parties that have members who are strongly inclined to radical political and economic ideology that has as its principle tenet central planning, will obviously favour a strong unitary government.

PROVINCIAL DEMARCATION

It was ultimately decided that South Africa was to be divided into nine provinces.[9] Provision has, however, been made for the holding of a referendum in designated magisterial areas on the question whether these areas desire to be incorporated into another province.[10] Each of the provinces will have its own legislative and executive authorities. The first amendment to the interim Constitution provides that provinces may adopt constitutions in terms of which legislative and executive structures and procedures may differ from those provided for in the interim Constitution.[11]

THE VOLKSTAAT

Provision has also been made for the establishment of a Volkstaat Council in a newly inserted chapter 11A of the interim Constitution.[12] Such a "Volkstaat"

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8 Livingstone "A note on federalism" in Meekinsin *Canadian federalism: myth or reality* (1968) 20–29.

9 These are Eastern Cape, Mpumalanga (formerly Eastern Transvaal), Kwa-Zulu/Natal, Northern Cape, Northern Province (formerly Northern Transvaal), North-Western Province, Free State, Gauteng (formerly Pretoria-Witwatersrand-Vereeniging) and Western Cape.

10 See Schedule 1, which defines the provinces in terms of magisterial districts.

11 S 160(3).

12 S 184A (ch 11A).

could either be completely independent, (which appears at this juncture to be unlikely[13]) or, more probably, a manifestation of corporate federalism within an overarching federal or quasi-federal structure. In such a case the federal unit or units are not territorially bound, so that what actually occurs is that various groups or communities that inhabit the same region attend to their own domestic interests in accordance with "the subsidiary principle, but naturally co-operate with each other on matters of common concern".[14] This approach was conceived and practised in the erstwhile Austro-Hungarian Empire, where a constitutional and political solution had to be found to enable divergent cultural and religious groups such as Czechs, Germans, Hungarians, and Slovaks to co-exist. The eminent political philosopher Friedrich argued as follows in this regard:

> "Altogether the most important argument for corporate federalism is that it does away with the entire problem of territorial districting which can then be tackled as a strictly administrative problem without attention having to be given to the complicating issues of population distribution and its cultural and linguistic requirements and aspirations."

Corporate federalism is, however, no panacea, though it may provide a means of accommodating the passionate desire for a Volkstaat, and the Volkstaat Council provides the opportunity to investigate the political feasibility of the idea. A contemporary example of corporate federalism is found in Belgium. In this regard Bognador,[15] in comparing Switzerland with Belgium, observes:

> "The Swiss Confederation is based upon cantons, upon territory – it is a territorial state, not, as with Belgium, a state based on religion."

The Constitution of the Republic of Ireland also reflects corporate federalism, where culture replaces territory as the institutional basis. In sections 3 and 59 of the Constitution of Belgium, provision is made for cultural councils that control certain functions and activities of the Dutch, French and German communities that occupy Belgium.[16] This is a manifestation of "person-orientated units"[17] which is closely related to corporate federalism.

The interim Constitution of South Africa,[18] as will be explained below, provides for a quasi-federal system of government that may ultimately be complemented by corporate federalism.

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13 In this regard the so-called Israeli option is sometimes mentioned, in terms of which a designated territory would be set aside. Persons favourably disposed to the Volkstaat ideal could "emigrate" to that territory so that within a certain period of time (say five or ten years) there would be a majority of such persons, which would allow a democratic Volkstaat to be set up. In such a state, Afrikaner Volkstaters would be in the majority, but they would not discriminate against other persons within the boundaries of the Volkstaat. They would use their majority to run the state, which would be politically but not economically independent of the rest of South Africa, along Afrikaner Christian-national lines. Cf comments made by Dr F Hartzenberg that the Volkstaat would come into operation within the next two years while the new Constitution was being finalised. See *Natal Mercury* 1994-06-01 "AVF leader confident of volkstaat success".

14 Kriek, Kotze, Labuschagne, Mtimkulu and O'Malley *Federalism* (1993) 22.

15 *Federalism in Switzerland* (1988) 75.

16 Kriek *et al* 24.

17 *Idem* 23.

18 Constitution of the Republic of South Africa Act 200 of 1993.

THE POWERS AND FUNCTIONS OF THE CENTRAL AND PROVINCIAL GOVERNMENTS

As indicated above, one of the most contentious debates and deliberations relating to the Constitution revolved around whether South Africa should have a federal or unitary system of government. On this cardinal issue a compromise was to emerge in the form of a quasi-federal constitution. The Constitution provides for provincial legislatures and governments to be headed by premiers for nine provinces. The most significant exclusive powers and functions of the central government will relate to: defence; foreign affairs; finance and taxation policy; economic policy; and communications.

The topics over which the provincial governments will exercise power are: agriculture; casinos, racing, gambling and wagering; cultural affairs; education at all levels, excluding university and technikon education; environment; health services; housing; language policy and the regulation of the use of official languages within a province, subject to section 3; local government, subject to the provisions of chapter 10; nature conservation, excluding national parks, national botanical gardens and marine resources; police, subject to chapter 14; public transport; regional planning and development; road traffic regulation; roads; tourism, trade and industrial promotion; traditional authorities; urban and rural development; and welfare services.

In addition to those above, the first amendment[19] to the 1993 Constitution added the following: abattoirs, airports, other than international and national airports, animal control and diseases, consumer protection, indigenous and customary law, markets and pounds, provincial sport and recreation, and soil conservation.

The provinces will have limited powers of taxation.[20] An amendment to the Constitution increased the financial and fiscal powers of the provinces in effect to give them greater provincial powers.[21] If the units of a composite state possess the residual power, their right to tax is greatly enhanced. Under the interim Constitution the residual powers vest in the central government, which places the provinces in a position of dependence on the central government.

Federations and quasi-federations are unified states and their units, whether designated as provinces, regions or states operate within such unified states. There are obviously constitutional limitations on the powers of such units, the most obvious of which is the power granted to the central government. Another is the territorial limitations on state power. Thus the legislative power of the units is intraterritorial, that is, they operate within the territorial borders of the units. Their powers cannot in general have extraterritorial effect, as the central government may. This is the position in the United States of America, Australia, Canada and India[22] and is an issue that is likely to arise in South Africa under the interim Constitution. In the USA the American Supreme Court held that the

19 S 14 Act 2 of 1994.
20 Discussed in greater detail below.
21 S 155.
22 See Antieau *States' rights under federal constitutions* (1984) 5–8.

legislature of the state of Virginia could not prevent abortion advertisements in Virginia newspapers when the abortion was to be performed in New York where it was legal.[23]

ASSESSMENT OF THE INTERIM CONSTITUTION: UNITARY STATE, FEDERATION OR QUASI-FEDERATION

In assessing the extent to which the Constitution is federal, it is important to note that it enumerates the powers allocated to the regions, and reserves the remainder, namely those not specifically allocated, to the national government. The provinces have been given significant powers such as agriculture, health, housing, primary and secondary education. However, the constitutional mechanism adopted by strong federations is to employ the opposite technique. They allocate the powers to the national government and reserve the remainder for the units. In the greatest federation in the world, namely the United States of America, the legislatures of the states, which have residual law-making powers, are able to legislate on all of the great moral and social issues of the contemporary world such as abortion, euthanasia, capital punishment and pornography. The 10th Amendment to the American Constitution stipulates, *inter alia*:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

With the exception of Canada,[24] the powers of the central government in federal states such as the USA, Australia and Switzerland are defined and enumerated in the Constitution, while the residual powers and functions are left to units making up the federation.[25] This is of very considerable constitutional significance because according to the eminent and erudite Oxford scholar and writer, Sir Kenneth Wheare,[26] a constitutional entity cannot be regarded an authentically federal if the residual powers are left to the central government. Wheare therefore refers to the Canadian Constitution as "quasi-federal".[27] He does, however, make the following perceptive observation, namely that the law of the constitution is one thing; the practice is another and therefore "although Canada has not a federal constitution, it has a federal government".[28] Hogg[29] makes the following observation about Wheare's classification of Canada as quasi-federal:

> "This judgment is fully justified by a literal reading of the terms of the Constitution. However, the subsequent development of the case law, convention and practice has virtually eliminated the elements of provincial subordination in the Constitution."

Wheare also classifies the 1949 Bonn Constitution of the erstwhile West Germany as quasi-federal in nature for different reasons, although the residual powers vest in the *Laender*. The Canadian political and constitutional experience could very well repeat itself with the interim Constitution and although the latter

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23 *Bigelow v Virginia* 339 US 643 (1950).
24 This also applies to India, Nigeria and Malaysia (see Antieau 3).
25 See Kriek *et al* 43.
26 *Federal government* (1963) 11.
27 *Idem* 18–20.
28 *Idem* 19–20.
29 *Constitutional law of Canada* (1992) 110.

does not constitute a genuine federation in theory, it could in practice produce federal government.

It must, however, be pointed out that Wheare's definition of and approach to federalism are considered to be legalistic.[30] Riker, for instance, observes that the lowest common denominator for federalism is that "all that the principle of federalism requires is that there be a *division of powers* and some *guarantee of the autonomy* of each government in its own sphere".[31] Federal governments differ markedly from one another. Canada and Austria are considered to be centralised federations in practice, in contrast with the USA, Australia, West Germany and Switzerland, which are considered to be decentralised federations.[32]

Much will depend on how the Constitutional Court interprets and applies the override provisions contained in section 126 which are discussed below. A restrictive interpretation of these provisions will favour a more federal dispensation. The reason for this is that, whatever the constitutional division of powers in a federal or quasi-federal state may be, it is inevitable that disputes about the division of power will occur and that the final word in this regard vests in the Constitutional Court. In the USA this task is performed by the celebrated Supreme Court, whereas in Canada and Australia it is performed by the Supreme Court of Canada and the High Court of Australia respectively.

In a federal or quasi-federal system, the constitution is in effect a contract which incorporates and symbolises the sovereign authority of a unified state.[33] Two levels of authority are created that are co-ordinate, but sovereignty is not divided between the two levels; rather, it

> "vests at all times in the constitution as the legal sovereign by means of which provision is made for the execution of all constitutional functions by various levels of authority, and the upholding of internal and external sovereignty".[34]

THE AMERICAN FEDERAL PARADIGM

The American federal constitutional experience furnishes some idea of the issues that our Constitutional Court could be confronted with in regard to the issue of the geographical division of powers. Section 4 of the United States Constitution, known as the supremacy clause, sets out the exclusive powers of the central government such as the declaration and waging of war, the conclusion of peace, control over interstate and foreign trade, the levying and control of taxes, exclusive money control, including the minting of money, regulating its value, and foreign exchange rates, naturalisation, patents and copyrights, and the maintenance of the supreme court and federal courts.

Judicial interpretation of the Constitution has, however, led to the extension of the powers and functions of the central government. Thus Chief Justice John

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30 Livingstone in Meekinsin 20–29.
31 Riker *Federalism, origin and operation* (1964) 11.
32 O'Malley "The role and functions of courts and other arbitrators in federations" in Kriek *et al* 85.
33 Wessels "The division of powers in a federation" in Kriek *et al* 42.
34 *Ibid.*

Marshall in the celebrated judgment of *McCulloch v Maryland*,[35] using teleological interpretation, enabled the central government to address changing circumstances through judicial construction of the Constitution. In this regard he commented: "Let the end be legitimate ... let it be within the scope of the constitution." The Supreme Court, using its power of interpretation, has ruled that the central government not only has enumerated powers but also has implied and inherent powers. These implied powers are derived from the trilogy of constitutionally enumerated powers, namely the "war powers clause", the "commerce clause" and the "tax and spending clause".

It has been through the extended interpretation of the war powers clause that the American federal government has been able to legislate in the field of scientific knowledge and research, and manufacturing. The commerce clause has been interpreted to justify legislation relating to the production, buying and transporting of goods.[36]

Federal government is not a panacea. The problematic nature of the American federal system is apparent from the political and constitutional saga that arose from President Roosevelt's endeavour to employ federal powers to alleviate the consequences that flowed from the economic depression of the nineteen thirties.[37] The President wished to use the considerable resources of the whole American society and nation to relieve distress in certain specific states which were incapable of coping with the situation on their own. As a consequence he prevailed on Congress to legislate for, *inter alia*, central control of money and credit, the nationwide regulation of agriculture, national industrial recovery and social security. These measures precipitated an avalanche of sustained and acrimonious opposition and criticism by persons who objected to the inordinate expenditure of the public funds involved and to the infringement of personal and economic liberty necessitated by policies of social democracy and to consequent violations of state rights.

The American executive relied on its constitutional responsibility for the well-being of the nation by virtue of Congress's right to tax and regulate inter-state trade. However, the conservative judges of the United States Supreme Court of the time (the late nineteen thirties) declared invalid the whole of the Agricultural Adjustment Act on the ground that it violated the rights of individual states. The National Industrial Recovery Act was also subsequently declared unconstitutional, thereby causing an unprecedented constitutional crisis, which was to be eclipsed only by the demands of the Second World War, which required a far more compelling concentration of national resources. This episode of American constitutional history illustrates that excessive state rights can indeed be counterproductive. All things considered, it may be asked whether the Canadian quasi-federal paradigm, which involves an asymmetrical relationship between the central government and the provinces, is a more appropriate one for South Africa. This is a matter that requires very careful research and deliberation in regard to the final constitution which is to be devised by the Constitutional Assembly.

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35 17 US 316 (1819).

36 Kriek *et al* 45.

37 Strong *Modern political constitutions* (1973) 95–96.

CONCURRENT POWERS OF THE PROVINCES AND OVERRIDING POWERS OF THE CENTRAL GOVERNMENT IN THE INTERIM CONSTITUTION

Schedule 6 of the Constitution contains a list of the legislative competences of the provinces. These important areas of government and social services will be the subject of concurrent competence between the provinces and Parliament in terms of section 126 which reads:

> "A provincial legislature shall be competent, subject to subsections (3) and (4) to make laws for the province with regard to all matters which fall within the functional areas specified in Schedule 6."

This provision is qualified by subsections (3) and (4). The former states that an Act of Parliament which deals with a schedule 6 matter shall prevail over a provincial law which is inconsistent with the Act in certain circumstances. The latter states that the Act of Parliament will prevail over the provincial legislation only if it applies uniformly in all parts of South Africa.

Thus in terms of the interim Constitution, the provinces' legislative powers can under specified circumstances be overridden by an Act of the national Parliament in accordance with somewhat vague and broad criteria that will have to be interpreted and applied by the Constitutional Court, but which certainly appear to favour Parliament. Much will depend on the approach adopted by the judges of the Constitutional Court and their inclinations in regard to the merits of federalism as a political philosophy. In all probability the judges will endeavour to find a *via media* and some form of quasi-federalism will emerge from the jurisprudence of the Constitutional Court.

The interim Constitution does not create a conventional federation, nor is it manifestly a unitary state, but its exact configuration is somewhere between the two. Indeed it is a *via media*, the nature of which will only become clearer when the system is put into operation and the uncertainty resolved by the Constitutional Court. The role of the Constitutional Court will be crucial in this regard and will most certainly not be purely jurisprudential but quasi-political. In the interpretation of vague and broad provisions of the interim Constitution it is submitted that the court will, particularly in regard to very contentious and sensitive issues, endeavour to reach decisions which reflect a compromise. In this way the members of the court will be acting as philosopher kings and attempting to give wise decisions that promote the process of national reconciliation and healing in South Africa. In a broad sense this would amount to a political role.

In general, a law passed by a provincial legislature prevails over an Act of Parliament which deals with matters referred to in section 126(1) and (2). An Act of Parliament will therefore prevail over or override a provincial statute only to the extent that[38]

(a) the Act of Parliament deals with a matter that cannot be regulated effectively by provincial legislation;

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38 S 126(3).

(b) the Act of Parliament deals with a matter which, to be performed effectively, requires to be regulated or co-ordinated by uniform norms and standards that apply generally throughout the Republic;

(c) the Act of Parliament is necessary to set minimum standards across the nation for the rendering of public services;

(d) the Act of Parliament is necessary for the determination of national economic policies, the maintenance of economic unity, the protection of the environment, the promotion of inter-provincial commerce, the protection of the common market in respect of mobility in goods, services, capital or labour or the maintenance of national security; or

(e) the provincial law materially prejudices the economic, health or security interests of another province or the country as a whole.

The Constitutional Court will have to interpret the above conditions under which parliamentary law will prevail over provincial law. Mervyn Frost, using an apt South African metaphor, has described (d) above as "a drift wide enough to drive an ox-wagon through".[39] This manifestly weights the Constitution in favour of the central government.[40] However, this does not mean that Parliament will be able to override provincial statutes in an arbitrary way or with impunity. Parliament can, however, set national norms and standards, or make provinces conform to national economic policies. A provincial law can also be overridden by a national law if it materially prejudices the economic, health or security interests of the country or another province. At this stage what emerges from the Constitution is a quasi-federal system of government.

An Act of Parliament and a provincial law must be construed as being consistent with each other, unless, and only to the extent that they are, expressly or by necessary implication, inconsistent.[41] This is in accordance with the common law position.[42] Furthermore, a provincial legislature may recommend to Parliament the passing of any law relating to any matter in respect of which such legislature is not competent to make laws or in respect of which an Act of Parliament prevails over a provincial law in terms of the Constitution.

The provincial governments will be able to decide on the area of political and administrative activity within which they wish to operate as long as these fall within the ambit of the powers enumerated by section 126. This means that these governments will, in accordance with the principle of subsidiarity,[43] allocate to themselves the powers that they consider they are politically and administratively competent to handle. In all probability KwaZulu/Natal and the Western Cape will claim and operate as many powers as possible, whereas others, like the Northern Cape and the Northern Province, which have infrastructural lacunae, may choose to leave some of their areas of activity and competence, at least for a

39 See Lawrence "Provincial government quo vadis" *The Star* 1994-05-13.
40 *Ibid.*
41 S 126(5).
42 See Devenish *Interpretation of statutes* (1992) 279.
43 See Louw "A political vacuum in the first 100 days" *Weekly Mail* 1994-05-06–12.

certain time with the central government. Constitutional litigation is obviously likely to occur with the former category of provinces. What is likely to emerge is an asymmetrical[44] federation or quasi-federation, in which the powers and functions of the provinces will differ from one another depending on political and administrative considerations. Kruger[45] has predicted that most of the provinces will haul in as many powers as possible, despite the fact that most of the provinces will be dominated by the ANC. He explained the reason for such action as follows: "It is in the nature of politics that politicians want as much power as possible. This will ensure that federalism takes root." In response, a source in the Transitional Executive Council[46] predicted that the new central government will become "a vacuum-cleaner sucking up every possible power".[47] There is likely to be controversy about the interpretation of the competences listed in schedule 6 and the demarcation or division of these competences between the provinces and the central government.[48]

THE DISTRIBUTION OF FINANCES BETWEEN THE PROVINCES AND THE CENTRAL GOVERNMENT

This important matter is dealt with in section 155. Each province will be entitled to an equitable share of the national revenue to enable it to perform its provincial powers and functions.[49] As a result, provincial legislature will be entitled to claim part of the income tax and VAT or other sales tax generated in its province, and other conditional or unconditional allocations out of the national revenue,[50] but Parliament will set the amount, taking into account the national interest and balancing the needs of a particular province against those of the others. This will also be done taking into account the recommendations of the Financial and Fiscal Commission.[51]

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44 This is clear from the amendment to s 160 of the Constitution by Act 3 of 1994 which provides for the substitution for the proviso to subs (3) by the following proviso: "Provided that a provincial constitution may–

(a) provide for legislative and executive structures and procedures different from those provided for in this Constitution in respect of a province; and

(b) where applicable, provide for the institution, role, authority and the status of a traditional monarch in the province, and shall make such provision for the Zulu Monarch in the case of the province of KwaZulu/Natal." In addition schedule 4 to the Constitution has also been amended by the addition of the following paragraph to constitutional principle XIII: "Provisions in a provincial constitution relating to the institution, role, authority and status of a traditional monarch shall be recognised and protected in the (final) Constitution."

45 As quoted in the *Weekly Mail* 1994-05-06–12.

46 *Ibid.*

47 Cf Lawrence *The Star* 1994-05-13: "Unless the provincial premiers actively champion regional interests, the probabilities are strong that South Africa will again witness the decline and fall of provincial governments."

48 See statement by Deputy Minister Valli Moosa as reported in *Weekend Star* 1994-06-04–05: "Provinces have no powers to govern."

49 S 155(1).

50 S 155(2).

51 S 155(4).

It is clear that section 155 makes provision for and anticipates a redistribution of finances[52] from more affluent to less affluent provinces. This is both politically and economically sound, but may in practice prove to be controversial. In this regard the Financial and Fiscal Commission will play a fundamentally important role "in securing fair treatment between provinces, and between the centre and the provinces, by ensuring that the centre does not victimize regionally successful political opponents".[53] However, it is not inconceivable that the central government could "pack" or be perceived to "pack" the Financial and Fiscal Commission with economists favourable to its viewpoint. If this were to occur, and the commission were to give decisions or be perceived as giving decisions favourable to central government, which a provincial government disapproved of, would the matter be justiciable? Consider the following hypothetical case relating to the interpretation and application of section 155: The province of KwaZulu/Natal is at loggerheads with central government in regard to the allocation of revenue to the province. The former has evidence to support its claim that it is being considerably under-funded in comparison with certain of the poorer ANC-controlled provinces. *Per capita* spending in some of the provinces is indeed more than that for Natal. The central government's response is that those provinces and their people are much poorer than the people of Natal. What is the response of the Constitutional Court likely to be? Is this not essentially a political question[54] that the courts should not get involved in or is it in fact a matter involving the principles of administrative law and therefore indeed justiciable?

In addition, the provinces have limited powers in regard to the levying of taxes other than income tax or VAT referred to in section 156(2)(a) or (b). There are, however, two provisos in this regard:

(a) The tax must be authorised by an Act of Parliament after recommendations of the Financial and Fiscal Commission; and

(b) it may not involve discrimination against non-residents of the province who are South African citizens.

In addition, a provincial legislature may not levy taxes in a way that detrimentally affects national policies, inter-provincial commerce or the national mobility of goods, services, capital and labour. This is a provision that could indeed give rise to constitutional litigation. The Constitution makes it possible for a province to raise loans subject to certain stipulated conditions.[55] Provincial revenue funds are to be established into which all provincial revenue must be paid.[56] Revenue allocations to both provincial or local government must be made through a parliamentary appropriation act.

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52 This is clear from the term "economic disparity within and between provinces" used in s 155(4)(b).

53 Ardington *Natal/KwaZulu Forum* 1994-02-24–28.

54 369 US 186 (1962); cf Hogg 804.

55 S 157.

56 S 159.

Provincial authorities will be able to levy taxes or surcharges over and above national income tax and VAT imposed by the central government. It will, however, not be allowed to do this in a way that is detrimental to national policies, inter-provincial commerce or the national mobility of goods, services, capital and labour. Furthermore, taxes and levies may not discriminate against non-residents of that province who are South African citizens. What is not clear, is whether the provinces will be competent in terms of provincial legislation to treat their residents preferentially in regard to user charges, taxes surcharges and levies. Consider the following hypothetical example. A large deposit of oil is discovered in the Northern Cape. A provincial statute of this province requires that residents of the province, in which there is the highest rate of unemployment in the country, be given preference in regard to unskilled work in regard to all employment resulting from the exploitation of the oil deposit. This legislation is in conflict with a parliamentary act which prohibits such preferential treatment. It is not clear whether the Constitutional Court would invalidate the provincial statute by invoking section 126(d) or (e). The American case of *Hicklin v Orbeck*,[57] which is to some extent analogous, could provide some guidance. In this regard the Supreme Court struck down the Alaska Hire Statute which required that qualified residents be given preference in all employment resulting from oil and gas leases or pipeline projects to which the state of Alaska was a party. This state was patently exploiting its natural resources and doing so in a way that could not be entirely explained as a means of helping local unemployed persons.

The American Supreme Court[58] has however recognised that in some areas of activity the states are indeed entitled to reserve their natural resources or goods and services which they have created themselves. This, for instance, would cover public libraries, public schools, state universities, state supported hospitals and public welfare programmes.

When the units of a federation are too dependent on the central government for financial or other resources, this gives rise to greater unitary government but can precipitate "separatist movements".[59] Financial autonomy for the participating states is a matter of crucial importance. In all federations there is inevitably economic diversity and the units are not financially and economically the same. It is necessary, therefore, that the poorer states must be supported and indeed subsidised by those that are more affluent.

The restraints on provincial taxation and revenue will of necessity inhibit provincial governments from expanding ambitiously the operation of provincial autonomy and the cause of federalism. However, the election has brought to power two premiers in the provinces who are not members of the ANC. It is likely that both Mr Kriel and Dr Mdlalose will promote the cause of strong provincial autonomy in the Western Cape and KwaZulu/Natal respectively. This

57 437 US 518 (1978).

58 See Tribe *American constitutional law* 539 as quoted by Woker in her paper "The impact of the new Constitution on business law" unpublished paper presented at the course on constitutional litigation at the University of Natal (Durban) 1994-05-25.

59 Kriek *et al* 30.

may also be the approach of strong and ambitious ANC premiers in certain provinces, such as Tokyo Sexwale (Gauteng), Patrick Lekota (Free State) and Popo Molefe (North West).[60] The ANC's Reconstruction and Development Programme could result in the powers of the provinces being curtailed in order to ensure that the plan is uniformly and effectively implemented and that the governments of the Western Cape and KwaZulu/Natal do not frustrate it.[61]

The federal nature of a constitution and fiscal arrangements are inextricably intertwined. As Simon Barber observes,[62] the Constitution is not an intentionally federalist document, but ironically it is unintentionally a federalising one. Forced to fight for their slice of limited pie, the provinces will demand ever greater revenues and raise their own loans.

PROVINCIAL CONSTITUTIONS[63] AND RELATED MATTERS

By means of a resolution of a majority of at least two-thirds of all its members, the provincial legislatures will be entitled to draft and adopt their own constitutions, which will have to be compatible with the interim national Constitution and the Constitutional Principles set out in schedule 4. This must be certified by the Constitutional Court,[64] whose decision is final and binding and no other court of law has jurisdiction to enquire into or pronounce upon the validity of such a text or any of its provisions.[65] The second amendment[66] to the interim Constitution made provision for the recognition of the Zulu monarch in both the provincial Constitution of KwaZulu/Natal and the interim Constitution, thereby creating an asymmetrical federation or quasi-federation.

The development of a system of provincial government is likely to receive priority attention from the Constitutional Assembly. In this regard it must take into account the recommendations of the Commission on Provincial Government.[67] This commission is established in terms of section 163, with the purpose of advising and making recommendations on various aspects of provincial government. These recommendations must include draft provisions for inclusion in the new constitutional text. The fate of these will depend on the deliberations and the decisions of the Constitutional Assembly.[68]

In terms of section 162, a provincial government may at its discretion at any time after the commencement of a provincial constitution, petition the Constitutional Assembly to dissolve its provincial legislature and call an election for the establishment of a new provincial legislature and executive authority in the province concerned.

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60 See Barber "Power to the provinces" *Sunday Times* 1994-05-08. Barber says that although South Africa's is not a federal constitution the provinces are going to be where the power lies.
61 See Sherrocks: "IFP looking for leeway" *Sunday Tribune* 1994-05-15.
62 *Sunday Times* 1994-05-08.
63 S 160.
64 S 160.
65 S 160(5).
66 Act 3 of 1994.
67 S 161(1).
68 S 161(3).

THE ROLE OF THE COURTS

The role of the judiciary as the interpreter of the Constitution and guardian of the constitutional order is of seminal significance in a rigid quasi-federal constitution. The interim Constitution assigns powers to both the central and regional levels of government and the courts must arbitrate as the final referee in the constitutional order[69] in the event of an alleged trespass of authority of the jurisdiction of another. The constitutional law in such a dispensation must of necessity have strong political elements.[70] Judicial review by its very nature involves a manifestly political role on the part of the courts. Thus the courts within federal systems are involved in policy-making.[71] In America, judicial power has developed into "a central component of the American concept of federalism".[72] In South Africa, judicial power is likely to increase very considerably as a result of the role of the courts as the watchdog of the Constitution. The interim Constitution involves a shift of power from the legislature to the judiciary by virtue of the stipulation in section 4 that the Constitution is supreme. In effect this gives rise to judicial supremacy as opposed to the legislative supremacy inherent in the Westminster paradigm.

The essential function of the courts within federations is the resolution of disputes concerning the division of power between the levels of government in terms of the Constitution, which flows from the contractual nature inherent in the federal paradigm which requires a special procedure for amendment of the Constitution that protects both the central authority and regional entities.

It is the judicial interpretation of a constitution that determines its ultimate nature. Thus although the Canadian Constitution is theoretically quasi-federal, "judicial interpretation ... has made it approach the American model".[73] The role of the courts is, however, not without controversy. The exercise of judicial review by non-elective and appointed judges is construed as undemocratic, particularly when their judgments reflect policy choices.[74]

THE COMMERCE CLAUSE

The interim Constitution and the regulation of trade and commerce

Schedule 6 *inter alia* enumerates the following items that have an important bearing on trade and commerce as falling within the legislative competence of the provinces: Trade and industrial promotion; tourism; consumer protection; markets and pounds; environment; roads; road traffic regulations; public transport; and environment.

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69 McWhinney *Comparative federalism: states' rights and national power* (1962) 19–35.
70 Kriek *et al* 84.
71 *Idem* 91.
72 *Idem* 87.
73 *Idem* 91.
74 O'Malley in Kriek *et al* 93: "Others argue that the exercise of judicial review by non-elected and often unrepresentative judges contradicts democratic principles and that such powers should be exercised by elected representatives. The latter are thought preferable for making political, policy-making decisions."

Section 126 of the Constitution deals with the relationship between Parliament and the legislature of the nine provinces as explained above. Since items (d) and (e) of section 126 set out above are in effect the South African equivalent of the American commerce clause, the American precedents may be able to provide some guidance. The legal and political background to these precedents needs to be considered.

Analysis of the "commerce clause" in the USA

Historical introduction

In the United States of America the residual power vests in the states. It was this consideration that necessitated the so-called commerce clause. This clause reads (a 1, section 8) as follows: "The Congress shall have power ... To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes . . ."

However, even where the residual power is not in the states but in the central government, the states or provinces of a unified but composite state, generally by constitutional grant, possess adequate power to regulate state and local trade and commerce. In Australia and Argentina the states and provinces have broad powers to control local trade.[75] The legal history and consequences of the commerce clause in the United States can give us some idea of the kind of problems that can arise as far as conflicts between the central government and the provinces about commercial and trade legislation are concerned.

The interim Constitution provides for nine provinces, each with its own legislatures, that will legislate in terms of their own constitutions and that of the national Constitution. However, unlike the United States Constitution, the interim Constitution of South Africa has in broad and somewhat vague terms set out the areas of jurisdiction when an Act of Parliament will override provincial law. One of those areas is inter-provincial commerce and the protection of the common market. The broad and vague terms of section 126(3)(d) and (e) lend themselves to judicial review and interpretation by the Constitutional Court.[76]

Inter-state commerce is found whenever persons, goods or communications actually cross state or provincial boundaries. Since there are going to be nine provinces in terms of the interim Constitution, instead of the four that have existed since 1910, there will be many more boundaries for goods and persons to cross, and in the post-apartheid political era of reconstruction there is likely to be a vast increase in trade and commercial activity.

In federal countries, and it is assumed that the interim Constitution will at the very least produce a quasi-federal constitution, it is accepted that there is an important political and economic interest in the freedom of movement of both persons and goods throughout the entire nation. This is essential to promote economic growth and political stability. However, federal or quasi-federal systems involve a degree of autonomy and it is necessary for the courts to

75 Antieau 61.
76 Woker *supra*.

balance the manifestations of autonomy reflected in legislation relating to trade and commerce with the overall freedom of movement and persons throughout the unified state.

The underlying purpose of the commerce clause in the United States Constitution was the avoidance of state customs barriers and other economic barriers which spawn trade rivalries and precipitate economic retaliation. The Constitution deliberately "was framed upon the theory that the peoples of the several states must sink or swim together and that in the long run prosperity and salvation are in the union and not in division".[77] There was also a political rationale involved in the commerce clause to the effect that when a law is framed so that its negative impact is directed solely at the out of state interests "legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state".[78]

The commerce clause involves a power that is at least partially, a shared or concurrent power. The existence of a plenary power over interstatal commerce in Congress is not necessarily inconsistent with the existence of state regulatory power over commerce.[79]

Besides the commerce clause, article IV (the so-called privileges and immunities clause) defines the relationship of the states to one another and delineates the treatment that one state must accord the citizens of another. It stipulates that the "citizens of each state shall be entitled to all privileges and immunities in the several states". This corresponds to some extent to section 156(3), which stipulates that

> "[a] provincial legislature shall be competent to enact legislation authorising the imposition of user charges: Provided that– . . . (b) they do not discriminate against non-citizens of the province who are South African citizens".

By virtue of the supremacy clause in the Constitution,[80] which states that "this constitution and the laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land", when a federal regulation conflicts with a state law in a shared area or the state law impedes the achievement of federal objectives, the federal regulation must prevail. The three clauses enumerated above (the commerce clause, the privileges and immunities clause and the supremacy clause) are indispensable for the union of American states inherent in the Constitution.

However, the United States Constitution itself does not expressly stipulate the boundaries of the commerce power vested in Congress. This uncertainty is compounded particularly when Congress is silent. In effect, when the court seeks to demarcate permissible state commercial regulation it is invariably interpreting congressional silence. The Supreme Court first grappled with the meaning of congressional silence in the early case of *Gibbons v Odgen*.[81] In this case Chief

77 *Baldwin v GAF Seelig Inc* 294 US 511 522–523 (1935).
78 *South Carolina Highway Dept Ltd v Barnwell Bros* 303 US 177 (1938).
79 *Cooley v Board of the Wardens of the Port of Philadelphia* 53 US 299 (1851).
80 Art VI [2].
81 22 US 1 (1824).

Justice Marshall gave a broad definition to commerce, acknowledging the supremacy of the common market and the compatibility of a concurrent regulation by the states emanating from state police powers. In doing so, Marshall CJ formulated an origin of state power doctrine. Thus initially a doctrinal approach was taken to the resolution of the problem rather than a practical one. Only at a later stage was a weighing up to take place, and if a regulation was more beneficial to health and safety than detrimental to interstate commerce, the court would not strike down the state legislation, but would do so if it was more of a burden than a benefit.[82]

Initially Marshall CJ "flirted with – but did not adopt – the idea that the power to regulate commerce among states is exclusive" to Congress.[83] Subsequently, in the later case of *Willson v Black Creek Marsh Co*,[84] he retreated from the "absolutist position" in *Gibbons*. The rule of selective exclusion formulated in *Cooley v Board of Wardens*[85] constituted a further development in the jurisprudence of the commerce clause. The so-called *Cooley* doctrine assists in the determination of whether a state regulation of inter-state commerce is permissible. According to this doctrine, when the subjects of commerce regulation are national in nature, that is, require a uniform system or plan of regulation, they are not amenable to state regulations. Hence the doctrine of selective exclusion emerged and therefore in the *Cooley* judgment it was held that in the absence of applicable federal legislation, a state may regulate local pilotage for navigation. This meant that Congress's commerce power is not exclusive and that in those circumstances where a uniform national rule is not necessary, the states may legitimately apply their own regulations to foreign and interstate commerce.

In *Cooley* the state of Pennsylvania enacted a law which obliged ships engaged in interstate and foreign commerce to employ local pilots when entering or leaving the Port of Philadelphia. The *Cooley* doctrine has been criticised for focusing excessively on the subject of the state regulation rather than the nature of the regulation, namely, its effect on inter-state commerce. However despite this criticism it continues to be occasionally used as a test of state power to regulate inter-state commerce.

The modern approach: the dormant commerce clause

The post-*Cooley* courts recognised the states' concurrent power to regulate commerce. The extent of permissible concurrent power remained problematic. Even when there is no relevant congressional legislation, the commerce clause by itself as construed by the courts, imposes some limitation on the ability of states to regulate commerce when the state regulation affects inter-state commerce. In determining whether a state regulation is voided by the negative implication of the commerce clause, an enquiry must take place and two questions derived from the judgment in *Pike v Bruce Church*[86] must be asked:

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82 Nowak *et al Constitutional law* (1978) 246.
83 *Idem* 245.
84 27 US 245 (1829).
85 *Supra*.
86 397 US 137 (1970).

(1) Does the state regulation discriminate against inter-state commerce; or

(2) are the incidental burdens imposed on inter-state commerce clearly excessive in relation to putative local benefits?

If the answer to either of the above questions is in the affirmative, the state law is unconstitutional.[87]

The contemporary approach to the commerce clause is no longer based on formalistic tests "and metaphysical attempts to interpret congressional silence [but] has led to an era of more understandable rules".[88] Thus the court now balances conflicting economic policies until such time as Congress decides to legislate. This contemporary approach was to a great extent precipitated by a dissenting judgment of Justice Stone in *Di Santo v Pennsylvania*.[89] Stone J's now famous dissent was to receive support from Professor NT Dowling, who extrapolated Stone J's ideas in an influential article.[90] The gist of Dowling's approach was that the court had deliberately to balance national and local interest and make a choice as to which of the two should prevail.[91] In the same case Stone J warned against a mechanical approach that merely indulged in labelling, by observing that it amounted to "little more than using labels to describe a result rather than any trustworthy formula by which it was reached".[92]

The legal position remains problematic, since, according to Tribe,[93] the courts "must attempt to weigh non-comparables". Thus he goes on to observe that in each case, the judiciary is called on to make a "delicate adjustment of the conflicting state and federal claims".[94] Judicial rules of thumb, Tribe comments,[95] cannot be applied mechanically. In the case of *Raymond Motor Transportation, Inc v Rice*[96] the court unanimously observed that "experience teaches that no single conceptual approach identifies all the factors that may bear on a particular case".[97] One of the consequences of the commerce clause is that the Supreme Court has set aside many state regulations affecting inter-state commerce, because they discriminate against entrepreneurs or products of other states. For example, it voided a state statute of New York requiring licences for vendors of domestically produced goods of other states.[98] In addition, the United States Supreme Court has ruled that the commerce clause forbade California to exclude indigent persons from settling in the state.[99] However, quarantine laws are

87 It should, however, be noted that there are indeed a number of justices of the Supreme Court who would limit the negative implications of the dormant commerce clause to state regulations that are expressly discriminatory.

88 Nowak 252.

89 273 US 34 (1927).

90 "Interstate commerce and state power" 1940 *Va LR* 1.

91 21.

92 524.

93 421.

94 *HP Hood & Sons, Inc v Du Mond* 336 US 525 553 (1949) (Black J dissenting).

95 421.

96 434 US 429 (1978).

97 441.

98 *Nebbia v New York* 291 US 502 (1934).

99 *Edwards v California* 314 US 160 (1941).

necessary to protect public health and would be sustained in all federal states including the United States.[100] In order to protect public health, states in many federal societies have also been accorded extra-ordinary powers over the manufacture, distribution and sale of alcoholic beverages.[101] To some extent this was motivated by a concern for protecting public morality.[102] Furthermore, the states have been allowed to impose burdens on inter-state railroads in the interest of local safety.[103]

The American Supreme Court has endeavoured to balance conflicting interests relating to the free movement of goods and trade against the rights of the inhabitants of the states, as far as legitimate protection against health and other hazards is concerned. However, state restrictions on the common market, even in the pursuit of parochial and state health and safety objectives, is impermissible if a "less burdensome, nondiscriminatory alternative is available".[104] In general, in federal states, the units of the federation have a legitimate interest in the welfare of their residents that must be allowed to prevail over the free flow of commerce.

The commerce clause has been given a wide interpretation and application and is also therefore applied to personal mobility. As a result, the states have been "prohibited from thwarting the influx of indigents".[105] The commerce clause has also been used in the interpretation and application of transportation legislation. Therefore nearly a decade before the celebrated judgment in *Brown v Board of Education of Topeka, Kansas*[106] which started the process of school integration, the Supreme Court held that the state of Virginia could not require the segregation of white and black passengers on interstate motor transport because "seating arrangements for the different races in interstate motor traffic require a single, uniform rule to promote and protect national travel".[107]

In *South Carolina Highway Department v Barnwell Brothers*[108] the Supreme Court upheld a state regulation which barred all trucks wider than 90 inches or heavier than 10 tons from state highways. The rationale for this regulation was that the state of South Carolina built the highways and maintained them for safe use. The Supreme Court found that the state in question did not violate the commerce provision, reasoning that "[t]he fact that the regulations affect alike shippers in interstate commerce in large numbers within as well as without the state is a safeguard against their abuse".[109]

By contrast, in *Southern Pacific Co v Arizona*[110] the Supreme Court invalidated a law which prohibited railroad train lengths of more than fourteen

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100 *Compagnie Francaise de Navigation a Vapeur v Louisiana Board of Health* 186 US 380 (1902).
101 Antieau 77.
102 *Idem* 79.
103 *South Carolina State Highway Dept v Barnwell Bros supra.*
104 Nowak 257.
105 *Idem* 264–265.
106 347 US 483 (1954).
107 *Morgan v Commonwealth of Virginia* 328 US 373 386 (1946).
108 *Supra.*
109 187.
110 325 US 761 (1945).

passenger cars or seventy freight cars. It was held that the burden on interstate commerce outweighed the law's advantage as a safety measure because longer trains operated quite safely in states other than Arizona. The Supreme Court has invalidated restrictive transport legislation if this was essentially protectionist in nature.[111]

Although section 92 of the Australian Constitution stipulates that interstate trade and commerce shall be "absolutely free", the courts have acknowledged that society has a substantial interest in protecting public safety, thereby justifying certain restraints on interstate commerce.[112] Chief Justice Griffith of the Australian High Court stated that "free" does not mean "extra legem"[113] and thus established that reasonable state controls are necessary to protect legitimate societal interests and would be constitutional. If, however, the protected interest is not legitimate but constitutes mere protectionism, the regulation will be invalidated. For example, when a Western Australia statute imposed a licence fee of fifty pounds on wine imported from sister states compared to a fee of two pounds on wine from locally grown fruit, it was voided.[114] Had the commodity brought into the state been nuclear waste, the court's decision would probably have been different. It is not inconceivable that the movement of wine, or nuclear waste or some other commodity across borders created by the nine new provinces could lead to constitutional litigation in South Africa: for example, the movement of Cape wine from the Western Cape to the Northern Cape, which has a fledgling wine industry and the movement of highly hazardous nuclear waste from Koeberg nuclear station in the densely populated Cape Town area to a very sparsely populated area of the North Cape. In this regard the United States Supreme Court held that New Jersey could not prohibit the introduction into that state of solid or liquid waste for disposal there.[115]

The jurisprudence of the American Supreme Court has not always been consistent.[116] For example, the Supreme Court held in 1908 that a state could indeed

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111 See *Kassel v Consolidated Freightway Corps of Delaware* 450 US 662 (1981). In this case the Supreme Court, in terms of the commerce clause, invalidated an Iowa law banning the use of 65ft double tractor trailers on its highways. The court held that the rule substantially burdened interstate commerce because loads carried by 65ft trucks had to be routed around Iowa or reloaded into smaller trucks for shipment through the state. The truck company produced substantial evidence that the bigger trucks were at least as safe as the smaller ones and that any reduction in accidents achieved by decreased truck footage would be offset by heightened accident opportunities created by increased truck mileage, as more small truck miles were logged to carry the same loads previously managed by the 65ft double tractors. In addition there were many exemptions to the regulations that allowed Iowans the benefits of larger trucks. Two of the judges (Brennan and Marshall) examined the state's motives for adopting the rule rather than debating the relative safety merits of large and small trucks. They concluded that Iowa's "real concern was not safety but an effort to limit the use of highways by deflecting some traffic through to neighbouring states. This motive was found to be protectionist in nature and therefore impermissible" (685).

112 *Hughes & Vale Pty Ltd v New South Wales (No 1)* (1954) 93 CLR 1.

113 *Samuels v Readers Digest Association Pty Ltd* (1969) 120 CLR 1 15.

114 *Hughes and Vale Pty Ltd v New South Wales (No 2)* (1955) 93 CLR 127 160.

115 *Baldwin v CAF Seeling Inc supra.*

116 See Tribe 439: "The Supreme Court's approach to commerce clause issues, despite such structuring devices as the emphasis on less restrictive discriminatory alternatives, often

continued on next page

restrict the export of water,[117] but the same court fifteen years later negated the endeavour of another state which had initially encouraged transmission of its natural gas out of the state to limit its export subsequently.[118] In an unfortunate judgment, the court ruled that California, which produced the bulk of the nation's raisins, could structure a marketing scheme "in the interests of safety, health and well being" that resulted in raising prices on this commodity at the expense of the purchasers in contiguous states, where 95% of the raisins were found.[119] In another regrettable judgment, the majority of the court held in contrast with well-reasoned dissents of Justices Brennan, Powell, White and Stevens, that a state could limit the sale of cement produced at state-owned plants to residents of the state.[120]

PROVINCIAL LEGISLATION WHICH DISCRIMINATES AGAINST CITIZENS OF OTHER PROVINCES

In the United States of America this is an issue that has precipitated litigation. By its nature this issue is involved with the question of discrimination. The question asked in each case is whether state governments are legitimately entitled to protect state assets, resources for the benefits of the citizens of the state concerned. Tribe[121] submits that the following criterion should be used: State regulation affecting interstate commerce will be upheld if (a) the regulation is rationally related to a legitimate state end; and (b) the regulatory burden imposed on interstate commerce and any discrimination against it, are outweighed by the state interest in enforcing the regulation.

Applying the criteria set out above, the American courts have permitted states to conserve and reserve their natural resources and facilities which they have created preferentially for citizens and hence taxpayers of the state. These include

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appears to turn more on *ad hoc* reactions to particular cases than on any consistent application of coherent principles."

117 *Hudson County Water Co v McCarter* 209 US 349 (1908).

118 *Pennsylvania v West Virginia* US 553 (1923). Two other cases that should be compared are *Baldwin v Fish and Game Commission of Montana* 436 US 371 (1935) and *Toomer v Witsell* 334 US 388 (1948). In the former Montana was charging residents $9 for elk hunting licences and non-residents $225. Surprisingly the court upheld this practice on the grounds that the privileges and immunities clause protects only "basic and essential" activities. Thus the court declined to set aside Montana's patently discriminatory policy because big-game hunting is mere recreation! Out of town state sportsmen therefore has no fundamental right to shoot Montana elk. Tribe (538) has criticized this case stating that there is no authority in other areas of constitutional jurisprudence for considering recreation less fundamental than work when the issue is one of discrimination. In the *Toomer* case, which was analogous, the court came to the opposite conclusion. In this case a South Carolina law limited commercial access to migrating shrimp by imposing a fee of $25 for each shrimp boat owned by a resident whereas for each boat owned by a non-resident it charged $2500! The court intimated that it was prepared to adopt a flexible approach that allowed discrimination but only where it is necessary (396).

119 *Parker v Brown* 317 US 341 (1943).

120 *Reeves Inc v Stake* 447 US 429 (1980); cf *Toomer v Witsell* 334 US 388 (1948); *Baldwin v Fish and Game Commission of Montana supra*; *Hicklin v Orbeck* 347 US 518 (1978).

121 503.

public libraries, public schools, state universities, state supported universities and hospitals and public welfare programmes.[122]

American jurisprudence in this regard could be of assistance to South African lawyers in the interpretation and application of section 126(3)(d) and (e). Tribe indicates[123] in his discussion of this issue that a judicious balancing of conflicting interests must take place. He therefore argues that the state is obliged carefully to consider the impact of its laws on out-of-staters, particularly in circumstances that would deter them from travelling into or establishing residence in the state or would otherwise make their treatment or status within the state turn on their prior non-residence. The court must explicitly require considerations of a state's legitimate interest in discriminating against outsiders in order to preserve goods and opportunities to which the citizens and government of that state have devoted their labour and public funds.[124]

CONCLUSION

There are two seminal aspects of the interim Constitution that will precipitate constitutional litigation.[125] The first relates to fundamental rights contained in chapter 3 and the second concerns the demarcation of power between the provinces and the central government. In the USA the issue of states' rights has been a prolific source of constitutional litigation, especially the construction placed on the commerce clause. Section 126(3) of the interim Constitution corresponds to the American interstate commerce clause and appears to be more extensive than its American counterpart. It could therefore give rise to very considerable constitutional litigation[126] in the future. American jurisprudence relating to the commerce clause is interesting and well developed, but it must be approached with a measure of caution. The South African legal, political and socio-economic context is vastly different from that of the United States. The way in which American jurists have endeavoured to address these problems is more important than the actual judgments in specific cases. In particular, how such jurists adjudicate between conflicting policy choices could be of great assistance. This also applies to the corresponding jurisprudence that has emerged in Canada, Australia, India and the German Federal Republic.

122 *Idem* 539.
123 *Idem* 532 *et seq*.
124 *Idem* 539.
125 Cachalia *et al Fundamental rights in the new Constitution* (1994) 3.
126 *Idem* 4.

Deliktuele aanspreeklikheid weens nadeel deur onbekende lede van 'n groep toegebring III:[1] Die posisie in Switserland en die nuwe rigting in Nederland[2]

(vervolg)

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SUMMARY

Delictual liability for harm brought about by unknown members of a group III: The position in Switzerland and the new direction taken in the Netherlands

In this contribution it is established that the Swiss code does not contain specific provisions for cases where no causal relationship in the usual sense exists. Through an extensive interpretation of the term the courts have created – namely "gemeinsame Kausalität", which is understood to mean "gemeinsam handeln", which in turn also means joint fault – it has been possible to impose joint liability on, amongst others, members of groups involved in causing harm to others. The criteria of conduct which threatened the interests of others more than would be regarded as usual according to common knowledge and experience in the light of precautions that could be regarded as normal in the circumstances, give indications of involving a value judgment. This brings the matter close to the *boni mores* criterion for unlawfulness employed in South Africa.

The new Dutch code heralded the arrival of a new form of delictual liability, which, putting it at its least drastic implication, entails a redefinition of the requirement of causality. The new requirement is met when the defendant becomes or remains part of a group, thus taking part in creating or maintaining the psychological climate conducive to the causing of harm by an unknown actor from the group. The key requirement thus becomes "involvement", instead of "causality".

In conclusion some statements are offered by way of suggestions as to what the nature of and requirements for the imposition of delictual liability in the relevant cases could be.

1 INLEIDING

In hierdie bydrae word eers gekyk hoe die onderhawige problematiek in Switserland benader word. Dit kan vir ons ondersoek van belang wees aangesien hulle

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1 Dele I en II van hierdie verslag het verskyn in 1995 *THRHR* 421 en 1995 *THRHR* 613. Deel IV verskyn in 'n latere uitgawe van die *THRHR*.

2 Die finansiële en ander ondersteuning wat verleen is deur die Sentrum vir Wetenskapsontwikkeling, Getrouheidsfonds vir Prokureurs en PU vir CHO het meegehelp dat hierdie ondersoek onderneem kon word. Elke bydrae word met dank erken. Standpunte hierin ingeneem moet uiteraard slegs aan die navorser toegeskryf word.

daar heelwat ondervinding opgedoen het met die hantering van die nadelige gevolge wat soms uit groepsoptrede soos demonstrasies kan ontstaan; te meer omdat in die regstelsel tradisioneel op die beskerming van fundamentele regte gelet word. Daarbenewens is daar invloede van sowel die Duitse as ander regstelsels, asook van die versekeringsbedryf, op die posisie in Switserland aanwesig. Daarna word die belangwekkende onlangse ontwikkeling van 'n heel nuwe benaderingswyse tot deliktuele aanspreeklikheid in sodanige gevalle in Nederland bespreek. Dit bring 'n mens by 'n voorgestelde benadering tot sodanige gevalle. Dit behels dat oor die aard en grondslag van die onderhawige aanspreeklikheid standpunt ingeneem moet word, en dat die vereistes daarvoor en hoe dit by die tradisionele reëls inpas, aangedui sal moet word. In die beoogde vierde en laaste deel van hierdie verslag word die toepassing behandel van wat reeds vasgestel is ten opsigte van demonstrasies en die fundamentele reg op demonstrasievryheid.

2 SWITSERLAND

2 1 Toepaslike statutêre bepalings

Wat Switserland betref,[3] bring die onderwerp artikel 50 I Obligationenrecht (OR) na vore wat só lui:

> "Haben mehrere den Schaden gemeinsam verschuldet, sei es als Anstifter, Urheber oder Gehilfen, so haften sie dem Geschädigten solidarisch."[4]

§50 II lui só:

> "Ob und in welchem Umfange die Beteiligten Rückgriff gegeneinander haben, wird durch richterliches Ermessen bestimmt."

Dientengevolge beteken solidêre aanspreeklikheid hier nie dat die mededaders se aanspreeklikheid nie ook vir minder as die volle nadeel kan wees nie, soos waar die mededader se skuldgraad net lig was.[5]

§50 III lui só:

> "Der Begünstiger haftet nur dann und nur so weit für Ersatz, als er einen Anteil an dem Gewinn empfangen oder durch seine Beteiligung Schaden verursacht hat."

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3 Guhl *Das schweizerische Obligationenrecht, mit Einschluß des Handels- und Wertpapierrechts*: Merz und Kummer (1980) (hierna Guhl) 187 ev; Von Tuhr-Peter *Allgemeiner Teil des schweizerischen Obligationenrechts von Andreas von Tuhr*, 1e Band, 1e Lieferung (1974) (hierna Von Tuhr-Peter) 93; Honsell, Vogt en Wiegand *Kommentar zum schweizerischen Privatrecht: Obligationenrecht I* (1992) (hierna Honsell) a 50; Neuenschwander *Die Schadensersatzpflicht für Demonstrationsschäden* Zürcher Studien zum Privatrecht Nr 30 (1983) (hierna Neuenschwander) 85.

4 Schönenberger *Schweizerisches Obligationenrecht, Textausgabe* (1976). Oorspronklik (in 1881) wou die *Bundesrat* daaraan toegevoeg het: "und zwar auch dann, wenn sich nicht ermitteln läßt, wer von mehreren Beteiligten den Schaden durch seine Handlung verursacht hat", wat dit in pas sou bring met §83012 *BGB*, maar dit is verwerp (Quendoz *Modell einer Haftung bei alternativer Kausalität* Zürcher Studien zum Privatrecht Nr 85 (1991) (hierna Quendoz) 9–10).

5 Oser-Schönenberger *Zürcher Kommentar Band 5 Obligationenrecht, Allgemeiner Teil (Art 1–183 OR)* (1929) (hierna Oser) 353. Oser 353–354 vertolk die vereiste van "gemeinsames Verschulden" só dat dit net dui op gevalle waar "bewuste, skuldige samewerking" aanwesig was.

§51 bepaal dat die gevolge van mede-aanspreeklikheid ook diegene tref wat weens dieselfde nadelige gevolge aanspreeklik gehou word, al het die een deur delik, die ander deur kontrakbreuk en nog 'n ander deur optrede waarvoor hy skuldloos aanspreeklik gehou word, die nadeel veroorsaak. Dit lê as beginsel neer dat by die onderlinge verstelling tussen hulle eers die delikpleger, en laaste diegene wat onskuldig en sonder enige kontraktuele verpligting skuldloos aanspreeklik is, aan die orde kom.[6]

Die vereiste vir die toepassing van artikel 50 I is dat meerdere persone dieselfde nadeel "gemeinsam verursacht und verschuldet haben", ongeag of hulle afsonderlike daders, mededaders, aanstigters of helpers daarby was.[7] Die "gemeinsame kausalität" bestaan dan in hulle gesamentlike handeling (die sleutelbegrip is: "gemeinsam handeln").[8] Direkte "Beteiligung" in die sin waarin dit in die Duitse reg verstaan word, is dus nie nodig nie – al wat vereis word, is dat die aangesprokene in die algemeen by die aktiwiteite waaruit die geweldadigheid voortgekom het, betrokke was.[9] Op hierdie vereiste, naamlik betrokkenheid by die skadestigtende gebeure in die algemeen, kom ons by die bespreking van die posisie in die Nederlandse reg weer terug.[10]

Waar vasgestel kan word watter dele van die nadeel deur verskillende daders of mededaders aangerig is, word elkeen slegs aanspreeklik gehou vir die nadeel wat hy toegebring het. Aanstigters of helpers word egter altyd vir die hele nadeel aanspreeklik gehou.[11] Die rede waarom hierdie persone vir die volle nadeel aanspreeklik gehou word, is dat dit nie 'n vereiste is dat die nadeel deur slegs een, of deur 'n spesifieke oorsaak, moet ontstaan het nie: dit is genoeg dat 'n handeling *'n oorsaak* daarvan was.[12] By hierdie kategorie word die aanspreeklikheid van die pers weens laster (gerig teen die redakteur, uitgewer en advertensiehoof as mededaders, en die drukker en beriggewer as hulpverleners) ingedeel.[13] Die vergoeding van nadeel wat tydens demonstrasies veroorsaak word, word ook onder hierdie vaandel gehanteer.[14]

Met die begrip van "gemeinsam handeln" soos dit in Switserland verstaan word, hang ook die gemeenskaplike skuldvereiste saam. Dit kan opset in enige

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6 *Die Studienkommission für die Gesamtrevision des Haftpflichtrechts* het in 1991 aanbeveel dat a 50 en 51 saamgevoeg en die onderskeid tussen sg egte en onegte solidariteit, asook dié tov "gemeinsames Verschulden" (a 50), teenoor die verskeidenheid van regsgronde (a 51) opgehef word. Hulle beveel deurgaans solidêre aanspreeklikheid aan waar meerdere mense betrokke was (*Bericht der Studienkommission für die Gesamtrevision des Haftpflichtrechts* (August 1991 Bundesamt für Justiz) (hierna Bericht) 102 ev).

7 Guhl 187; Honsell 358–359.

8 Oftinger 1968 64 *SJZ* 228: "Die unmittelbare Beteiligung an den einzelnen Handlungen, die zu den einzelnen Schäden geführt haben, braucht den Teilnehmern am Krawall nicht bewiesen zu werden. Es genügt die Teilnahme am Gewaltakt als einem Ganzen." Hieroor is Quendoz 17–19 krities omdat hy meen dat dit onbevredigende resultate oplewer, bv waar mense eintlik presies dieselfde gedoen het maar in een geval "gemeinsam" en in die tweede geval heeltemal onafhanklik van mekaar, maar waar elkeen se daad uiters gevaarlik was en in die hoogste mate daartoe geneig was om die betrokke nadeel te veroorsaak.

9 Sien Deel II par 3 2 2 van hierdie verslag in 1995 *THRHR* 629.

10 Sien par 3 4 hieronder.

11 Von Tuhr-Peter 93 vn 33.

12 *Idem* 88.

13 Guhl 188.

14 Sien Deel IV van hierdie verslag wat later gepubliseer sal word.

vorm maar ook nalatigheid insluit.[15] Uit wat hierna volg, lyk dit of dit ook risikoverhoging as aanspreeklikheidsgrondslag kan insluit.[16]

2 2 Gevalle wat nie in die OR gereël word nie

Twee gevalle wat nie in die OR[17] gereël word nie is, eerstens, waar een nadeel ontstaan as gevolg van die onafhanklike onregmatige en onskuldige handelinge van meer as een persoon, of die skuldige handelinge van meer as een persoon sonder dat hulle gemeenskaplike opset gehad het.[18] Von Tuhr-Peter noem as voorbeeld van die tweede geval waar 'n hoeveelheid plofstof, wat deur iemand onversigtig bewaar is en dan deur 'n ander persoon nalatig aan die brand gesteek word, ontplof en nadeel teweegbring; of twee fabrikante wat afloopwater in 'n rivier stort, en daar dan weens die gesamentlike verhoogde konsentrasievlak van giftige stowwe nadeel ontstaan. Op grond van die feit dat die kousale verband tussen 'n oorsaak en gevolg nie deur die medewerking van ander oorsake uitgesluit word nie, meen Von Tuhr-Peter[19] dat albei persone ook in hierdie gevalle vir die volle nadeel aanspreeklik gehou behoort te word. Guhl[20] steun dit en meen dat gesag daarvoor afgelei kan word uit die regresvoorskrif wat in artikel 51 OR voorgeskryf word. Dit kan voorts wees dat by die een verweerder skuld, by die ander risiko- en by 'n derde die vereistes vir skuldlose aanspreeklikheid aanwesig is.[21] Ook dan geld dieselfde resultaat, naamlik solidêre aanspreeklikheid.[22]

2 3 Verskillende kategorieë kousaliteit in die Switserse reg

Die kategorie "konkurrierende (of: 'kumulative') Kausalität" word ook hier beskou as die geval waar twee persone deur hulle onafhanklike onregmatige handelinge die nadeel veroorsaak het, maar op só 'n wyse dat die volle nadelige gevolg reeds deur enigeen van die twee se handelinge sou kon ingetree het. In hierdie gevalle ontstaan ander vrae as by mededaderskap maar die volgende kan by wyse van herhaling gesê word: die *conditio sine qua non*-benadering lei hier tot die algehele vryspraak van albei daders wat onsinnig is. "Praktische Vernunft" vereis volgens Von Tuhr-Peter[23] dat albei daders vir die volle nadeel aanspreeklik gehou moet word. Voorbeelde van sodanige gevalle is waar twee

15 Honsell 369; Neuenschwander 78–79. In die VSA word die geval waar nadeel deur twee faktore veroorsaak is, een waarvan 'n onregmatige daad deur die verweerder daarstel terwyl hy nie vir die tweede verantwoordelik is nie, deur die *Restatement of Torts* §432 beoordeel as gevalle waar die jurie kan besluit dat die verweerder se onregmatige daad 'n "substantial factor" was wat die veroorsaking van die nadeel betref (sien Hart en Honoré *Causation in the law* (1985) (hierna Hart en Honoré) 236–237).

16 Sien vn 21 hieronder. In die konteks van die Suid-Afrikaanse reg hieroor sal dit in elk geval ook die terrein van risiko-aanspreeklikheid raak vir sover die aanspreeklikheid van die pers weens laster oor daardie boeg gegooi word.

17 Of die *BGB*.

18 Brehm "Zur Haftung bei alternativer Kausalität" 1980 *JZ* 35 (hierna Brehm) 38.

19 93.

20 188.

21 Nav §51 OR. Wat die Suid-Afrikaanse reg betref, sou dit inhou dat dit ook die geval sou wees waar van skuldlose aanspreeklikheid sprake is soos by die *actio de pauperie*, *actio de pastu* ens.

22 Guhl 188–189.

23 94.

wilddiewe, sonder om van mekaar te weet, albei op 'n wildbewaarder skiet en hom sodanig verwond dat hy ten volle arbeidsongeskik raak; of bogenoemde voorbeeld waar twee fabrikante onafhanklik van mekaar genoeg gif in 'n stroom stort om die water giftig te maak en nadeel daaruit voortvloei; of waar A stene en B sement op dieselfde dag vir die bou van 'n huis moes lewer, en albei versuim het om hulle leweringsverpligtinge na te kom.[24]

Die kategorie van "alternative Kausalität" is een wat veral vir ons onderwerp van belang is. Dit is die geval waar die nadeel deur A óf B se handeling veroorsaak is maar nie bepaal kan word deur watter een van die twee dit gebeur het nie. Die OR bevat geen reëling vir hierdie geval nie,[25] maar die Switserse howe het onlangs in sulke gevalle albei persone solidêr aanspreeklik gehou. Die grond wat daarvoor aangegee word, is dat elke persoon, al was hy nie 'n medebewerker, aanstigter of hulpverlener nie, tog op 'n ander wyse een van die voorwaardes vir die intrede van die nadeel bewerkstellig het.[26] Op grond hiervan kan verder gesê word dat iemand wat onregstreeks by die veroorsaking van die nadeel betrokke was, soos die ontvanger van geroofde goed, ook so aanspreeklik gehou behoort te kan word.

Die grond vir sodanige aanspreeklikheid sal wees dat 'n onregmatige handeling verrig is, of dat ten minste *'n gemeenskaplike aktiwiteit bestaan het, wat derdes se belange meer as gewoonlik bedreig het.*[27] 'n Ander formulering van die maatstaf vir sodanige gevalle is dat dit gaan oor gevalle waar *op grond van algemene lewenservaring* regtens van iemand wat 'n gevaarlike handeling verrig, vereis word om *die gebruiklike voorsorgmaatreëls* teen die intrede van nadeel te onderneem en hy dit nie doen nie, byvoorbeeld waar iemand 'n vuur aangesteek en dit verlaat voordat dit geblus was.[28] Nog 'n voorbeeld van hierdie klas, is volgens Von Tuhr-Peter[29] 'n "Straßendemonstration", wat tot die uitbreek van geweld en nadeel gelei het.[30]

2 4 Samevatting

Die maatstawwe van *optrede wat derdes se belange meer as gewoonlik bedreig het*, *algemene lewenservaring* en *gebruiklike voorsorgmaatreëls* wat hierbo geblyk het, vertoon 'n soepelheid wat dit moontlik maak om talle gevalle wat andersins nie gehanteer sou kon word nie, tog sinvol af te handel. Dit handel hier kennelik oor objektiewe kriteria vir optrede; 'n gemeenskapsnorm word dus toegepas. Hier te lande word daardie soort waarde-oordeel gewoonlik oor die boeg van die onregmatigheidskriterium gegooi, soos duidelik na vore kom wanneer die *boni mores* of gemeenskap se regsoortuigings as maatstaf vir die bepaling van onregmatigheid bestempel word.

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24 As A voor B moes lewer en versuim het, gaan B vry uit al versuim hy ook later sy plig omdat geen nadeel daardeur veroorsaak word nie aangesien die werk reeds deur A vertraag is.

25 Anders as in §830 *BGB*.

26 "Er hat eine der Bedingungen gesetzt, durch welche der Schaden herbeigeführt wurde" (Von Tuhr-Peter 95).

27 "Voraussetzung dieser Haftung ist, daß, wie beim Raufhandel, eine verbotene Handlungsweise vorliegt oder wenigstens *eine gemeinsame Veranstaltung, welche fremde Interessen über das übliche Maß hinaus gefährdet*" (Von Tuhr-Peter 95) (klem ingevoeg).

28 *Idem* 96 vn 47.

29 95 vn 43.

30 BGE 48 II 145 ev; Oftinger (1968) *SJZ* 228, asook die feite in BGE 79 II 69.

In die Switserse reg kan deelnemers aan 'n demonstrasie dus deliktueel aanspreeklik gehou word indien hulle voldoen aan die vereiste van "gemeinsam handeln", welke kriterium meer omvat as net 'n gesamentlike handeling of gemeenskaplike opset. Word dit oorweeg saam met die kriterium van bedreiging van derdes se belange bo wat gebruiklik is, of die uitbly van voorsorgmaatreëls wat volgens algemene lewenservaring gebruiklik is, is dit duidelik dat hierby 'n noodsaaklike soepelheid ingebou is wat die hantering van die moeilike verskynsel van groepsoptrede wat tot nadeel lei, kan vergemaklik. In belang van regsekerheid sal uiteraard by die toepassing van hierdie behorensmaatstaf toegesien moet word dat die vereistes vir sodanige aanspreeklikheid so duidelik moontlik omlyn en konsekwent toegepas word, sonder om uit die oog te verloor dat dit 'n proses is wat 'n waarde-oordeel vereis. By die maak van daardie waarde-oordeel is dit belangrik dat dit in hierdie konteks gaan oor die grondwetlik beskermde uitoefening van die fundamentele vryheid om te demonstreer.

3 NEDERLAND

3 1 Inleiding

'n Bespreking van die belangwekkende huidige stand van die Nederlandse reg in hierdie verband kom eintlik neer op 'n uiteensetting van die agtergrond, invoering, strekking en toepassing van artikel 166 van die nuwe Nederlandse privaatregkode.

3 2 Agtergrond tot artikel 166 *Nieuw Burgerlijk Wetboek*

In die *Burgerlijk Wetboek* van 1838 het geen bepaling oor aanspreeklikheid weens onregmatige dade gepleeg in groepsverband voorgekom nie. 'n Soort groepsaanspreeklikheid het nietemin vroeg reeds[31] bestaan. Met verwysing na De Groot, Van der Keessel en Van der Linden sê Van der Burg dat in die Romeins-Hollandse reg meerdere mense wat deelgeneem het aan byvoorbeeld 'n geveg waartydens iemand beseer is sonder dat dit bekend was wie die besering veroorsaak het, sáám met die ander deelnemers die skuldige moes aanwys, óf anders saam met die ander vir die hele nadeel aanspreeklik gehou sou word. Gelyksoortige reëlings het in die vroeë kodifikasies en ontwerp-kodifikasies voorgekom maar is nie behou nie.[32]

In die Nederlandse laere regspraak het egter so 'n vorm van aanspreeklikheid ontwikkel.[33] Van die gevalle wat in die laer howe gedien het, het gehandel oor 'n

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31 Van der Burg "De onrechtmatige daad gepleegd in groepsverband" 1969 *WPNR* 5064 verwys in hierdie verband na sekere tekste uit die *Digesta*: 9 2 11 2, 9 2 11 4, 9 2 51 2, 9 2 11 3 en 9 2 51 2 in 'n poging om sy uiteensetting "in 'n historiese konteks" te plaas. Krities oor hierdie manier van doen hoegenaamd, en die vraag of dit deur Van der Burg korrek gehanteer is, veral vir sover na "turba" verwys word, is Brinkhof "Kanttekeningen bij het artikel 'De onrechtmatige daad gepleegd in groepsverband'" 1970 *WPNR* 5074. Boonekamp *Onrechtmatige daad in groepsverband volgens NBW* (1990) 1–2 steun egter Van der Burg se weergawe sonder om self diep op die historiese gegewens in te gaan. Ek gaan ook nie hier op die historiese agtergrond in nie.

32 *Toelichting: Ontwerp voor een Nieuw Burgerlijk Wetboek, Toelichting*, 3de Gedeelte Boek 6 (hierna Toelichting) 660; ten spyte van voorstelle in hierdie verband vanaf 1890 is geen reëling oor groepsaanspreeklikheid ooit in die 1838-Wetboek opgeneem nie.

33 Van der Burg 1969 *WPNR* 5065. Vriesendorp "Het comlex van handelingen, vormende één onrechtmatige daad" 1939 *WPNR* 3610 is gekant teen so 'n uitleg van die tendens in die laere howe se uitsprake.

klomp drinkebroers, een waarvan 'n leë bottel deur 'n ruit gegooi en iemand beseer het maar dit nie bekend was wie dit gegooi het nie; of 'n klomp kwaaijongens wat met kluite na 'n trein gegooi en 'n besering aan 'n passasier veroorsaak het, sonder dat dit bekend was wie die betrokke kluit gegooi het; of van knapies wat voetbal gespeel en hulle bal buite beheer geraak en 'n fietsryer beseer het.[34]

Die Hooge Raad het in 1867, in sy enigste uitspraak daaroor, siviele aanspreeklikheid op grond van *turba* afgewys, en beslis dat daarvoor minstens aan die vereistes vir medepligtigheid in die sin waarin dit in die strafreg gebruik word, voldoen moet word! Deelname aan *turba* kon dus selfs in die 19de eeu nie onregmatig gewees het as daar nie aan die vereistes vir strafregtelike medepligtigheid voldoen is nie.[35]

3 3 Artikel 166 *Nieuw Burgerlijk Wetboek*

Artikel 166 van die *Nieuw BW* is 'n nuwigheid sover dit die Nederlandse reg aangaan.[36]

Dit lui só:

> "1. Indien één van tot een groep behorende personen onrechtmatig schade toebrengt en de kans op het aldus toebrengen van schade deze personen had behoren te weerhouden van hun gedragingen in groepsverband, zijn zij hoofdelijk aansprakelijk indien deze gedragingen hun kunnen worden toegerekend.[37]
>
> 2. Zij moeten onderling voor gelijke delen in de schadevergoeding bijdragen, tenzij in de omstandigheden van het geval de billijkheid een andere verdeling vordert."

Anders as by gewone deliktuele aanspreeklikheid[38] ontstaan aanspreeklikheid ingevolge artikel 166 *Nieuw BW* sonder dat 'n feitelike kousale verband tussen enige aktiewe optrede van die aangesprokene en die intrede van die nadeel vereis word.[39]

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34 Drion (red) *Onrechtmatige daad, Losbladige uitgave I* (Bloembergen) No 358 gee die regspraak weer: Rb Rotterdam 8 Januari 1923 NJ 1924 221 (feite nie gerapporteer nie); Rb Dordrecht 22 Februari 1933 NJ 1933 753 (dodelike skietparty langs die Vechtvaarwater); Hof's Hertogenbosch 9 Juni 1936 NJ 1937 102 (bierbottels deur ruit gegooi en oog beseer); Rb Almelo 15 December 1943 NJ 1944 312 (drie seuns gooi klippe na 'n ander wat op fiets verbyry en beseer hom); Rb Alkmaar 22 December 1949 NJ 1950 447 (seuns gooi met kluite na trein en beseer 'n insittende se oog); Rb Amsterdam 16 Maart 1962 NJ 1962 302 ('n voetbal het langs 'n straat buite beheer gerol en 'n bejaarde bromfietser het geval en is beseer); Rb Arnhem 16 Mei 1963 1963 NJ 455 (kollektiewe handeling van pontpersoneel by oplaai van te swaar vrag het veroorsaak dat pont sink en vrag waterskade kry); Rb Haarlem 19 November 1963 NJ 1964 133 (spelende kinders van 11 en 14 jaar het deksel van tenkwa oopgemaak; oudste trek vuurhoutjie en ontploffing beskadig tenkwa).

35 Boonekamp 3.

36 Rutten-Roos "Je was er bij, dus je bent er bij: Aansprakelijkheid bij geweld in groepsverband" 1986 *NJB* 305–310 (hierna Rutten-Roos) 307 ontken dit maar verwys slegs na laere regspraak.

37 'n Lid van 'n groep is dus, indien aan die vereistes van a 166 voldoen is, aanspreeklik vir al die nadeel wat uit die groepsoptrede ontstaan het al het hy self niks daarvan veroorsaak of medeveroorsaak nie (Boonekamp 217).

38 Ingevolge a 162 *Nieuw BW*.

39 Boonekamp 18 217.

Hierdie bepaling is bedoel om iemand wat deel was van 'n groep toe 'n delik gepleeg is maar nie self die nadeel aangerig het nie, en dan as verweer opwerp dat hy nie aanspreeklik is nie omdat die nadeel ook sou ontstaan het al het hy nie deel van die groep gevorm nie, van daardie gewaande verweer te ontneem. Vanselfsprekend moet die handeling wat die nadeel veroorsaak het, 'n delik teenoor die benadeelde daarstel. Die grond vir die aanspreeklikheid van passiewe lede van die groep[40] is dat die blote deel-wees van die groep reeds 'n delik daarstel.[41] Daarvoor word vereis dat sodanige deel-wees in 'n voldoende verband met die nadeel staan (dit word 'n "psychisch causaal verband" genoem).[42] Hierdie uitdrukking is kennelik uit die Franse reg oorgeneem[43] en dit het niks met (feitelike) kousaliteit te make nie ten spyte van die benaming daarvan.[44]

3 4 Evaluering van die nuwe Nederlandse posisie

In die Franse reg is volgens Van der Burg té ver gegaan; volgens Boonekamp se uiteensetting kan myns insiens egter nie hier van 'n té wye aanspreeklikheid gepraat word nie. Dit maak volgens hom nie saak of 'n lid van die groep hom aan die gebeure onttrek net voordat die nadeel berokken word, of juis dán afgelos word, of op die betrokke oomblik aan die slaap geraak het, of daar nie bewys kan word dat hy by die berokkening van die nadeel betrokke was nie. *Deur deel te wees en te bly van die groep het elke lid van die groep dus die onregmatige daad in groepsverband gepleeg.* Rutten-Roos[45] toon aan dat dieselfde resultaat sal volg al is dit ook bekend wie van diegene wat by die enkele "complex van onrechtmatige daden" betrokke was, die nadeel aangerig het. Waar daar dus "in concerted action" opgetree is, volg hoofdelike aanspreeklikheid ongeag of die identiteit van die skadetoebrenger bekend is of nie.

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40 Hierdie uitdrukking is minder goed gekies hoewel dit wyd gebruik word. Dit kan die onnodige wanindruk laat ontstaan dat die aangesprokene nie aktief aan die groepshandeling deelgeneem het nie terwyl dit juis is wat teen hom gehou word; hy het wel nie self die nadeel aangerig nie. Hierin word gevolglik eerder van "die aangesprokene" gepraat.

41 Toelichting 660–661.

42 *Mr C Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht, Verbintenissenrecht Deel III: De Verbintenis uit de Wet* 9de druk (1994) (hierna Asser-Hartkamp) 89; *Parlementaire geschiedenis van het Nieuwe Burgerlijk Wetboek Boek 6* (1981) 662.

43 Boonekamp 4–5.

44 *Idem* 32–35 217. Dit gaan dus daaroor dat deur die optrede van die lede van die groep *'n psigiese sfeer* daargestel is wat vir die onregmatige daad wat die nadeel veroorsaak het nodig was. Hierna verwys die Franse uitdrukkings "contagion réciprogue" en "le psychisme de la faute collective", wat in die rigtinggewende uitspraak van die *Cour de Cassation* van 5 Juin 1957 *Recueil Dalloz* 1957 493 (kommentator: Savatier) gebruik is: 'n Lid van 'n groep van agt jagters wat die groep reeds verlaat het, is in die oog getref deur 'n skoot wat deel gevorm het van 'n laaste salvo wat kragtens onderlinge afspraak deur die sewe toe nog aanwesige lede afgetrek is. Daar kon nie bepaal word wie se skoot hom getref het nie. Al sewe die deelnemers aan die *action concertée* word toe hoofdelik aanspreeklik gehou "par une action concertée, ou même spontanément sous l'effet d'une excitation mutuelle", omdat hulle almal deel gehad het aan die daarstel van die betrokke psigiese sfeer (1969 *WPNR* 5065). Savatier (495) het dit "une jurisprudence nouvelle" genoem, wat nuwe vrae na vore gebring het oor dinge soos *psychisme collectif* en persoonlike aanspreeklikheid weens nadeel deur 'n anonieme lid van 'n groep aangerig.

45 307.

Ten spyte van Van der Burg se bedenkinge teen die Franse invloed op die Nederlandse reg, word nou veral op die gebied van skadevergoedingseise weens verkeersongelukke deur die Nederlandse howe al hoe meer na aspekte van die Franse reg vir leiding opgesien. Dit behels dat die tendens in die Franse reg (dat nou van "implication" in plaas van "causalité" – dit wil sê van *betrokkenheid* in plaas van *kousale verband* gepraat word) in die Nederlandse reg inslag gevind het. Dit bring mee dat aanspreeklikheid in hierdie gevalle, soos in Frankryk, eintlik direk op sosiale oorwegings berus.[46]

Aanspreeklikheid vir onregmatige dade in groepsverband gepleeg verskil dus wesenlik van aanspreeklikheid as mededader (dit wil sê gevalle van konkurrente veroorsaking) en aanspreeklikheid op grond van alternatiewe kousaliteit (a 99-gevalle), omdat in albei daardie gevalle die gewone kousaliteitsvereiste steeds ten opsigte van die aangesprokene gestel word.[47] Daar is nietemin wel ook ooreenkomste tussen hierdie vorme van aanspreeklikheid. By sowel mededaderskap as alternatiewe kousaliteitsgevalle is daar, net soos in artikel 166-gevalle, ook meerdere persone by die berokkening van die nadeel betrokke, terwyl in albei daardie gevalle aanspreeklikheid opgeloop kan word weens nadeel wat (ook) deur 'n ander aangerig is.

Die ooreenkomste of raakvlakke tussen artikel 166-gevalle, mededaderskap en alternatiewe kousaliteitsgevalle is dus duidelik aanwesig, maar die wesensverskil[48] tussen hierdie gevalle blyk ewe duidelik. Daar bestaan dan ook afsonderlike maniere om die eiser se bewysprobleme by mededaderskap en alternatiewe kousaliteit mee op te los.

Mededaderskap word nie in die *Nieuw BW* spesiaal gereël nie. Mededaders moet elkeen gewoonweg voldoen aan al die vereistes van artikel 162 *Nieuw BW* (vroeër a 1401 *BW*),[49] maar die eiser hoef nie te bewys wie van die mededaders welke deel van die nadeel veroorsaak het nie: hy spreek eenvoudig enige een van hulle vir die geheel aan ook al het die mededaders nie bewustelik saamgewerk nie; die mededaders moet dan maar onderling langs die omweg van regres uitmaak wie van hulle vir watter gedeelte aanspreeklik is.

Die reël in verband met mededaderskap kan nie die probleem in gevalle van alternatiewe veroorsaking oplos nie omdat dit daar duidelik is dat net een van die daders die nadeel veroorsaak het – dit is net onbekend watter een. Vanweë die eiser se bewysnood in sulke gevalle is die bewyslas in artikel 99 *Nieuw BW* op die verweerders geplaas om te bewys dat hulle nie die nadeel veroorsaak het nie. Anders is hulle elkeen vir die hele nadeel aanspreeklik en selfs onderlinge regres sal nie volledige ewerediheid tussen hulle kan bewerkstellig nie.[50]

Die pasgenoemde uitweg, wat steeds in Kanada en Amerika geld, is nie meer in Engeland beskikbaar nie. In Engeland word die kwessie waar albei alternatiewe

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46 Hulst "Een nieuwe grondslag voor aansprakelijkheid" 1992 *NJB* 693–700 698–699.

47 Boonekamp 13 ev wys daarop dat die *conditio sine qua non*-toets faal in hierdie gevalle; Van Rensburg *Juridiese kousaliteit en aspekte van aanspreeklikheidsbeperking by die onregmatige daad* (LLD-proefskrif Unisa 1970) 49 ev het ook na sulke gevalle (giftoediening) verwys.

48 Nl dat die aangesprokene ingevolge a 166 deliktueel aanspreeklik gehou word sonder dat sy feitelike kousale bydrae tot die nadeel ter sprake kom.

49 Dit stel eintlik die gewone vereistes van handeling, onregmatigheid, skuld, nadeel en kousale verband vas.

50 Boonekamp 29.

oorsake op nalatigheid berus, opgelos deur die andersins alternatiewe oorsake as kumulatiewe oorsake aan te merk op grond van die wesenlike bydrae wat elkeen tot die nadeel gemaak het.[51] Waar een alternatief met skuld en die ander met onskuld gepaard gegaan het, faal die eiser, tensy hy kan bewys dat die aangesprokene die nadeel (en nie net 'n kans op die intrede daarvan nie) veroorsaak het.[52]

By sowel mededaderskap as alternatiewe kousaliteit word uit billikheidsoorwegings die onbekendheid van 'n gegewe feit (bydrae tot die nadeel onbekend/veroorsaker van die nadeel onbekend) op die verweerders gelaai, maar word hulle nie vir nadeel wat deur 'n ander veroorsaak is, aanspreeklik gehou as die anonimiteit ontbloot word nie.[53] By artikel 166-gevalle speel die bekendheid van lede se bydrae tot die nadeel, of van die identiteit van die dader daarenteen geen rol nie[54] – al wat tel, is of die aangesprokene by die groep betrokke was soos in artikel 166 bedoel word.

Hier is twee argumente moontlik: (a) die tradisionele rede om iemand op grond van sy lid-wees van 'n groep aanspreeklik te hou vir nadeel wat onregmatig in groepsverband veroorsaak is – naamlik die bewysnood van die eiser – val weg die oomblik wanneer die identiteit van die dader bekend is, en dan kan die eiser eenvoudig teen die bekende dader eis. (b) Hierteenoor is dit egter ook weer so dat daar geen rede is waarom die aangesprokene wat deel was van 'n groep waaruit nadeel onregmatig veroorsaak is, van sy aanspreeklikheid onthef moet word net omdat dit bekend is wie die (ander?) dader was nie. Die eiser kan andersins benadeel word deurdat hy 'n potensieel kapitaalkragtiger verweerder verloor. Artikel 166 skep dus 'n "materieelregtelike norm"[55] vir groepsoptrede op grond waarvan die lede vir mekaar se onregmatige, skadeveroorsakende handelinge aanspreeklik gehou word as aan die vereistes daarvoor voldoen is.

3 5 Vereistes vir aanspreeklikheid ingevolge artikel 166 *Nieuw BW*

Die vereistes vir aanspreeklikheid kragtens artikel 166 is dat die gedraging aan die aangesprokene *toegereken moet kan word*: hy pleeg immers self 'n delik.[56] Dit beteken dat dit 'n gedraging moet wees wat aan sy skuld te wyte is, of aan 'n oorsaak wat kragtens die wet of verkeersopvattings aan hom toegereken word (a 162(3)), en dat hy ouer as 14 jaar moet wees (a 164). Daarbenewens is dit geen verweer dat die dader onder die invloed van 'n geestelike of liggaamlike gebrek opgetree het nie, met dien verstande dat 'n derde wat weens ontoereikende toesig oor die dader teenoor die eiser aanspreeklik is, teenoor die dader ook vir kontribusie tot die omvang van sy aanspreeklikheid teenoor die eiser aanspreeklik is.[57]

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51 Iets hiervan blyk ook uit die Suid-Afrikaanse benadering tot die verdeling van skadevergoeding ingevolge bydraende nalatigheid.

52 Fleming *The law of torts* (1992) (hierna Fleming) 199–200.

53 In albei gevalle is die verweerders afsonderlike daders as die anonimiteit opgeklaar is.

54 Volgens Boonekamp 30 217–218.

55 *Idem* 217–218.

56 Toelichting 661.

57 A 165 (Asser-Hartkamp 90). Asser-Hartkamp 90–91 (en andere waarna hy verwys) meen dat dit hier nie moet gaan oor die toerekeningsvatbaarheid van die dader nie maar oor dié van die aangesprokene, anders kan lg dalk daarmee wegkom dat die dader onder 14 jaar oud was! Hy gee 'n voorbeeld van 'n groep jeugdiges wat na 'n voetbalwedstryd delituele nadeel veroorsaak terwyl die aktiewe dader onder 14 jaar is. Hierdie bekommernis

vervolg op volgende bladsy

3 6 Die plek van artikel 166-aanspreeklikheid in die Nederlandse regstelsel

Die gebrek aan effektiwiteit van siviele aanspreeklikstelling vir lede van groepe as 'n metode om geweld en vandalisme hok te slaan wat in groepsverband gepleeg word, lyk vir Rutten-Roos[58] só ernstig dat privaatregtelike aanspreeklikheid volgens hom eintlik nutteloos is omdat die meeste van die verweerders in hierdie soort gevalle in elk geval insolvent is, of só jonk is dat hulle nie regtig deur die gevaar van aanspreeklikheid geraak word nie. Met hierdie besware sal 'n mens ook deeglik rekening moet hou – die bes gefundeerde aanspraak op teoretiese gronde maar wat in die praktyk faal, sal immers nie die huidige posisie verbeter nie.

Balkenstein[59] pleit egter in sy reaksie op die kritiek vir wyer erkenning van die voorkomende werking van privaatregtelike aanspreeklikstelling, en bepleit eintlik daarmee voortgesette beklemtoning van die gedagte van individuele verantwoordelikheid ook op hierdie ingewikkelde terrein waar kollektivisering deur versekering[60] toenemend die norm begin word het.[61] Ten spyte van die rol van uitsluitings in versekeringspolisse, voer hy aan dat daar in die onderhawige gevalle vir sowel versekering as vir deliktuele aanspreeklikstelling plek is. Dat sy betoog steek hou, staan vas[62] veral as onthou word dat vergrype deur enkele deelnemers aan 'n geoorloofde, andersins vreedsame demonstrasie, nie onder "binnelandse onrus" geklassifiseer[63] en gevolglik nie sonder meer van versekeringsdekking uitgesluit word nie.[64]

3 7 Bied die strafreg nie beter antwoorde op die behoefte aan effektiewe regsmiddele op hierdie gebied nie? – 'n regsvergelykende blik

Die vraag het ook in Nederland ontstaan of baie van die probleme op die onderhawige gebied nie deur die oplegging van strafregtelike sanksies opgelos kan

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maak mi net sin as Hartkamp daarmee wil sê dat siviele aanspreeklikheid ter voorkoming van vandalisme/geweld ingespan moet word: Waar die dader óf aangesprokene onder 14 is, is die ouers immers aanspreeklik vir sy onregmatige dade sodat die eiser nie bedroë daarvan sal afkom nie (ingevolge a 169 *Nieuw BW*), al sal die kind self nie aanspreeklik wees nie – 'n gevolg wat uit die oogpunt van individuele verantwoordelikheid nie aanvaarbaar lyk nie (so meen ook Nieuwenhuis "Beantwoording rechtsvraag (5)" 1984 *Ars Aequi* (hierna Nieuwenhuis) 572).

58 1986 *NJB* 308.

59 1986 *NJB* 925.

60 Met die gevolglike onderbeklemtoning van elke mens se individuele verantwoordelikheidsin.

61 Sien hieroor ook Nieuwenhuis 571.

62 Hoewel darem in gedagte gehou moet word dat dit baie algemeen voorkom dat versekeringspolisse aanspreeklikheid uitsluit vir nadeel wat deur oorlog, burgeroorlog, burgerlike onrus, oproer en dergelike "politieke risiko's" ontstaan (bv Martin *Sachversicherungsrecht, Kommentar* (1992) F I 4–14; Maurer *Schweizerisches Privatversicherungsrecht* (1986) 506). In sodanige gevalle sal dus steeds van die gewone regsmiddele gebruik gemaak moet word.

63 Sien die vorige vn.

64 Martin F I 8. Ingevolge die tipiese bewoording wat in Suid-Afrikaanse versekeringspolisse voorkom, word aanspreeklikheid uitgesluit oa vir skade wat voortspruit uit politieke opstand, burgerlike oproer en binnelandse onlus (die sg SAVV-uitsonderings). Hier te lande vervul Sasria se spesiale risikoversekering weliswaar in die behoefte aan skadevergoeding op hierdie terrein. Of dit ver genoeg strek, en of dit in beginsel bevredigend is dat dmv die een of ander vorm van versekering wegbeweeg word van individuele verantwoordelikheid, is iets waaraan in Deel IV van die verslag (sien 'n latere uitgawe van die *THRHR*) aandag geskenk word.

word nie. Hiermee is in die Franse reg ondervinding opgedoen. Die gewese artikel 314 *Code Penal* het met die oog op 'n fase van geweld in Frankryk in die sestigerjare sowel strafregtelike as sivielregtelike aanspreeklikheid bepaal vir deelnemers aan gewelddadige versteurings van die openbare orde. By ongeoorloofde byeenkomste is die skadeveroorsakers, die organiseerders wat nie die verrigtinge betyds ontbind het nie en meelopers wat hulle nie onttrek het toe hulle gesien het dat dinge gewelddadig raak nie, aanspreeklik gestel. By geoorloofde byeenkomste was aanhitsers tot geweld (maar nie blote meelopers nie) aanspreeklik gestel. Die regter kon elkeen se aanspreeklikheid bepaal volgens sy bydrae tot die nadeel. Hierdie vorm van kollektiewe strafbaarheid en aanspreeklikheid is egter weinig gebruik en is in 1981 afgeskaf.[65] Dit lyk dus nie of dit die weg is om in te slaan nie. Kriminalisering van 'n ongewensde toedrag van sake kan nie noodwendig as die korrekte reaksie van die gemeenskap op iets soos geweld en nadeel wat in die loop van demonstrasies ontstaan, beskou word nie, al is dit so dat die strafreg op die oog af meer moontlikhede bied om op die gewraakte situasie te reageer. Spesifiek binne 'n demokratiese regstaat is dit 'n vraag of sommer maklik na kriminalisering gegryp moet word om lastige kwessies te hanteer. Die risiko van kriminele aanspreeklikheid en alles wat dit kan meebring, is van so 'n aard dat dit mense baie maklik te veel kan hinder in die uitoefening van hulle grondwetlike vryheid om te demonstreer.

3 8 Samevatting

Die ervaring in Nederland, waar gevorder is van pogings om die soort gevalle onder die rubriek van *turba* te hanteer, verby vrugtelose pogings om dit deur middel van die analisering van iets soos die handelings- of kousaliteitsmaatstawwe op te los, tot by 'n nuwe benadering tot die onderhawige gevalle, kan vir ons baie leersaam wees. Die ontwikkeling in Nederland toon duidelik dat 'n vars benadering hier gevestig moet word wat kan lei tot die erkenning van 'n "nuwe"[66] vorm van deliktuele aanspreeklikheid.

So 'n "nuwe" vorm van aanspreeklikheid kan nie ontwikkel solank die insig ontbreek dat die tradisionele kousaliteitsmaatstaf in die geval van aanspreeklikheid weens onregmatige dade in groepsverband gepleeg, deur 'n ander beginsel vervang moet word nie.[67] In hierdie ontwikkeling is Nederland vir Frankryk, Switserland en Duitsland (in opgaande orde) ver vooruit.[68] In Duitsland gaan daar wel stemme op[69] dat van die vereiste van kousaliteit afgesien moet word by die toepassing van §830I1 *BGB*,[70] terwyl daar in Switserland ook die moontlikheid bestaan om te vorder van die strakke vereiste van 'n kousale verband tot by die vereiste van betrokkenheid by die gewelddadighede in die algemeen.

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65 Rutten-Roos 309.

66 Tussen aanhalingstekens aangesien dit mi nie meer vereis as 'n konsekwente toepassing van die algemene aanspreeklikheidsbeginsels wat reeds in ons reg bestaan op die besondere soort gevalle nie. Daardie algemene beginsels moet net bevry word van sommige van die beperkings wat weens tydsverloop en herhaalde aanwending tot gekunstelde teoretiese doodloopstrate (oftewel heilige koeie) gedegenereer het.

67 Boonekamp 35.

68 Volgens Boonekamp 35.

69 Soos Fränkel *Tatbestand und Zurechnung bei §823 Abs 1 BGB Schriften zum bürgerlichen Recht* Nr 51 (1979) (ongelukkig was dit nie tot my beskikking nie).

70 Boonekamp 49.

4 DIE AARD EN GRONDSLAG VAN PRIVAATREGTELIKE AANSPREEKLIKHEID WAAR NADEEL DEUR ONBEKENDE LEDE VAN 'N GROEP TOEGEBRING IS, DIE VEREISTES WAARAAN VOLDOEN MOET WORD EN HOE DIT BY DIE TRADISIONELE REËLS INPAS

4 1 Die aard en grondslag van die aanspreeklikheid

- By wyse van herhaling[71] word daarop gewys dat iemand op verskillende maniere by 'n groepsaktiwiteit betrokke kan wees, byvoorbeeld as 'n voor- of teenstander van of 'n simpatiseerder met 'n bepaalde sienswyse of optrede, 'n organiseerder, 'n toesighouer, 'n veiligheidsbeampte in diens van die owerheid, 'n nuuskierige, of iemand met 'n eie (bose) oogmerk.
- Iemand wat as gevolg van die optrede van 'n onbekende lid van 'n groep benadeel word, behoort in beginsel 'n geskikte regsmiddel tot sy beskikking te hê ten spyte van die algemene uitgangspunt van *casum sentit dominus*, net soos iemand wat deur 'n bekende dader benadeel word mits daar aan die *facta probanda* vir sodanige regsmiddel voldoen word. Geen besondere ingrype deur die wetgewer is nodig om hier die gewensde situasie vir die onderhawige gevalle te bereik nie.
- Benewens die moontlikheid van regsmiddele vanuit ander regsgebiede (byvoorbeeld ingevolge die straf-, versekerings- of administratiefreg), is daar 'n groot behoefte aan geskikte privaatregtelike regsmiddele waarmee 'n benadeelde skadevergoeding, kompensasie of genoegdoening in die onderhawige soort gevalle kan eis. Die aangewese regsgebied hiervoor is dié insake onregmatige daad.
- Die bekende *facta probanda* vir die ontstaan van die samegestelde verbintenisskeppende regsfeit onregmatige daad, naamlik 'n handeling,[72] skuld[73] en nadeel,[74] behoort in beginsel nie anders as normaalweg gehanteer te word waar dit oor nadeel handel wat deur 'n onbekende lid van 'n groep aan 'n ander toegebring word nie. Oor die vereistes van onregmatigheid[75] en kousaliteit[76] moet egter meer gesê word.

4 2 Die moontlike onregmatigheid van 'n aangesprokene se deel-wees of -bly van 'n groep

- Iemand wat deel word of deel bly van 'n groep, welke groep begin of besig is met 'n aktiwiteit wat die gevaar van benadeling van ander geoordeel volgens die regsoortuigings van die gemeenskap bo die gewone vlak verhoog, handel onregmatig en behoort in beginsel daarvoor deliktueel aanspreeklik gehou te kan word mits aan die ander deliksvereistes voldoen word. Die gemeenskapsoortuigings word op hulle beurt bepaal deur die algemene kennis en spesifieke

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71 Sien Deel I par 3 5 van die verslag (1995 *THRHR* 432).

72 In die sin van 'n willekeurige menslike gedraging.

73 Hetsy in die vorm van opset of nalatigheid. Hierby moet ook die gevalle in gedagte gehou word waar aanspreeklikheid berus op risikoskepping of -verhoging, benewens die gemeenregtelike gevalle van skuldlose aanspreeklikheid wat steeds in ons reg bestaan.

74 Hetsy dit van 'n vermoëns- of nie-vermoënsaard is.

75 In die sin van 'n skending van die regsoortuigings van die gemeenskap, wat gewoonlik manifesteer in die inbreukmaking op iemand anders se subjektiewe regsfeer of die nienakoming van 'n regsplig. Sien par 4 2 hieronder.

76 Sien par 4 3 hieronder.

ervaring wat ten aansien van die besondere soort groepsoptrede in die gemeenskap of elders in soortgelyke situasies bestaan. Geykte faktore, soos die aard van die optrede en die belange wat daarby betrokke is, die benadelingspotensiaal van die groepsoptrede, die nut van die groepsoptrede en die aangesprokene se betrokkenheid daarby, die moontlikheid, koste en moeite verbonde aan onttrekking aan die groepsoptrede en dergelike oorwegings, kan van hulp wees om uit te maak of aan die groepsoptrede sodanige risiko van benadeling gekleef het dat dit onredelik was vir die aangesprokene om in die omstandighede by die groep betrokke te raak of daarvan deel te bly.

- 'n Belangrike oorweging by die vasstelling van onregmatigheid in hierdie gevalle, is dat mense besig was om hulle konstitusioneel gewaarborgde fundamentele vryheid om te demonstreer, en sodoende hulle reg op vryheid van spraak, uit te oefen toe 'n onbekende dader uit die groep die nadeel toegebring het; aan die ander kant moet ingesien word dat sodanige uitoefening begrens word deur die ander beskermde belange van die gemeenskap en van individue. Indien 'n regsmiddel algemeen weerhou sou word waar daar onregmatig opgetree is deur deel te word of te bly van 'n groep van waaruit nadeel toegebring is bloot omdat mense daarop geregtig is om te demonstreer, en derdes se regtens beskermde belange ten opsigte van hulle persoonlikheid, liggaam of goed dus aangetas kan word sonder dat die geskonde ewewig deur 'n gepaste privaatregtelike regsmiddel reggestel kan word, is anargie ons voorland. Aan die ander kant mag ook nie deur oormatige ywer met die toevoeging van regsmiddele meegebring word dat mense nie kans sal sien om van hulle vryheid om te demonstreer gebruik te maak nie, want dan het ons eweneens die baba saam met die badwater uitgegooi.

4 3 Die kousaliteitsvereiste en groepslidmaatskap in die onderhawige gevalle

- Die *conditio sine qua non*-toets vir die bestaan van 'n kousale verband se mislukking in die geval waar 'n onbekende lid van 'n groep nadeel aan 'n ander toegebring het, kan nie ondervang word deur die handelingsfiguur aan te pas, of deur dit te vervang deur die een of ander vorm van gesamentlike handeling nie. Die probleem kan ook nie opgelos word deur die splitsing van die kousaliteitselement in kumulatiewe of alternatiewe of watter ander klas van kousaliteit ook al nie, al is dit met die oog op die hantering van bepaalde ander gevalle wat kan voorkom inderdaad sinvol om sodanige onderskeidinge te maak.
- Wanneer sommiges beweer dat in die onderhawige gevalle heeltemal met die kousaliteitsvereiste weggedoen moet word, moet dit nie só verstaan word dat daar geen kousale verband tussen die tersaaklike groepsgedrag en groepsgebeure en die intrede van die nadeel hoef te wees nie; wat wél daaronder verstaan moet word, is dat nie vereis word dat die aangesprokene iets meer hoef te gedoen het as om deel te word of te bly van die groep van waaruit die nadeel teweeggebring is, ten einde te voldoen aan die vereiste dat die aangesprokene by die intrede van die nadeel sodanig *betrokke* was dat deliktuele aanspreeklikheid in beginsel daaraan verbind kan word nie.
- Die oplossing vir die probleem kan daarin gevind word dat aan die kousaliteitsvereiste ten opsigte van die aangesprokene in die onderhawige gevalle die betekenis geheg word van *betrokkenheid by die groepsaktiwiteit*. Daaronder word dan verstaan dat die aangesprokene deel geword of gebly het

van die groep toe die groepsaktiwiteit 'n buitengewone risiko van benadeling vir ander daargestel het. Die gedagte van *betrokkenheid by die daarstel of instandhouding van die psigiese sfeer verbonde aan die gebeure* is, ten spyte van die metafisiese skyn daarvan, nuttig om te verduidelik waaruit sodanige betrokkenheid bestaan. Deur in die "verkeerde" omstandighede deel te word of te bly van 'n groep, dra die aangesprokene by tot die daarstel of voortsetting van 'n bepaalde psigiese klimaat van waaruit die gewelddadigheid ontstaan wat tot die benadeling lei.

(*word vervolg*)

Die werweldier se reg op biopsigiese integriteit

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SUMMARY

Vertebrata's right to biopsychic integrity

In this article it is pointed out that scientific and legal interest in animal protection and animal rights has exploded at both national and international level. The vertebrata's right to biopsychic integrity is explained. Scientific experiments on animals are scrutinised. The Draize test as well as the LD-50 test is criticised. Legal measures directed at protection of animals during scientific experiments are critically evaluated. References are made throughout to various foreign legal systems. It is contended that vertebrata have a right to avoidance of pain, a right to freedom of movement in order to satisfy basic instincts, and a right to intactness of anatomic functionality.

1 INLEIDING

Die afgelope paar dekades was daar 'n ontploffing van (onder andere) regswetenskaplike publikasies oor dierebeskerming en ook oor diereregte.[1] Dierebeskerming en gepaardgaande daarmee die aandrang op diereregte, het inderdaad 'n internasionale dimensie verkry.[2] Dit het naamlik reeds in internasionale ooreenkomste neerslag gevind.[3] Hofbeslissings, selfs verreikendes, het nie uitgebly nie. So het 'n Frankfurtse hof beslis dat psigologie-studente geregtig is op eksperimente wat nie die dood van diere tot gevolg het nie.[4]

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* Dank word uitgespreek teenoor die Universiteit van Pretoria wat my in staat gestel het om 'n deel van dié navorsing in 1993 te doen aan die Max-Planck Institut für ausländisches öffentliches Recht und Völkerrecht, Heidelberg, Duitsland. Die menings uitgespreek verteenwoordig nie noodwendig dié van die Universiteit van Pretoria nie.

1 Chase "Animal rights: an interdisciplinary, selective bibliography" 1990 *Law Library J* 359–391.

2 Gündisch "Tierschutz im Gefüge von Verfassungsrecht und europäischen Recht" 1986 *MDR* 537.

3 Wengler "Tierschutz und internationales Strafrecht" 1980 *JR* 487.

4 VG Frankfurt, Urt v 24/10/1990, 1991 *NJW* 768. Sien ook Brandhuber "Kein Gewissen an deutschen Hochschulen?" 1991 *NJW* 725.

Die onderhawige bydrae word beperk tot werweldiere (*vertebrata*). Ryke[5] verklaar in hierdie verband:

> "Ten opsigte van kompleksiteit wissel die Vertebrata van relatief eenvoudige visagtige diere tot hoogs georganiseerde soogdiere. Almal besit die drie kenmerkende chordaatstrukture – notochorda, hol dorsale senuweestring en kieusakke of kieusplete – tydens een of alle lewensstadiums. By sommige primitiewe werweldiere is hierdie strukture in die volwassenes teenwoordig, maar by die hoër ontwikkelde groepe is sommige kenmerke slegs in die embrio herkenbaar.
>
> By sommige laer werweldiere bestaan die swak ontwikkelde *werwelkolom* uit kraakbeen, en die hele chorda of 'n gedeelte daarvan bly in die volwasse dier as 'n ondersteuning vir die rug en werwelkolom. Die hoër werweldiere het meestal 'n benige werwelkolom en by hulle verplaas dit die chorda tydens embriogenese.
>
> Die hoofskeletraamwerk van 'n werweldier is inwendig en bevat lewende selle. Dit het dus die vermoë om te groei en wysiginge te ondergaan gedurende die lewe van 'n individu. Die *kranium* of skedel wat die brein beskerm, is kenmerkend van alle hoër werweldiere en selfs die primitiefste vorme het 'n rudiment daarvan."[6]

Pyngevoel en -lyding is by werweldiere meer intensief.[7] Daarom word sekere vorme van beskerming in die Duitse reg tot werweldiere beperk.[8] Binne die biopsigiese struktuur van die werweldier word aandag aan drie regte gegee, naamlik die reg op pynvermyding, die reg op basies-instinkmatige bewegingsvryheid en die reg op anatomies-funksionele intaktheid. Aangesien hierdie regte dikwels by wetenskaplike eksperimentering ter sprake kom, word 'n afsonderlike afdeling aan die problematiek in verband daarmee afgestaan. 'n Verwysing na "dier" in die bespreking wat volg, is 'n verwysing na "werweldier".

2 WETENSKAPLIKE EKSPERIMENTE

Wetenskaplike eksperimente op diere is nie nuut nie. So verklaar McDonald:[9]

> "Animals have been the subject of scientific research and experiments since the third century BC. Although painful experiments are no longer justified by resorting

5 *Dierkunde* (1975) 666.

6 Sien ook Hildebrand *Analysis of vertebrata structure* (1987) 1.

7 Lorz *Tierschutzgesetz* (1992) 15; Von Loeper en Reyer "Das Tier und sein rechtlicher Status" 1984 *ZRP* 206. Sien ook Squire "On animals and pain" 1985 (Summer) *Between the species* 20: "The fact that animals cannot communicate with us verbally has reinforced the notion that they cannot think, and therefore, do not experience pain. In a 1984 Congressional hearing on the steel jaw leghold trap, one trapping advocate stated that he would not believe that a trapped animal was in pain until the animal told him so in our own language! But, as we have seen, the capacity to sense pain is basic and is unrelated to language. We do not doubt that human infants feel pain even before they have learned to talk; so, why should the fact that animals cannot talk lead us to doubt that they feel pain? There can be no justification for applying one set of criteria to humans and a different set to animals. All the evidence indicates that animals are more similar to humans than we have ever suspected. If they are like us, are we justified in doing things to animals that we would not do to other humans? Or do we have an obligation to treat animals the way we would wish to be treated? Luckily, more and more people are recognising the similarity between animals and humans and are demanding that animals be treated with the consideration and respect that their sentient natures require."

8 Lorz 84.

9 "Creating a private cause of action against abusive animal research" 1986 *Univ of Penn LR* 399.

> to the Cartesian view that animals are simply machines, research on animals continues in the hope of discovering answers to medical and biological questions. With the development of an active movement for the recognition of animal rights, however, both the use of animals in research and the pain that is inflicted on them in the name of science are coming under increasing scrutiny."

Honderde miljoene diere word jaarliks wêreldwyd in wetenskaplike eksperimente gedood.[10] 'n Vraagteken hang egter oor baie van hierdie eksperimente.[11]

2 1 Tipes eksperimente

Die tipes eksperimente wat uitgevoer word, kan in drie (dikwels oorvleuelende) kategorieë ingedeel word, naamlik (1) toksiologiese navorsing; (2) mediese navorsing; en (3) gedragsnavorsing.

2 1 1 Toksiologiese navorsing

Diere word gebruik om die veiligheid van verbruikersgoedere en medisynes te toets. Produkte soos insekdoders, bleikmiddels, oondskoonmaakmiddels, deodorante, ink, grimering, verf en sjampoe word eers op diere getoets om vas te stel of dit vir die mens nadelig kan wees. Veral twee toetse wat gebruik word, het grootskaalse kritiek uitgelok, naamlik die Draize-toets en die LD-50-toets. Ten aansien van eersgenoemde toets verklaar Gendin:[12]

> "The test consists of placing rabbits in stocks that immobilize their heads and then dropping the substance to be tested into one eye, using the other eye as a control. The testing takes place over several days and may lead to opacity of the cornea, haemorrhage, ulceration, blindness, and nearly always to considerable irritation and pain. Indeed the pain is sometimes so great that rabbits have been known to break their backs in efforts to free themselves from the stocks. Rabbits are particularly well suited for this experiment because their tear ducts are too inefficient to wipe away or dilute the product being tested."

Volgens Thomas[13] bestaan daar reeds effektiewe alternatiewe vir dié toets en is die resultate daarvan in ieder geval nie baie akkuraat nie.

Die doel met die LD-50-toets is om te bepaal welke hoeveelheid van die stof wat getoets word, nodig is om 50% van die toetsdiere te dood. Gewoonlik word die toetsdiere eers baie siek voordat hulle sterf. Hierdie toets is al dikwels gekritiseer, veral omdat dit in elk geval nie akkurate resultate oplewer nie. Mens en dier reageer nie altyd dieselfde op 'n giftige stof nie. So is bensien en arseen nie noodwendig vir toetsdiere giftig nie maar potensieel dodelik vir die mens. Regan[14] sê die volgende oor die nodigheid van hierdie toetse:

> "[T]here already are plenty of lipsticks, eyeshadows, oven cleaners, paints, brake fluids, crayons and other products competing in the market and readily available to consumers. There is no demonstrable human need that would be served by having new products from which to choose, nor is there any credible basis for believing that any consumer would be harmed by being deprived of yet another Christmas

10 Gendin "The use of animals in science" in Regan (red) *Animal sacrifices* (1986) 15; Ryder *Animal revolution* (1989) 242–243; Dudeck "The use of animals in medical research and testing: does the tail wag the dog?" 1987 *Ohio Northern Univ LR* 871.

11 McDonald 399.

12 22.

13 "Antinomy: the use, rights, and regulation of laboratory animals" 1986 *Pepperdine LR* 735.

14 Regan *The case for animal rights* (1983) 373.

> tree spray or nail polish from which to choose, least of all that this deprivation in any given case would be prima facie comparable to the harm done to animals in say the LD-50 test."

Die LD-50-toets word ook gebruik om medisynes te toets. Dwyer toon aan dat, in die farmaseutiese veld in geheel, slegs 1 uit 100 nuwe middels wat op diere getoets word, goed geag word om op die mens te toets en slegs 2% daarvan uiteindelik bemark word.[15] Ook hier is die toetsresultate dikwels onakkuraat. Penissilien is byvoorbeeld soms baie giftig vir diere maar van groot waarde vir mense. Die middel thalidomide is daarenteen op diere getoets en veilig bevind. Toetse van dié middel op gekultiveerde menslike embrio-weefsel het egter katastrofiese gevolge gehad. 'n Verdere tekortkoming van die toets van medisyne op diere is dat diere nie newe-effekte, soos hoofpyn en naarheid, aan wetenskaplikes kan meedeel nie. Buyukmihci[16] se samevatting is onderskryfbaar:

> "[O]nly experimentation on the human animal can provide results that can accurately be applied to the human condition, there is no such thing as a model of a human being."

2 1 2 Mediese navorsing

Diere word ook in mediese navorsing met betrekking tot byvoorbeeld kanker, vigs en hartsiektes gebruik. Verskeie mense bevraagteken die noodsaaklikheid van dié tipe navorsing. Buyukmihci[17] wys daarop dat

> "most advances, in terms of increasing the longevity and quality of our lives, have not come about through the use of non-human animals. The greatest benefits have come from adequate nourishment and proper sanitation".

Volgens Gendin[18] weet wetenskaplikes wat baie tipes kanker veroorsaak. Hierdie kennis het aan die lig gekom deur epidemiologiese studies en nie deur eksperimente op diere nie. Sommige kritici is selfs van oordeel dat eksperimente met diere gevaarlik vir die mediese wetenskap is omdat dit die aandag weglei van die model wat werklik bestudeer moet word, naamlik die mens. So verklaar Sharpe:[19]

> "But since animal-based research is unable to combat our major health problems and, more dangerously, often diverts attention from the study of humans, the real choice is not between animals and people, rather it is between good science and bad science."

2 1 3 Gedragsnavorsing

'n Wye reeks eksperimente word in dié verband op diere uitgevoer. So word gedeeltes van 'n dier se senustelsel vernietig of gestimuleer om te bepaal hoe dit sy gedrag affekteer. Elektriese skokke word aan diere toegedien om breinstimuli te monitor. Pasgebore apies word van hulle ma's geskei en in totale isolasie aangehou om die invloed daarvan op hul persoonlikheidsontwikkeling vas te

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15 "The role of laboratory animals in pharmaceutical research in South Africa" in *South African Association of Laboratory Animal Science* (1978) 33.

16 "The use of nonhuman animals in research" 1990 *Law Library J* 357.

17 356.

18 31.

19 "Animal experiments – a failed technology" in Langley (red) *Animal experimentation* (1989) 88 111.

stel. Diere se oë word verwyder om te bepaal welke effek blindheid op hulle gesigsuitdrukking het.[20] Gendin, met verwysing na Heim wys dié tipe toets tereg af:[21]

> "[E]xperimenters do experiments to animals that would be unthinkable to perform on humans and justify them on the grounds that animals are utterly different from us. On the other hand, they believe that the results gained from the experiments may be extrapolated to form conclusions about people. This is inconsistent."

2 2 Juridiese beheermaatreëls

In die VSA word eksperimente op diere deur die Animal Welfare Act (AWA) van 1985 gereël.[22] Daarin word standaarde neergelê vir die versorging van proefdiere en vir die aanstelling van 'n inspeksiekomitee. Hierdie komitee moet 'n veearts en 'n gemeenskapslid as lede hê en het die bevoegdheid om laboratoriums waarin diere in eksperimente gebruik word, te inspekteer. Die AWA vereis ook dat laboratoriums gelisensieer moet word. 'n Lisensie sal slegs uitgereik word indien aan voorgeskrewe standaarde ten aansien van huisvesting, hantering, voeding, sanitasie, ventilasie en mediese sorg voldoen word. Artikel 2143(a) van die AWA maak ook voorsiening vir die gebruik van narkotiese en verdowingsmiddels. Hierdie bepaling is egter nie gebiedend nie. Die LD-50- en Draize-toets is in party gebiede in die VSA verbied.[23] Die Universiteit van Harvard het in 1984 ongeveer 600 000 dollar bestee om 4 000 honde vir eksperimente te koop, te kondisioneer, te voed en te huisves. In Massachusetts is dit egter tans verbode vir navorsingsliggame om diere by 'n openbare skut te koop wat baie goedkoper is.[24]

Die posisie in Brittanje word gereël deur die Animals (Scientific Procedures) Act van 1986.[25] Hierdie wetgewing vereis dat beide 'n persoonlike en projeklisensie aan 'n navorser en navorsingsinstansie respektiewelik toegeken word. Ten einde te kwalifiseer vir 'n persoonlike lisensie moet die applikant bewys dat hy oor die nodige opleiding beskik om die eksperimente waarvoor hy aansoek doen, te kan uitvoer en ook dat hy bewus is van die vereistes wat vir die versorging van die diere gestel word. By 'n aansoek om 'n projeklisensie moet onder andere vermeld word hoe ernstig die diere geaffekteer gaan word. In dié verband word drie vlakke van pyn onderskei, naamlik lig ("mild"), matig ("moderate") en substansieel ("substantial"). Die betrokke vlak van pyn mag nie oorskry word sonder dat die Home Office daarvan in kennis gestel is nie. Ook word van die applikant verwag om 'n waardeskatting te maak, met ander woorde die waarskynlike nadelige gevolge van die eksperiment op die diere moet opgeweeg word teen die voordele wat die projek moontlik kan inhou. Die projeklisensiehouer

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20 Gendin 23–27; Regan *The case for animal rights* (1983) 352.

21 26.

22 Dresser "Assessing harm and justification in animal research: federal policy opens the laboratory door" 1988 *Rutgers LR* 723–795; sien ook Moretti *Animal rights and the law* (1984) 42.

23 Gavin "Constitutional limits in the regulation of laboratory animal research" 1988 *Yale LJ* 369.

24 Silas "The dogs win" 1984 *ABA J* 37.

25 Cooper *An introduction to animal law* (1987) 44–72; Hickman *Recent local advances in the regulation of animal experimentation* (1991) 32.

het spesifieke verantwoordelikhede, soos rekordhouding van al die diere en eksperimente wat op hulle uitgevoer is. Slegs diere wat in erkende broei-eenhede ("breeding establishments") geteel is, mag in laboratoriums gebruik word. Die Sekretaris van Binnelandse Sake (Home Office) is gemagtig om 'n lisensie vir drie maande op te skort indien hy dit in belang van die diere ag. In sekere omstandighede is eutanasie op 'n sekere voorgeskrewe wyse verpligtend. Inspekteurs, met mediese of veeartsenykundige kwalifikasies, kan laboratoriums te eniger tyd besoek en het die bevoegdheid om die eutanasie van 'n dier wat onnodig ly, te beveel.

In die Europese Gemeenskap is 'n konvensie in 1986 aangeneem, bekend as die European Convention for the Protection of Vertebrate Animals used for Experimental and other Scientific Purposes. Die idee is dat die bepalings van dié konvensie in nasionale wetgewing opgeneem word. Dit stel naamlik sekere minimum standaarde vir die aanhouding en versorging van proefdiere, maak voorsiening vir behoorlike rekordhouding en verbied die aanwending van rondloperkatte en -honde as proefdiere.[26]

In Suid-Afrika bestaan daar nie wetgewing wat spesifiek gerig is op die beheer van wetenskaplike eksperimente op diere nie. Die Dierebeskermingswet 71 van 1962 is ook op wetenskaplike eksperimente van toepassing. Daar bestaan egter 'n dringende behoefte aan spesifieke wetgewing in die onderhawige verband.[27] Die Mediese Navorsingsraad (MNR) het egter wel 'n etiese kode neergelê vir navorsers wat fondse van die MNR ontvang. Dit is 'n redelik omvattende kode wat onder andere voorsiening maak vir die gebruik van alternatiewe eksperimente indien moontlik, die gebruik van narkose en pynstillers waar die dier ernstige pyn kan verduur en die aanstelling van etiese komitees om toesig oor die hele proses te hou.[28]

2 3 Riglyne vir verbetering

In dié verband kan die volgende aan die hand gedoen word:

2 3 1 Kontrole deur lisensiëring

Soos reeds hierbo aangetoon is, mag slegs persone wat in besit van 'n lisensie is in Brittanje eksperimente op diere uitvoer.[29] In die land word ook noukeurig rekord gehou van elke dier waarop daar geëksperimenteer word. In 1987 is daar byvoorbeeld 3 631 393 gelisensieerde eksperimente op diere uitgevoer. Hiervan was 4 935 op katte, 5 078 op primate en 10 853 op honde. Daar word ook rekord gehou van die tipe eksperimente waarvoor die diere gebruik is. So is daar in 1987 14 534 diere gebruik om kosmetiese produkte te toets en 91 934 is in bestralingseksperimente gebruik.[30] Ook in Duitsland moet individue en organisasies wat toetse op diere doen, in besit van lisensies wees.[31] Hierdie

26 Cooper 177.
27 Sien Bleby "What is laboratory animal science and the need for a South African Association for Laboratory Animal Science" *South African Association for Laboratory Animal Science* (1978) 43.
28 Hickman "The regulation of animal experimentation" 1991 *Bluestocking* 32.
29 Sien ook Ryder "Speciesism in the laboratory" in Singer (red) *In defence of animals* (1985) 80.
30 Ryder *Animal revolution* 242.
31 Cooper 177.

benadering behoort as uitgangspunt ook in Suid-Afrika aanvaar te word. Sonder kontrole kan diere op groot skaal mishandel en misbruik word.[32]

2 3 2 Pyn- en benadelingsbeperking

In die VSA vereis die AWA dat navorsers 'n veearts by beplanning van 'n navorsingsprojek moet raadpleeg en dat hulle verdowingsmiddels en pynstillers moet gebruik tensy dit wetenskaplik noodsaaklik is dat dié middels nie gebruik word nie. In Australië moet enige dier wat ernstige, onomkeerbare pyn verduur op 'n menslike wyse gedood word, ongeag of die navorsingsdoel bereik is of nie. In Brittanje word, soos hierbo[33] aangetoon, met vlakke van pyn gewerk. Die pynvlak, soos in die lisensie vermeld, mag nie oorskry word nie. Indien 'n dier aan 'n eksperiment onderworpe is wat ernstige pyn veroorsaak en nie verlig kan word nie, moet die dier onmiddellik op 'n menslike wyse gedood word.[34] Hierdie benaderingswyse kan onderskryf word en behoort ook in Suid-Afrika gevolg te word.

2 3 3 Verbetering in die aanhouding en versorging van die diere

Die Animal Welfare Institute in die VSA lê die volgende riglyne neer:

> "Experimental animals, sacrificed for human benefit, should be provided optimum living conditions before, during and after their use. This is a minimum repayment for their services."

Die AWA vereis dan ook dat navorsingsfasiliteite voorsiening moet maak vir oefening vir honde en 'n fisiese omgewing moet geskep word wat bevorderlik vir primate se psigiese welstand is.[35] Dit is vereistes in die regte rigting en is onderskryfbaar.

2 3 4 Vermindering van eksperimente met diere

Soos hierbo[36] genoem, word honderde miljoene diere jaarliks in wetenskaplike eksperimente gebruik. Baie van die eksperimente is onnodig en waardeloos. Lewensvatbare alternatiewe eksperimente sonder diere bestaan in 'n veelheid van gevalle. Dit is duidelik dat die aantal eksperimente wat op diere uitgevoer word, aansienlik verminder kan word. Die ideaal moet wees om dit drasties te verminder en sekere tipes eksperimente behoort verbied te word.[37]

2 3 5 Die daarstelling van 'n ombudsman vir dierebelange

Daar behoort 'n ombudsman aangestel te word om oor dierebelange te waak. Hy/sy behoort bygestaan te word deur inspekteurs wat te eniger tyd laboratoriums kan besoek en sodoende toesig oor die welstand van diere hou. Algehele outonomie van wetenskaplikes by eksperimente op diere is geheel en al onaanvaarbaar.[38]

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32 Sien Karstaedt "Vivisection and the law" 1982 *THRHR* 350.
33 Par 2 2 *supra*.
34 Dresser "Standards for animal research: looking at the middle" 1988 *Journal of Medicine and Philosophy* 125–128.
35 Dresser "Standards for animal research" 128–129.
36 Par 2 2 *supra*.
37 Sien *ibid*.
38 Vgl Kloepfer "Tierversuchbeschränkungen und Verfassungsrecht" 1986 *JZ* 212.

3 DIEREREGTE

In hierdie afdeling word aanvanklik enkele opmerkinge oor die regsubjektiwiteit van die dier gemaak. Daarna word na spesifieke regte verwys.

3 1 Regsubjektiwiteit van die dier

Die algemene benadering is dat slegs mense of 'n menslike groep regsubjektiwiteit kan hê.[39] Hierdie benadering is sterk antroposentries gefundeerd: die ganse natuur sentreer, volgens die mens, om homself.[40] Die Duitse Bundesverfassungsgericht[41] het beslis dat die Tierschutzgesetz ten doel het om die medeverantwoordelikheid van die mens vir die lewende wesens wat aan hom toevertrou is, te reël. Die vroeëre mens het homself nie bokant die diereryk geag nie.[42] So wys die bekende Switserse psigoloog Jung[43] daarop dat die Afrika-mens sekere diere, soos die olifant en die leeu, as van 'n dierkundig hoër klassifikasie as homself beskou. Diere is aanvanklik selfs aan die strafreg onderworpe gestel.[44] Die antroposentrisme van die moderne mens is by ander geleenthede[45] verwerp. Die argumente daarin geopper, word nie hier herhaal nie. Diere verdien regserkenning en -beskerming ter wille van hulleself en nie ter wille van die mens nie.[46]

3 2 Diereregte as 'n natuurlike konsekwensie van die sosio-emosionele evolusieproses van die mens

Die *pater* (tropleier; hoofman; koning) het aanvanklik die *ius vitae necisque* oor sy ondergeskiktes gehad en is, volgens Freud, deur hulle beide gevrees en bewonder.[47] Hy het die reg gesimboliseer en was die enigste "draer van regte". Uit hierdie sosio-emosionele gevangenskap het die "ondergeskiktes" en andersoortiges geleidelik ontwikkel. So het met die verloop van tyd slawe, anderskleuriges, anderskulturiges, vroue en kinders sekere regte verkry.[48] Hierdie probleme is nog nie afgeloop nie. Seksisme, rassisme, kulturisme en adultisme is derhalwe deur die eeue juridies geërodeer. Dieselfde proses, hoewel nog in 'n beginstadium, is besig om ook spesisisme te erodeer.

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39 Sien White *Rights* (1984) 90; Liddell "The consistency-from-marginal cases argument for animal rights: a critical examination" 1985 *Victory Univ of Wellington LR* 147.

40 Sien Hargrove "Foundations of wildlife protection attitudes" 1987 *Inquiry* 3; Sitter *Plädoyer für das Naturrechtsdenken. Zur Anerkennung von Eigenrechten der Natur* (1984) 39–40.

41 (1973) BVerfGE 36 47 56–57; (1978) BVerfGE 48 376 389 gelees met a 74 (20) van die *Grundgesetz*; Schmidt-Bleibtreu en Klein *Kommentar zum Grundgesetz* (1990) 834.

42 Lorz 27.

43 *Modern man in search of a soul* (vertaling van Dell en Baynes (1949)) 165.

44 Evans *The criminal prosecution and capital punishment of animals* (1987) 1 ev.

45 Labuschagne "Regsubjektiwiteit van die dier" 1984 *THRHR* 334; "Regsobjekte sonder ekonomiese waarde en die irrasionele by regsdenke" 1990 *THRHR* 557.

46 Sien Goetschel *Tierschutz und Grundrechte* (1989) 28–34; Emrich "Tierschutz und Tierschutzrecht" 1949 *MDR* 676; Von Loeper en Reyer 208; Sitter 32; Weinreb "Natural law and rights" in George (red) *Natural law theory* (1992) 284–285.

47 *Complete psychological works* vol 18 (vertaal onder redaksie van Strachey (1971)) 127 128; Labuschagne "Die voorrasionele evolusiebasis van die strafreg" 1992 (1) *TRW* 28–29.

48 Sien Ryder 177; Albright "Animal welfare and animal rights" 1986 (Winter) *National Forum* 34; Rollin *Animal rights and human morality* (1981) 85; Magel "Animals: moral rights and legal rights" 1985 (Spring) *Between the species* 13–14.

3 3 Diere kan hulleself nie in drukgroepe organiseer nie

Anders as slawe, anderskleuriges, anderkulturiges, vroue en tot 'n sekere hoogte ook kinders, kan diere hulleself nie organiseer en in opstand kom nie.[49] Diere kan gevolglik nie self hulle regsposisie verbeter nie. Hiervoor is hulle geheel en al afhanklik van diereliefhebbers en welsynsorganisasies.[50] In beide Suid-Afrika en die VSA, om twee voorbeelde te gebruik, het sodanige groepe *locus standi in judicio* om "namens diere" te litigeer.[51] Hierdie feit sal in 'n toenemende mate tot gevolg hê dat die regsposisie van diere nie slegs onder die aandag van die howe nie maar ook onder die aandag van die publiek kom.

3 4 Die dier se reg op pynvermyding

Daar is verskeie bepalings[52] in die Dierebeskermingswet wat daarop gerig is om pyn by diere te vermy.[53] Dié bepalings is ook op wetenskaplike eksperimente van toepassing.[54] Die Duitse Tierschutzgesetz (TSG) van 1986 bevat bepalings wat dieselfde veld dek.[55] Artikel 254(1) van die Nederlandse Strafkode bepaal in dié verband soos volg:

> "Met gevangenisstraf van ten hoogste zes maanden of geldboete van de derde categorie wordt gestraft:
>
> (1) hij die, zonder redelijk doel of met overschrijding van hetgeen ter bereiking van zodanige doel toelaatbaar is, opzettelijk een dier pijn of letsel veroorzaakt of de gezondheid van een dier benadeelt;
>
> (2) hij die, zonder redelijk doel of met overschrijding van hetgeen ter bereiking van zodanige doel toelaatbaar is, opzettelijk aan een dier dat geheel of ten dele aan hem toebehoort en onder zijn toezicht staat, of aan een dier tot welks verzorging hij verplicht is, de nodige verzorging onthoudt."[56]

Dat al hierdie bepalings om diere self gaan, blyk uit die feit dat dit ook teenoor die eienaar van die dier geld. So het 'n Duitse hof beslis dat die eienaar van 'n dier aanspreeklik is as hy die dier mishandel deur oorafrigting.[57] Soos by ander geleenthede aangetoon is, het 'n dier, as uitgangspunt, 'n reg om op 'n pynvermydende wyse behandel te word.[58]

3 5 Die dier se reg op basies-instinkmatige bewegingsvryheid

Kragtens artikel 2(1)(b) van die Dierebeskermingswet stel dit 'n misdaad daar om 'n dier aan te hou in 'n plek waar onvoldoende ruimte is. Artikel 2(1) van die Duitse TSG bepaal dat 'n dier nie teen sy aard of behoeftes aangehou mag word nie. Kragtens artikel 2(2) TSG mag 'n dier nie op 'n wyse aangehou word wat

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49 Ryder 105; McDonald 399; Rollin 85–86; Sitter 36–39.

50 Goetschel 34. In die VSA bestaan daar 'n organisasie, "Attorneys for Animal Rights", bestaande uit regsgeleerdes wat hulle vir diereregte beywer.

51 *SPCA, Standerton v Nel* 1988 4 SA 42 (T); *Sierra Club v Morton* 405 US 727, 31 LEd 2d 636, 92 S Ct 1361.

52 A 2(1) a–s en regulasies onder genoemde wet uitgevaardig.

53 Sien Labuschagne en Bekker "Dieremishandeling" 1986 *Obiter* 33 waarin dié bepalings bespreek word.

54 Sien Karstaed 351.

55 A 3–18; Lorz 36 ev.

56 Sien Remmelink *Wetboek van Strafrecht* Boek 2 (1992) 788.

57 OLG Hamm, Urt v 27/2/1985, 1985 *NStZ* 275.

58 Labuschagne 1984 *THRHR* 334; 1990 *THRHR* 557; Labuschagne en Bekker 33.

hom pyn of vermybare lyding veroorsaak of beseer (beskadig) nie.[59] In Duitsland het veral die aanhou van lêhenne in batterye onder skoot gekom omdat hulle nie daarin genoeg ruimte het om hulle instinkte, soos die versorging van hul vere, te bevredig nie.[60] Ook in die VSA word die sogenaamde agribesighede of fabrieksboerdery gekritiseer. So verklaar Frank:[61]

> "Factory farming, characterized by overcrowding, restricted movement, unnatural diets and unanesthesized surgical procedures utilizes intensive farming procedures in such a way that results in severe suffering for the farm animal. The poultry industry uses factory farming techniques in nearly every phase of poultry production and, consequently, most vividly illustrates the abuses of factory farming. However, factory farming occurs in the raising of all farm animals – hogs, calves, dairy cows, cattle and so forth."

Die aanhouding van wilde diere in hokke behoort, as uitgangspunt, verbied te word.[62] Daarom is die bestaan van dieretuine as sodanig onaanvaarbaar.[63]

3 6 Die dier se reg op anatomies-funksionele intaktheid

Kragtens artikel 2(1)(a) van die Dierebeskermingswet is dit strafbaar om 'n dier te vermink. Ingevolge artikel 254(1)(1) van die Nederlandse Strafboek stel dit 'n misdaad daar om 'n letsel aan 'n dier te veroorsaak. Kragtens artikel 6(1) van die Duitse TSG mag 'n ledemaat van 'n dier, geheel of gedeeltelik, slegs geamputeer word of liggaamsorgane verwyder of versteur word indien dit dierartskundig goedgekeur word.[64] Wat duidelik uit dié bepalings blyk, is dat die dier se anatomies-funksionele intaktheid beskerm word. 'n Dier se liggaam mag hiervolgens nie geskend word nie selfs al sou dit sonder pyn en ongerief geskied.

4 KONKLUSIE

In bogenoemde bespreking is aangetoon dat die werweldier se biopsigiese integriteit, in die sin van pynvermyding, basies-instinkmatige bewegingsvryheid en anatomies-funksionele intaktheid, regtens beskerm word. Hierdie beskerming geskied ter wille van die dier self. Daarom is van die standpunt uitgegaan dat die dier regte in dié verband het, selfs al sou sodanige beskerming ook 'n beskerming van die mens se gevoelslewe, en veral van menslike waardigheid, wees.[65] Namate die mens meer sensitief vir dierebelange en -regte word, sal gebruike wat die mens vir eeue beoefen het, soos die jag van diere as 'n

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59 Lorz 95.

60 Brandhuber "Das neue Tierschutzgesetz – ein grundlegender Fortschritt für den Tierschutz?" 1988 *NJW* 1952; Sojka "Käfighaltung von Legehennen aus rechtlicher Sicht" 1985 *MDR* 364; Gündisch 529; vgl ook OLG Frankfurt, Beschl v 14/9/94, 1985 *NStZ* 130.

61 "Factory farming: an imminent clash between animal rights activists and agribusiness" 1979 *Boston College Environmental Affairs LR* 425.

62 Händel "Kein halbherziger Tierschutz" 1986 *ZRP* 122.

63 Erwin en Deni "Strangers in a strange land: abnormal behaviours or abnormal environments?" in Erwin, Maple en Mitchell (reds) *Captivity and behaviour* (1979) 6; Jamieson "Against zoos?" in Singer 108.

64 Lorz 188.

65 Sien Bässler en Daxer "Die Gesetzentwürfe zur Änderung des Tierschutzgesetzes" 1982 *ZRP* 198; Sitter 40; Jamieson "Experimenting on animals: a reconsideration" 1985 (Summer) *Between the species* 4.

sportsoort,[66] in die slag bly. In Suid-Afrika bestaan daar 'n behoefte aan omvattender navorsing oor die kwessie van diereregte en die begrensing daarvan. Ons hoop hierdie artikel het 'n bydrae tot aktivering van sodanige navorsing gemaak.

66 Sien Thomas "Hunting as a political issue" 1986 *Parliamentary Affairs* 30.

Erfregtelike ontwikkelinge aan die Kaap: 1806–1828

(*vervolg*)*

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3 FORMALITEITE, *CLAUSULE RESERVATOIR, QUERELA INOFFICIOSI TESTAMENTI*

3 1 Romeinse regsontwikkeling

Verskeie testamentvorme het in die Romeinse reg bestaan. Die vroegste vorme was die *testamentum calatis comitiis* en die *testamentum in procinctu.* Hierdie twee vorme het reeds vroeg verdwyn. Alle latere testamentvorme is van die *testamentum per aes et libram* afgelei. Dié testament was 'n formele testament waarvoor vyf getuies, 'n skaalhouer en 'n *familiae emptor* vereis is. Die boedelgoedere is deur middel van 'n skyn *mancipatio*-handeling oorgedra. Indien nie aan die formaliteite voldoen is nie, was die testament nietig.[183]

Vanweë die nietigheid wat 'n gebrek aan formaliteite meegebring het, het die *praetor* ingegryp en *bonorum possessio secundum tabulas* verleen indien die erfgename die *tabulae* kon toon waarin hulle as erfgename ingestel is en kon aantoon dat die testament deur sewe getuies verseël is.[184] In die na-klassieke tyd het die keisers sekere wysigings aangebring wat later deur Justinianus in die *testamentum tripertitum* opgeneem is. Die vereistes vir dié testament was dat sewe getuies die testament moet verseël, die erfgename en erflater 'n *subscriptio* moet aanbring by die ondertekening van die testament en dat die testament ononderbroke verly moet word.[185] Mondelinge testamente met sewe getuies wat voor 'n regterlike amptenaar verklaar is, was ook geldig. In sekere gevalle is die aantal getuies verminder soos waar daar pes was, die persone op die afgeleë platteland gewoon het of slegs die kinders as erfgename aangewys is en die erflater in eie skrif die name van sy kinders neergeskryf het.[186]

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* Sien 1995 *THRHR* 585–602.

183 Van Zyl *Geskiedenis en beginsels* 208; Spiller *A manual of Roman law* 143–149; Kaser-Dannenbring *Roman private law* (1984) 290–291; Thomas *Institutes* 484; Feenstra 272–273.

184 Feenstra 263–274; Spiller 144–145; Van Zyl *Geskiedenis en beginsels* 484–485.

185 Feenstra 274–275; *C* 6 23 21; *I* 2 10 3; Van Zyl *Geskiedenis en beginsels* 208–209; Lee 356.

186 Kaser-Dannenbring 293; Thomas *Textbook* 485; Lee 356.

In die Middeleeue moet mondelinge testamente op skrif gestel word. Die getal getuies is op grond van die kanonieke reg (waarskynlik met 'n beroep op Galasiërs 13:1) na drie verminder waarvan een 'n kerkman moet wees. Namate die kerk se invloed afgeneem het, is die kerkman se plek deur 'n notaris ingeneem.[187] In Frankryk is 'n testament wat die erflater self geskryf het en geheim gehou is, as 'n geldige testament aanvaar – hierdie testament ontwikkel uit die 15de eeuse gewoontereg.[188]

Die Romeinsregtelike testamente is in die 15de eeu in die Nederlande geresipieer. Die inheemse vorme het steeds 'n rol gespeel. Hierdie vorme is na die Kaap oorgedra. In 1845 is sekere formaliteite neergelê vir testamente wat sewe getuies gehad het. Die notariële testament en testamente uit die *clausula reservatoir* het dié vereistes vrygespring.[189] Daar is onderskei tussen die oop en geslote notariële testament.[190] Die oop testament is aan die getuies voorgelees – die nie-ondertekening daarvan deur die erflater en getuies het nie nietigheid tot gevolg gehad nie.[191] By die geslote testament word slegs voor die notaris en getuies verklaar dat dit die testament van die erflater is; die erflater moet die stuk onderteken; daarna is dit in die teenwoordigheid van die partye verseël en het die notaris 'n "superskripsie" daarop aangebring dat die testament tot die dood van die erflater verseël moet bly.[192] Die notariële testament moet gedateer word anders was dit nietig.[193]

Die mondelinge testament waarvoor sewe getuies teenwoordig moet wees, het ook in die Kaap voorgekom.[194] Waar die ouer 'n testament ten gunste van sy kinders skryf, is dit as 'n geprivilegieerde testament beskou.[195] Dit lyk nie of 'n testament *ad pias causas* bevoorregte status geniet het nie.[196]

'n *Clausule reservatoir* of *clausula reservatoria* is

> "'n bepaling in 'n testament waardeur 'n testateur vir homself die bevoegdheid voorbehou om die testament te verander of aan te vul in afwesigheid van getuies, hetsy in 'n afsonderlike geskrif, hetsy aan die voet van die testament wat die bepaling bevat".[197]

Volgens Joubert[198] verwys Bartolus na die *clausula* en is dit geleidelik in die Romeins-Hollandse reg geresipieer.[199]

Op 1 Januarie 1954 het die Wet op Testamente 7 van 1953 eenvormige reëls vir testamente daargestel en is daar slegs vir twee testamentvorme (een met twee getuies en die soldatetestament) voorsiening gemaak. Die *clausule reservatoir* mag nie meer gebruik word nie.[200]

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187 Feenstra 274–275; De Smidt 52.
188 Sedert die 16e eeu word dit as 'n *holografisch testament* aangedui – Feenstra 274.
189 Van der Merwe en Rowland 121–122 132.
190 Vgl ook Lee 357–358.
191 133–134.
192 134–135.
193 Lee 358.
194 Van der Merwe en Rowland 134–136.
195 *Idem* 139–145; Lee 360.
196 Van der Merwe en Rowland 145; Lee 359.
197 Van der Merwe en Rowland 145; Lee 361.
198 1958 *THRHR* 32 ev; vgl ook Feenstra 276.
199 Van der Merwe en Rowland 146.
200 *Mirvish v The Master* 1945 AD 674; Van der Merwe en Rowland 148–149.

Die *querela inofficiosi testamenti* kon aanvanklik ingestel word wanneer die erflater enige van sy *descedentes* of *adscendentes* onterf het. Broers en susters kon dit instel as hulle ter wille van 'n eerlose persoon onterf is. Later kon dit ingestel word indien die erflater nie 'n legitieme porsie aan sy intestate erfgename nalaat nie. Die legitieme porsie is bereken na gelang van die aantal kinders. In die Justiniaanse tyd is byvoorbeeld bepaal dat as daar vier of minder kinders was, hulle ten minste vir 'n derde van hulle intestate erfdeel as erfgename ingestel moet word. Was daar meer as vier kinders moet hulle ten minste die helfte van hulle intestate erfdeel erf.[201] In die Middeleeue het die beperking ontstaan dat die legitieme porsie nie beswaar mag word nie.[202]

Die kodisil word reeds in die Romeinse reg aangetref. 'n Kodisil het tot toevoeging van die testament gedien en hoef aanvanklik nie aan al die formaliteite van 'n testament te voldoen het nie.[203] Justinianus vereis egter vyf getuies.[204] Hierdie vorm van kodisil is in Wes-Europa geresipieer.[205]

In die oud-Nederlandse reg is 'n "kodisil" meestal op grond van 'n *clausula reservatoir* opgestel.[206] Die doel hiermee was om die vormvereiste van vyf getuies te ontkom.[207] Kodisille kon by wyse van 'n testament of 'n latere kodisil herroep word.[208]

Die Romeins-Hollandse outeurs het 'n groot debat gevoer of daar werklik 'n verskil tussen testamente en kodisille was. Dit lyk of die meeste outeurs hulle aan mekaar gelykgestel het.[209]

3 2 Die reg van toepassing aan die Kaap

In *Anossi & Neetling (Smuts) v Fleck*[210] het Maria Smuts en Fleck (leraar van die Hervormde Kerk) 'n gesamentlike testament verly. Sy erf sekere eiendom van haar suster wat nie deel van die gemeenskaplike boedel uitmaak nie. Op 9 April 1800 skryf sy in haar eie handskrif dat die huise wat sy van haar suster geërf het na haar dood op 'n openbare veiling verkoop moet word, dat die helfte van die opbrengs na haar man moet gaan en die ander helfte onder haar broer en ander suster verdeel moet word. Op 13 Junie 1801 herroep sy haar deel van die gesamentlike testament en verklaar dat haar man die enigste erfgenaam sal wees. Die eisers word as eksekuteurs aangewys. Hierdie "geskrif" en die kodisil met betrekking tot die broers en susters word op 1 Februarie 1804 notarieel bevestig. Sy het beide onderteken – die eerste as kodisil en die laaste as haar uiterste wil.[211] Dit was 'n geslote testament en die notaris het in teenwoordigheid van getuies 'n "superskripsie" aangebring.[212]

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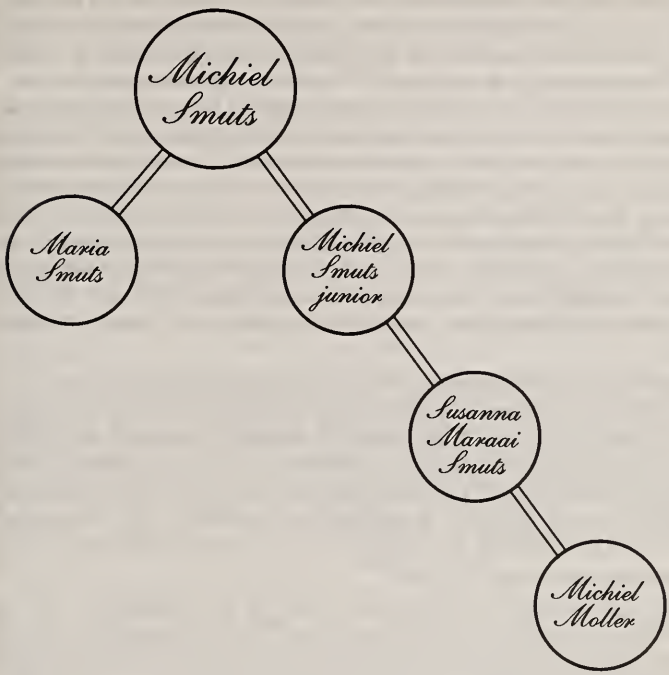
201 Vgl in die verband Van Zyl *Geskiedenis en beginsels* 217–218; Thomas *Textbook* 495; Kaser-Dannenbring 301; Feenstra 269–270; Spiller 154; De Smidt 56–57.
202 Feenstra 269; De Smidt 57.
203 Feenstra 275–276.
204 *I* 2 25*pr*.
205 Feenstra 276.
206 De Smidt 54.
207 Feenstra 276.
208 De Smidt 54.
209 Lee 370; Van der Merwe en Rowland 115 (met 'n beroep op Voet *Commentarius* 29 7 5).
210 1806 CJ 1419 6–300.
211 15.
212 23.

Die eisers plaas die "geldigheid" van die testament in geskil. Volgens hulle is haar man die eksekuteur van die gesamentlike testament van 30 Maart 1790. Sy kon egter te eniger tyd die testament herroep en oor haar boedelgoedere beskik.[213]

In die *Antwoord* is beweer dat 'n testament slegs gewysig mag word as dit voldoen aan die wette en formaliteite van die land en dat die geringste *omissio* die testament nietig kan maak. Haar testament het wesenlike gebreke volgens Huber[214] se uiteensetting van die formaliteite, naamlik dat een notaris en twee getuies die testament moet teken.[215] Van Leeuwen[216] is van mening dat die notariële testament gelykstaande is aan testamente waarvoor daar vyf of sewe getuies vereis is. Hierdie verwysing moet met *C* 4 20 en 2 9 bestudeer word waar daar aangetoon word dat waar net een getuie nie kon teken nie, die testament nietig was.[217] Volgens *C* 6 22 8 en die *Hollandsche consultatien*[218] moet die getuie vyf grade van die testateur verwyder wees.[219]

'n *Placaat* van 22 Desember 1733 en 'n ordonnansie van 30 September 1746 het bepaal dat die uiterste wil op 'n behoorlike "zegal" geskryf moet word en dat alle vorige testamente van "nul en geener waarde" verklaar word.[220] Die verweerder is van mening dat die wetgewing ook die geslote testament raak. Die testament moet aanvanklik in teenwoordigheid van sewe getuies verly, onderteken en verseël word om die bemaking geheim te hou[221] en dan ook as geslote verklaar word in die teenwoordigheid van die notaris en getuies.[222] Volgens Lybrechts[223] mag die notaris geen voordeel uit die testament bekom nie anders is die testament kragteloos. Rochefort,[224] Schomaker[225] en De Groot[226] sou die standpunt ondersteun. Een van die getuies wie se name in die "superskripsie" voorkom, is vier grade van die testatrise verwyder en daarom is die testament volgens verweerder nietig.[227] Dit word soos volg in die saak uitgebeeld:[228]

213 24–34.
214 2 20 5 (121).
215 112–121.
216 *RHR* 3 2 7 (121–122).
217 Daar word ook verwys na *I* 2 10 5 dat die getuie ouer as 14 jr moet wees.
218 4 245 (124).
219 In die verband word daar ook na Wassenaar *Practyk notariael* 18 19 ivm legate en *fideicommissa* verwys (124).
220 125.
221 De Groot *Inleydinge* 2 17 12 (126).
222 *Idem* 2 17 24.
223 *Redeneerend vertoog over 't notaris ampt* 1:271.
224 *Civile wetten* 26 6 (127).
225 *Selecta consilia et responsa iuris* 2 43 5; 2 46 1 (127).
226 *Inleydinge* 2 24 2 (128).
227 129.
228 165.



Daar is dus slegs een getuie oor. Volgens *C* 4 20 9[229] kan dit beskou word asof daar geen getuies teenwoordig was nie. In die verband verwys hy ook na die *Hollandsche consultatien.*[230]

In die *replicq* is beweer dat die testatrise die testament self geskryf het; dit is na drie jaar verseël en voldoen wel aan al die vormvoorskrifte. Sy is bowendien geregtig om haar gesamentlike testament te herroep; dit kan ook beskou word asof sy op grond van die *clausule reservatoir* gehandel het. Indien dit so in die "kodisil" vermeld word en deur die handtekening van die testatrise bekragtig is, is die testament volgens Van Bijnkershoek[231] afdwingbaar en die eksekuteure soos in dié laaste skriftelike stuk aangewys.[232] Van Zutphen[233] toon aan dat 'n eksekuteur ook in 'n kodisil of minder plegtige testament aangestel mag word. Ten aansien van die gebrekkige seël word daar na Voet[234] verwys in die sin dat "het recht den geene hulpe bied, welke zonder quaed opzet struykeld". Die

229 130.

230 4 245: 431 in die Rotterdamse druk van 1669. Die saak verwys self na *C* 4 20 10–112 en Mantica *De conjectur ultim volunt* 66 3 16. Die rechtsdoctoren P van der Meulen en Cornelis van der Broek het in Delft die advies gelewer – vgl 'n uiteensetting van hierdie saak op 131–134.

231 *Verhandelingen over burgerlijke rechtszaaken* 342 (184).

232 184–185. Daar word ook verwys na Voet *Commentarius* 26 2 5, 9 (185).

233 *Nederlandsche praktycque* 6 (185).

234 *Commentarius* 26 5 4 (187).

verwysings na die tekste wat bepaal dat die getuies vyf grade van die testateur verwyder moet wees, hou verband met die openbare testament. Die beperking is ingevoer ten einde te verseker dat daar geen "valscheid, bedrog of quade handelingen" teenwoordig sou wees nie.[235] Die tekste wat die ander party aanhaal, dui ook op 'n testament waarvan die inhoud aan die getuies bekendgemaak word. In hierdie geval is 'n geslote testament ter sprake waar nóg die notaris nóg die getuies geweet het wat in die testament staan.[236] Hulle verklaar slegs dat die testament aan hulle oorhandig is en voor die notaris en testateur geseël en geteken is. Bowendien sou volgens Bartolus, Merula, Costalis en Van Zutphen[237] selfs broers en susters kon getuig. Moller het verder opgetree as klerk van die notaris en het dus nie as familielid geteken nie; hy het ook geen verwagting op 'n deel van die erfenis gehad nie. Lybrechts[238] toon aan dat daar volgens die Hof van Holland maar een gekwalifiseerde getuie buiten die testateur nodig is.

Die volgende redes word aangevoer waarom die testament geldig sou wees:[239] Die testatrise het die testament self geskryf; die notaris het dit bevestig; die notaris en twee getuies het bevestig dat hulle die testament geattesteer het; bogemelde is met die dood van die testatrise herbevestig; die vorige testament is behoorlik herroep; die erfgename, legatarisse en eksekuteur is *in forma* benoem; en die Weeskamer het die testament as behoorlik verly beskou. Die verweerder doen 'n beroep op billikheid en die *mobile et benignam judiciis officium* om van die streng vereistes van die reg af te sien.[240]

Verweerder gaan verder ten einde aan te toon dat die "testament" ook 'n kodisil kan wees. Hy verwys na Van Bijnkershoek[241] waar aangetoon word dat legate in 'n kodisil bemaak mag word. Die Hooge Raad het in 1706 byvoorbeeld 'n *fideicommissum* op grond van 'n *clausule reservatoir sine forma* bekragtig. Aan die ander kant het die Romeinse reg vyf getuies (mans en vrouens) vir 'n kodisil en vir 'n testament sewe (mans) vereis.[242] 'n Kodisil en testament is volgens verweerder gelykgestel en eersgenoemde kan gevolglik ook notarieel verly word (met 'n beroep op Voet en die *Digesta*).[243] Indien die testament of kodisil nietig is, moet die boedel intestaat vererf.[244] Die testatrise kon ook die testament herroep.[245]

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235 Met verwysing na *Hollandsche consultatien* 245; Lybrechts *Redeneerend vertoog* 1 256 12, 14 (189).

236 189.

237 *Nederlandsche praktycque en getuigen* 10 (190).

238 *Redeneerend vertoog* 1: 18 (191).

239 195–196.

240 Met 'n beroep op *D* 50 17 183 en Voet *Commentarius* 26 1 4 (197).

241 *Verhandeling over burgerlijke rechtszaaken* 3 4.

242 De Groot *Inleydinge* 2 25 1 (201).

243 Voet *Commentarius* 29 7 8; 29 11 1; *D* 28 1. 'n Erfgenaam kan selfs in 'n kodisil herroep word. Met beroep op P Voet *D de codicillus*; Munniks *Handleiding tot de hedendaagse rechtsgeleerdheid* 13 5: 100 (205).

244 Lybrechts *Redeneerend vertoog* 1: 21; Schomaker 2 455; 46 1 ev; Bort *Nagelaten wercken* 226; Van Bijnkershoek *Observationes* 2 2: 37–38 (212).

245 Guido Papaquest 200; Faber 6 5 29 (207); Groenewegen verwys na die Howe van Holland op 1644-07-29 in die sake van *Wouter van Hendoorn cum locis requiranten contra Michiel Tormein* (207); De Groot *Inleydinge* 2 24 13; *C* 4 20 27 (202–203).

Indien die erflater geen direkte intestate erfgename het nie maar wel 'n gebrekkige testament opgestel het waarin ander bloedverwante as erfgename aangewys is, sou daar aan so 'n testament uitvoering gegee kan word.[246]

In die *duplicq* is aangevoer dat al die gesag en verwysings in die *replicq* oor die openbare testament handel en dat die geldigheid van sodanige testament wel afhang of daar valsheid of bedrog ter sprake is. Die formaliteite mag egter nie geheel en al by die notariële testament genegeer word nie – daar mag nie in die "superskripsie" skielik minder formaliteite vereis word as wat in die ander wette voorgeskryf word nie.[247] Hy beroep hom op Lybrechts,[248] Van Leeuwen[249] en Groenewegen[250] in die verband. Die beroep wat op Merula gedoen is ten einde te bewys dat selfs broers en susters mag getuig, is nie op testamentêre getuies spesifiek van toepassing nie maar handel oor die instelling van 'n voog in die saak van *Gerbe Tans Grade* voor die howe (in Holland) in Februarie 1725.[251] Volgens die advokaat sou Moller selfs indirek as 'n legataris beskou kan word.[252] Die argument van die advokaat in die *replicq* dat slegs een getuie voldoende is as die erfgename bloedverwante is,[253] word ook verwerp. Dié argument sou slegs in Friesland op grond van die gewoontes aldaar geldig wees.[254] Volgens die *Hollandsche consultatien*[255] is 'n testament ongeldig waar een van die getuies onder 14 jaar oud was en twee predikante verklaar het dat die erflater in hulle teenwoordigheid gesê het dat dit sy testament is.[256] Volgens die *Hollandsche consultatien*[257] moet die oorspronklike testament geldig wees om die bemaking uit die *clausule reservatoir* geldig te maak.[258]

Daar is volgens die prokureur geen voorbeeld in die *costume locaal* of selfs in die hele Bataafse republiek op grond waarvan daar van die voorgeskrewe formaliteite afgewyk mag word of 'n "vryer" kodisil mag bestaan nie.[259]

Eiser voer ten slotte die volgende aan oor waarom die 1804-testament nie geldig is nie:[260] Die testament is onbestaanbaar met die reg; die bemaking van 1804 is nie 'n kodisil nie en voldoen bowendien nie aan die formaliteite nie; die 1804-testament val nie onder een van die vorme van geprivilegieerde testamente nie (byvoorbeeld net aan kinders iets nalaat of die soldatetestament; persoonlike

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246 Van Bijnkershoek *Obs Tum* 2 2: 37–38. Hyself verwys (216) na *D* 28 3; *D* 3 7 4 12 1; *C* 420 21 (213–217). Daar word ook verwys na Conanis *Comm iuris* 9 7; Voet *Commentarius* 28 1 2 (217).

247 226–228.

248 *Redeneerend vertoog* 19 29–36 (228).

249 *Censura forensis* 3 1 2 7 (229).

250 *Tractatus* 4; Paulus Voet *ad* 3 *Inst* 2 (229).

251 232.

252 *Ibid.* Hy verwys ook na Lybrechts 6 1: 28 (5e druk) (233).

253 Lybrechts 1 18 (234–236).

254 233.

255 245: 431.

256 236–237. Lybrechts 1 252 3 sou ook hierdie aangeleentheid beskryf het.

257 6 28 3.

258 248. Daar word verder verwys na *D* 10 51 (255) en Faber *Breviarium in Codicem* 6 5 3. Ivm die vraag hoeveel getuies 'n kodisil sou benodig en die bevoegdheid van die getuies word daar verwys na die *Hollandsche consultatien* 5 151 (256); *C* 6 36 2; Van Bijnkershoek 559 se verwysings na die Hooge Raad. Vgl ook die gesag aangehaal op 258–260.

259 270.

260 273–275.

testament in eie skrif tydens 'n oorlog voor twee getuies verly; testament *ad pias causas*); die testament is nie op grond van die *clausule reservatoir* uit die gesamentlike testament geskep nie; 'n *testamentum singulare* het nog nie in hierdie kolonie voorgekom nie – ten minste twee bevoegde getuies word vereis; en die gesamentlike testament is al wat geldig is.

Die hof gee die eiser gelyk dat die testament van 1 Februarie 1804 nietig en onbestaanbaar met die reg is en dat daar geen effek daaraan gegee kan word nie.[261]

Omvangryke gesag word in die *Anossi & Neethling*-saak aangehaal. Van al die sake wat oor testamente handel, word in hierdie gewysde na die meeste gesag verwys. Die prokureurs val mekaar ook aan oor die wyse waarop die ander die gesag sou siteer en gebruik en verwys telkens na nuwe gesag om hulle standpunte te staaf. Wat veral opval, is dat daar hoofsaaklik op Romeins-Hollandse gesag gesteun word – veral omdat die geskil oor 'n notariële testament en die *clausule reservatoir* handel. Die eiser se prokureur toets egter ook die standpunte van die verweerder aan die plaaslike reg en bevind dat daar geen voorbeeld daarvoor in die Kaap bestaan het nie. Wat ook opval, is dat daar verskeie kere deur beide partye na die beslissings van die Hooge Raad en die Howe van Holland verwys word.

In *Nielen & Hamman (Disch) ea v Nielen*[262] is aangevoer dat 'n testament nietig is omdat die formaliteite nie nagekom is nie. Die testament sou in Stellenbosch opgestel wees deur 'n notaris wat in Kaapstad woon. Bowendien sou een van die getuies 'n swaer van die notaris wees en die ander getuie onder 15 jaar oud. Daar is 'n beroep gedoen op 'n beslissing van die Hooge Raad van 11 Januarie 1626 waar beslis is dat 'n testament slegs verly mag word in die stad waar die notaris (in die geval Delft) werk.[263] Die Raad van Justisie het egter bevind dat die testament geldig is.[264]

Die geldigheid van geslote en oop notariële testamente is in *Leeson v Cruywagen*[265] betwis. Die notaris het sy ernstige siek skoonsuster (suster van sy vrou – Cruywagen) besoek sodat sy haar testament kan teken waarkragtens sy vrou en hulle kinders sou erf. Die bewering is gemaak dat sy "delirious" was tydens die maak van die testament. Sy het voorheen geen testament gehad nie. Haar helfte van die boedel sou dus intestaat op haar twee susters (Appeldoorn – haar kind is Leeson) en Cruywagen vererf het. 'n Geskil het bestaan oor die vraag of die testatrise by haar volle positiewe was toe sy die testament gemaak het en of daar dokters teenwoordig was.[266] Appellant voer aan dat die gesag wat die advokaat vir die respondent in die hof *a quo* aangehaal het (ten einde te staaf dat die

261 CJ 918 426–428.

262 1811 CJ 1534 140–378; 1814 GH 48/2/19 631–821.

263 CJ 1534 (260). Verdere gesag wat in die verband aangehaal word, is Coren *Observationes* 37 (262); Van der Keessel *Theses selectae* 295 (263–264); *Resolutie van de Staaten van Holland* 1608-11-27 (261); landreg (375 360 tav testamentêre vereistes); natuurlike billikheid (366). Tav die getuies is aangehaal *I* 2 10 6 (236); *I* 2 12 1 (258); *D* 22 6 9*pr* (256); *D* 22 5 1, 3 (258–259 322); *Roomsche wette* (376).

264 1811 CJ 929 278–283. Die Siviele Appèlhofsaak het hoofsaaklik gehandel oor die bemaking in 'n kodisil wat tot die gesamentlike testament gevoeg is – sien die bespreking van gesamentlike testamente hierbo.

265 1820 CJ 1741 2–518; GH 48/2/44 444–674.

266 GH 48/2/44 444 ev.

handtekening van die testateur nie nodig is nie), geen aanwending kan vind nie.[267] Die regulasies (a 37–38) vir notarisse wat in 1793 aan die Kaap uitgevaardig is, skryf voor dat 'n notariële akte slegs geldig is as dit deur die betrokke party(e), getuies en die notaris onderteken is.[268] As appèlgronde word onder andere aangevoer dat[269] die gekrap (*scribble*) onder aan die testament nie die handtekening van die testatrise was nie; die notaris wie se familie bevoordeel is, ongewens tydens die verlyding teenwoordig was; en dat die testatrise nie by haar volle positiewe was toe sy die testament geteken het nie.

Respondent voer aan dat daar voldoende mediese getuienis bestaan wat aantoon dat die testatrise wel bevoeg was om die testament te maak. Die volgende redes word vermeld waarom die bevel van die hof *a quo*[270] (dat die aansoek om ongeldigverklaring van die testament van die hand gewys word) gehandhaaf moet word:[271] Die "merk" van die testatrise is voldoende – dit is in elk geval deur die notaris bevestig;[272] die optrede van die notaris is nie ongewens nie – met 'n beroep op *I* 2 10 mag slegs persone wat self bevoordeeldes is, nie as getuies optree nie;[273] die teenwoordigheid van die notaris en sy kinders speel geen rol nie (Die enigste twee redes vir nietigverklaring van 'n testament sou wees (a) waar 'n *suus heres* verbygegaan was of (b) die formaliteite nie nagekom is nie.[274] Volgens Van Leeuwen[275] rus die bewyslas op die persoon wat die ongeldigheid beweer.); die testatrise was by haar volle positiewe (In die verband verwys die advokaat na die *mores hodierna* waar die oop en geslote notariële testament aangetref word en waar by die geslote testament die handtekening van die testatrise in die teenwoordigheid van getuies aangebring moet word. By die oop testament is dit nie nodig nie; slegs die bevestiging van die notaris en die getuies is noodsaaklik – soortgelyk aan die Romeinse *testamentum nuncupativa*.[276] Volgens Voet[277] is die handtekening van die testateur bloot 'n beter bewys.[278] Daar is ook na verskillende hofuitsprake van die howe van Holland verwys soos aangehaal deur Van Leeuwen,[279] Coren[280] en Lybrechts[281].); en in die Kaap word

267 Dié gesag is *C* 6 23 21; *D* 33 7 (geldigheid van die testament word per handtekening bevestig tot die teendeel bewys is – CJ 1741 164–168). Verweerder se kommentaar daarop is te vinde op 189. Daar word verder verwys na Böckelmann *Compendium Institutionum* 10 9: "jure novo testamentum dicitur vel privilegatum vel solemna, utrumque est semptum vel nuncupiativum" (177); *Querela inofficiosi testamenti* (181–182). In die *duplicq* is daar verder verwys na Van Leeuwen *RHR* 3 2 3 en *C* 4 20 (454 461).

268 469–470.

269 465–487.

270 1820 CJ 939 480–482.

271 532–585.

272 538.

273 538–543.

274 'n Beroep word gedoen op *D* 2 8 3 1 (548–549).

275 *RHR* 3 2 3 (549–550).

276 554–556.

277 38 13 3.

278 In die verband word verder verwys na Huber *Praelectiones iuris civilis ad D* 28 1 12–13; Groenewegen *ad Instit* 2 10 3; Van Leeuwen *Censura forensis* 1 3 2 8; *RHR* 3 2 3–4.

279 *Censura forensis* 1 3 2 14 (1693).

280 *Observationes* 2 2.

281 *Notarieel praktijk* 1 32 2. Daar word ook verwys na die Hooge Raad van 1779-07-13 en Van der Linden *Collection of decisions* 25.

sowel die oop as geslote testament aangetref wat verskil van die Romeinse testamente – veral die rol van die notaris is belangrik.[282]

Die Siviele Appèlhof het die Raad van Justisie se bevinding bekragtig dat die testament geldig is.[283] 'n Merk van die testatrise was dus voldoende om die openbare testament te bevestig. Die notaris se verbintenis met haar suster het ook geen invloed op die geldigheid van die testament gehad nie. Die hof het waarskynlik bevind dat sy dus by haar volle positiewe was toe sy die testament verly het. Die verweerder/respondent het hoofsaaklik op die Romeins-Hollandse reg gesteun vir gesag vir sy standpunte. Belangrik is dat ook hierdie saak heelwat verwysings na vroeëre Nederlandse regspraak bevat.

'n Kodisil, opgestel na aanleiding van 'n gesamentlike testament, was weer eens die geskilpunt in *Van Druten v Le Roux*[284] en in die appèl van *Van Druten & Sappe v Widow Kiesewetter & Haupt*.[285] Daar is in die saak uiteindelik aansoek gedoen om verlof tot appèl na die Privy Council.[286]

Die feite[287] was kortliks dat in 'n gesamentlike testament van 20 Augustus 1806 Michiel Kiesewetter en Dina le Roes die eiser/appellante (hierna appellante) as eksekuteurs van die boedel en voog oor die testateurs se minderjarige kinders aangewys is. Michiel is op 16 Oktober 1812 oorlede. Die respondente (Kiesewetter en Haupt) het appellante nie kennis gegee nie en as eksekuteurs van die boedel opgetree op grond van 'n kodisil wat die dag voor Michiel se dood opgestel is. Appellant voer aan dat Michiel op hierdie dag reeds te swak was om sy naam te teken. 'n Aansoek om insae in die kodisil te verkry, is deur respondente geweier, waarna by die hof om blootlegging aansoek gedoen is. 'n Interdik is op 8 Mei 1813 verleen ten einde vas te stel wie as eksekuteurs mag optree. Na inspeksie het dit vir appellante geblyk dat die kodisil deur Haupt geskryf was waarin hy homself en die weduwee Kiesewetter as eksekuteurs aanwys; dat die handtekening nie ooreenstem met die bekende handtekening van die oorledene nie; dat die optrede van Haupt "inconsistent [was] with the law and several precedent decisions in this colony";[288] en dat volgens "Dutch law and customs observed in this colony, [it] is illegal and pro non scripto habetur".[289] Die kodisil is nie behoorlik opgestel, geattesteer en publisiteit aan verskaf nie.[290] Daar kan 'n nadelige afleiding gemaak word uit die feit dat die respondente nie die kodisil beskikbaar wou stel nie. In die Raad van Justisie-beslissing van 3 Maart 1814[291]

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282 574–583 – daar word verwys na Van Bijnkershoek *Quaest iuris priv* 3 5, 8. Selfs kopieë van testamente kan geldig wees. Daar word verder verwys na Voet *Commentarius* 28 4 1, 4; *Lex Cornelia de falsis*; tav die *querela inofficiosi testamenti: I de iniust test* 1 (waarskynlik *D* 28 3 1). In CJ 1573 word verwys na Hooge Raad van 1712-07-03 (152).

283 GH 48/1/2 86.

284 1814 CJ 1573 33–609.

285 1814–1815 GH 48/2/21 578–1347.

286 GH 48/1/1 296. Daar kon nie vasgestel word of die saak wel in die Privy Council voorgekom het nie.

287 GH 48/2/21 1069–1081.

288 GH 48/2/21 1077.

289 1080.

290 In CJ 1573 303–305 word gesag aangehaal tav die formaliteite van kodisille en gesteun op Lybrechts *Vertoog over't notaris ampt* 19 10: 253. Selfs die vors van 'n land moes die formaliteite nakom: Huber *Hedendaegse rechtsgeleerdheid* 139; *C* 6 36; De Groot *Inleydinge* 2 25.

291 1814 CJ 2226 164–166.

is bevind dat Haupt nie as eksekuteur kon optree nie, maar dat appellante (eisers in Raad van Justisie) moet aantoon dat hulle wel as eksekuteurs en voogde van die minderjariges kon optree.[292]

Die volgende redes is in appèl aangevoer waarom appellante as eksekuteurs moes optree:[293] 'n Kodisil is slegs geldig as dit deur die testateur self geskryf is, anders moet dit behoorlik opgestel en geattesteer word; 'n bevoordeelde kan nie self 'n testament skryf en hom die voordele laat toekom nie; 'n ongeldige kodisil kan nie 'n bestaande testament ophef nie – daar kan in elk geval nie bewys word dat die kodisil die wil van die erflater bevat het nie; geen getuies was teenwoordig nie – daar bestaan onsekerheid oor die handtekening van die erflater; 'n kodisil of testament kragtens 'n *clausule reservatoir* is onderworpe aan *stamp duties* van Rd 1 – geen sodanige aantekening van betaling kom voor nie; die hof het fouteer deur appellante nie as eksekuteurs aan te wys nie aangesien hulle in 'n behoorlik verlyde en geattesteerde testament aangewys is; en die kodisil stel nie uitdruklik dat die appellante nie meer as eksekuteurs moet optree nie – dit is duidelik dat die oorledene nooit bedoel het dat sy vrou alleen as eksekuteur aangestel moes wees nie.[294]

Daarteenoor het respondent aangevoer dat volgens die Hollandse reg die testateur geregtig is om sy testament te wysig kragtens die voorbehoudsklousule – soos dit bevestig is deur verskeie sake van die Raad van Justisie. Alhoewel die Hollandse reg bepaal dat niemand vir homself 'n voordeel in 'n testament mag beding nie, staan in *Hollandsche consultatien* 1 103 dat 'n notaris wel as eksekuteur aangestel mag word. Al sou 'n legataris en sy seun getuies by 'n testament wees, sou so 'n testament nie nietig wees nie.[295] Die legate verval maar die aanstelling van die eksekuteur bly geldig. Hieruit lei appellante af dat individue op dieselfde wyse gehanteer moet word.[296]

Die respondent verwys na die posisie van skuldeisers en skuldenaars waar die skuldeisers 'n skuldbrief opstel en die skuldenaar dit onderteken; die skuldenaar word aan die "brief" gebonde gehou volgens die reg van die kolonie.[297] Volgens respondent moet appellant bewys dat hierdie gewone reël nie ook op testamente by die aanstelling van eksekuteurs van toepassing is nie. *Hollandsche consultatien* 2 147 wat bepaal dat iemand nie 'n voordeel mag bekom nie, is slegs op erfgename en legatarisse van toepassing en nie op die eksekuteur nie.[298]

In appellant se "rejoinder" verwys hy na die geval in die Engelse reg waar 'n testament, geskryf in die testateur se eie handskrif, geldig is solank daar voldoende bewys bestaan dat dit wel sy handskrif is. In die Raad van Justisie is verwys na 'n beslissing van die Hooge Raad van 31 Mei 1732 waar 'n testateur in sy eie handskrif 'n kodisil op grond van 'n *clausule reservatoir* geskryf het.[299] Blackstone adviseer dat dit egter veiliger is om dit aan 'n kerklike regter oor te

292 Vgl ook GH 48/2/21 1081.
293 1082–1093.
294 Vgl ook 1193.
295 1136 1195–1196.
296 1137.
297 1193–1196.
298 1195–1196.
299 CJ 1573 111. Behoorlike bewyse moet egter bestaan: Van Bijnkershoek *Verhandelinge over burgerlijke rechtszaaken* 2 5 5: 577ev (111); Lybrechts *Redeneerend vertoog over't notaris ampt* 1: 355 (112); *Hollandsche consultatien* 157 215 (113–114).

laat om toe te sien dat die testament behoorlik geteken en verseël is. In die kolonie moet die Hollandse reg[300] egter nagekom word en was dit in belang van die testateur dat die testament deur 'n notaris opgestel en deur twee getuies bevestig word.[301] As nie daaraan voldoen is nie, was die testament nietig.[302] Volgens De Groot[303] is die aanstelling van die eksekuteur aan dieselfde formaliteite onderworpe. 'n Kodisil hoef nie aan die formaliteite te voldoen nie net as dit deur die testateur self onderteken en geskryf is[304] of deur iemand geskryf is wat geen belang by die testament het nie.[305] Die kodisil voldoen nie aan hierdie vereistes nie. Volgens Blackstone[306] sou die eerste testament dus geldig wees.[307] 'n Testament wat 'n ander herroep, moet self ook aan alle formaliteite voldoen.[308] Volgens die Hollandse reg moet daar bewys wees dat dit die handtekening van die testateur was.[309] Die feit dat daar 'n *clausule reservatoir* was, hef nie die formaliteite op nie en daar moet steeds daaraan voldoen word – die doel van die formaliteite is juis om korrupsie en bedrog te voorkom en kan nie afgewater word nie.[310] Daarteenoor het die hof waarskynlik reeds verweerder se standpunt in die Raad van Justisie[311] aanvaar dat 'n beskikking sonder formaliteite in 'n *clausule reservatoir* gemaak kan word.[312]

Die eksekuteur ontvang ook 'n voordeel uit die testament volgens die Hollandse reg en tradisie. Die "salaris" van die eksekuteur is 2,5% van die boedel plus 'n kwart van die betaling van skulde aan die boedel. In die geval van 'n boedel van ongeveer Rd 200 000 sal die eksekuteur dus Rd 7 500 ontvang. In die kolonie word daarenteen 5% van die boedel aan die eksekuteur (soos ook deur die howe in Holland en aan die Kaap bevestig) oorbetaal.[313] Dit is dus 'n voordeel wat die eksekuteur uit die boedel toekom en hy behoort dit nie vir homself in 'n testament te beding nie.[314] In die Raad van Justisie[315] is geopper dat volgens

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300 De Groot *Inleydinge* 2 7 6–7 (1218).

301 Van Leeuwen *Censura forensis* 1 3 11 10 – CJ 1573 76. Volgens Wassenaar *Practyk notariael* 18 167 (CJ 1573 77) word daar onder die "Doctoren gecontroverteert" of die notaris en twee getuies by 'n kodisil op grond van *clausule reservatoir* benodig word. Volgens "onse costumen" sou hy dit wel so voorstel.

302 1216–1217.

303 *Inleydinge* 2 17 6–7.

304 In die CJ 1573 73–76 word verwys na Voet *Commentarius* 28 1 29. Legate kan op dieselfde wyse bemaak word – Van Bijnkershoek *Verhandelingen over burgerlijke rechtszaaken* 3 4 en tov die bemaking van 'n *fideicommissum* die beslissing van die Hooge Raad van 1706 soos aangehaal in *Smuts v Fleck* 1809 CJ 1492 258.

305 Met verwysing na *D* 34 8: "quae quis sibi vel suis adscripsit, in alieno testamento pro non scripto habetur" (1219) – ook CJ 1573 87–88.

306 Vol 2 502.

307 1223. De Groot *Inleydinge* 2 24: "revocatio prioris testamenti per testamentum imperfectum non valet ex defecti solemnitatis non adhibitio legitimo testium numero" (1223–1224).

308 *Hollandsche consultatien* 6 (417) – CJ 1573 416.

309 1225. Volgens Blackstone vol 3 369 ev kan getuies wat self 'n belang by die testament het, se getuienis nie aanvaar word nie – gevolglik behoort die weduwee se getuienis nie in ag geneem te word nie.

310 1229–1230.

311 CJ 1573 72.

312 In die verband word verwys na Papinianus *lib* 17 soos vervat in *D* 28 5 77.

313 Hof van Holland van 1725-07-28 – CJ 1573 430.

314 1234–1236.

315 CJ 1573 88.

Van Leeuwen[316] 'n notaris geen voordeel vir homself in die testament mag inskryf nie selfs al sou dit die wil van die erflater wees. Die doel sou volgens Van Zurck[317] wees om enige bedrieglike handelinge te stuit.

Die pligte van die eksekuteur is om die wil van die erflater uit te voer.[318] 'n Administrateur (of voog) sou daardie persoon wees wat 'n insolvente boedel administreer. Volgens die appellante is hulle volgens die oorspronklike testament beide as eksekuteurs en administrateurs aangestel. Hulle verwys ook na die onderskeid wat Blackstone[319] in dié verband maak.

Die Siviele Appèlhof bevestig egter die uitspraak van 3 Maart 1814 dat weduwee Kiesewetter die enigste eksekuteur van die boedel en administrateur (as voog) van die minderjarige kinders is.[320]

Uit hierdie saak kan afgelei word dat die hof steun op die Romeins-Hollandse reg en die gebruike aan die Kaap, naamlik dat dit moontlik is om 'n bemaking in 'n ander skriftelike stuk (wat nie aan die formaliteite voldoen nie) te maak. Die testateur moet die testament óf self skryf óf onderteken. Niemand wat op enige wyse uit die testament bevoordeel word, mag die testament skryf nie – die res van die testament bly egter geldig. Dit blyk ook dat daar aan die Kaap 'n eiesoortige praktyk ontstaan het waar die eksekuteur in plaas van 2,5% van die boedel 5% as voordeel ontvang. Daar sou afgelei kan word dat dié voordeel as 'n vorm van 'n "legaat" deur die hof beskou is eerder as vergoeding vir dienste.

In *Anossi (Hayning) v Smuts (Buissine)*[321] het die erfreg van die graafskap Zutphen ter sprake gekom.[322] Ene Moller en Hayning is sonder 'n huweliksvoorwaardekontrak in Holland getroud. Moller koop 'n stuk grond (met 'n huis daarop) vir weiding in Zutphen. In Moller se testament (behoorlik verly voor die hof van Zutphen) word sy vrou as universele erfgenaam benoem. Daar word beweer dat volgens die plaaslike reg van Zutphen 'n eggenoot in 'n huwelik sonder 'n huweliksvoorwaardekontrak nie meer as die helfte van die erflater se deel of 'n kwart van die totale gesamentlike boedel mag erf nie. 'n Ooreenkoms is in die Kaap bereik waarvolgens die boedel onder die weduwee, twee broers van die erflater en die weduwee Buissine (voormalige vrou van erflater se broer) verdeel is. Op grond van dié ooreenkoms is *res iudicata* gepleit en het die appellant se appèl nie geslaag nie.[323]

In *Vermaak v De Wet*[324] het die legitieme porsie ter sprake gekom. Ene Dempers het 'n gesamentlike testament met sy eerste vrou opgestel waarin die boedel onder hulle vier kinders verdeel moet word. Na sy eerste vrou se dood is hy weer getroud en hy het drie kinders by die tweede vrou gehad. Sy tweede huwelik is in gemeenskap van goed sonder 'n huweliksvoorwaardekontrak gesluit. Die

316 *Censura forensis* 1 3 4.
317 *Codex Batavus* 1 5 4 – CJ 1573 88–89. Vgl ook Voet 48 10 (89–92); *Utrechtse consultatien* 2 64 (92–93); *C* 9 22 3–4 (97).
318 Lybrechts *Vertoog over 't notarieel praktyk* 1: 539 (1238–1239).
319 Vol 2: 32 (1239–1240).
320 1814–1815 GH 48/1/1 240.
321 1817 CJ 1645 253–382; 1818 GH 48/2/35 310–597.
322 Die saak het hoofsaaklik oor *res iudicata* gehandel.
323 GH 48/2/35 310–312; GH 48/1/1 344 (319).
324 1820 CJ 1725 149–310.

vraag het ontstaan of die tweede eggenote meer as die legitieme porsie van die wettige kinders kan bekom. Daar is 'n beroep gedoen op *C* 5 9 6 dat[325]

> "in de Verenigden Nederlanden gerecipieerd ist geworden en steeds geobserveerd word en van daar in deze colonie is overgebracht en in dezelve ook steeds onderhoud en geword volgens welke wet, het aan de ouders, voorkinderen hebbende, verboden word, aan hun tweede egtgenoot, iets meerder te begiftigen, aan alleen ter concurrentie van zoodanig erfdeel, als voorkind geniet het welk in de minste portie, ist geinstitueerd geworden".

Coren,[326] Neostadius[327] en Peckius[328] verwys na die geval waar 'n huweliksvoorwaardekontrak gesluit is – eiser maak dit egter ook van toepassing op 'n huwelik sonder sodanige kontrak.[329]

Die vraag of boedelsamesmelting kan plaasvind en of 'n tweede huwelik in gemeenskap van goed gesluit kan word, is breedvoerig deur verweerder bespreek met verwysing na De Groot.[330] Die kinders moet dus ten minste 'n legitieme porsie bekom het.

In die *Pleidooy van antwoord*[331] wys die verweerder daarop dat *C* 5 9 6 verkeerd toegepas is en dat dié verkeerde interpretasie deur die Hof van Holland en die Hooge Raad verwerp is.[332] Volgens hom kan boedelvermenging in Holland plaasvind nieteenstaande die teks. Hierdie verskynsel het reeds in die gewoontereg voorgekom voordat die *Codex*-teks daar geresipieer is. Die Romeinse reg was subsidiêr tot die plaaslike of gewoontereg. Joan Cos[333] beskryf die "gevoelens" van die Hollandse regsgeleerdes in die verband die beste. Die *Hollandsche gerechtshoven* van 22 Mei 1586,[334] Van der Keessel[335] en Van der Linden[336] dui duidelik aan dat boedelvermenging nie op grond van die *Codex*-teks ontstaan het nie.[337]

Die bevinding van die Raad van Justisie was dat die tweede huwelik wel in gemeenskap van goed gesluit is en dat die verweerder op die helfte van die boedel, sowel as die slavin Louisa van die Kaap (wat in 'n kodisil van 18 September

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325 156.
326 *Observatien* 100 29, 54 (167).
327 *De pactis antenuptialibus* 4 (167).
328 *Tractatus de testamentis conjung* 2 18 8; Lybrechts *Redeneerend vertoog* (167).
329 167–168.
330 *Inleydinge* 2 11 8 (254–255); 2 12 6 (256–260); ook die *Hollandsch rechtsgeleerd woordenboek* 158 steun De Groot se standpunt dat sodanige verbod bestaan sodat die kinders uit die eerste huwelik nie benadeel word nie (261–270). Die verweerder se regsverteenwoordiger haal die eiser se regsverteenwoordiger oor die kole omdat hy die reg nie noukeurig ontleed het nie (265).
331 305 ev.
332 305.
333 *Verhandelingen over de boedelvermenging* 6 (306).
334 In *Gerrit Laurens cum locis impetranten in cas appel ende Eliz Corn Gysbrechts weduwee Laurens* soos aangehaal deur Coren *Observationes* 30 29: "Quamvis inter Doctores et alium etiam inter nostri fori patronos id practiens non satis convenerit utrum consuetudo illa introducens communionem inter conjugens, in casu existentium aliborum anterioris matrimonium restrigenda sit . . . praxis invaluit eo casu consuetudine non restringi" (306).
335 *Theses selectae* 229 (307).
336 *Koopmans handboek* 1 3 8 (307).
337 De Groot *Inleydinge* 2 2 5 (308).

1817 aan haar bemaak is) geregtig is. Die helfte van Dempers se erfdeel moet so verdeel word dat die weduwee nie meer as die legitieme porsie ontvang nie. Die gedeelte wat meer as die legitieme porsie is, moet onder die kinders uit die eerste huwelik verdeel word.[338]

Dit blyk dus dat die hof wel gevolg gegee het aan sowel die gewoontereg wat in Holland bestaan het ten aansien van die tweede huwelik wat in gemeenskap van goed gesluit is, as aan die Romeinsregtelike reëling met betrekking tot die legitieme porsie. Dit is duidelik dat die 16de- en 18de-eeuse Hollandse gewoontereg in die verband aan die Kaap toepassing gevind het en nie noodwendig die 17de-eeuse Romeins-Hollandse reg nie.

4 SAMEVATTING EN GEVOLGTREKKINGS

Die erfreg het 'n belangrike rol in die regslewe aan die Kaap gespeel. Dit blyk uit die aantal erfregsake wat voor sowel die Raad van Justisie as Siviele Appèlhof gedien het.

Van die belangrikste onderwerpe wat aangespreek was, was gesamentlike testamente, die *fideicommissum familia, substitutio, clausule reservatoir*, kodisille, legitieme porsie en die *querela inofficiosi testamenti.*

4 1 Reg aan die Kaap

Die vraag kan gestel word watter reg aan die Kaap ten opsigte van die erfreg toepassing gevind het. 'n Duisternis gesag is deur die verskillende regspraktisyns aangehaal ten einde hulle stellings te staaf. Buiten die Romeinse en Romeins-Hollandse reg word daar ook na ander skrywers uit die Europese *ius commune* verwys. Hierdie gebruik dui dan ook daarop dat nie net die "eng" reg soos in Holland aan die Kaap gegeld het nie, maar die Europese *ius commune*. Daar word ook ruim van 18de-eeuse Romeins-Hollandse outeurs gebruik gemaak en dit bewys stellings wat sou beweer dat die reg van Holland soos in 1652 aan die Kaap gegeld het, ook foutief. Blackstone word hoofsaaklik as bron van die Engelse reg aangehaal. 'n Geskiedkundige outeur (Holme/Solme) en selfs Shakespeare is as gesag vir die Engelse reg aangehaal. In 1818 is die eerste keer in die erfregsake wat ondersoek is van die Engelse reg melding gemaak.

Daar is verskeie verwysings na regspraak van die Howe van Holland en die Hooge Raad, waaruit die afleiding moontlik gemaak kan word dat 'n informele stelsel van *stare decisis* toenemend 'n rol begin speel het. Uit die ondersoek het dit geblyk dat die *ius commune* aangevul is deur plaaslike gebruike en gewoontes. Nie alleen verwys die regspraktisyns na *costume locaal* of plaaslike gebruike nie, maar ook na Kaapse wetgewing in dié verband.

4 2 Gesamentlike testamente

'n Gesamentlike testament is waar meer as een testateur hulle wilsverklarings in een dokument uiteensit. Aan die Kaap was dit die algemene gebruik dat egpare wat in gemeenskap van goed getroud is, 'n gesamentlike testament (waarin daar gewoonlik 'n *clausule reservatoir* vervat is) verly. Dit sou volgens die een saak ooreenkomstig die *costume locaal* erken word.[339] Die gesamentlike testament het probleme opgelewer wanneer een van die testateurs te sterwe kom en die ander

338 1820 CJ 938 562–563.

339 *Roux en Hamman (Disch) v Nielen* 1811 CJ 1534 140–378.

een weer trou. Van dié partye het dan die vorige gesamentlike testament herroep en 'n nuwe gesamentlike testament met die tweede eggenoot (eggenote) opgestel.

Ten aansien van prelegate is daar op die Romeinse en Romeins-Hollandse reg gesteun. Daarvolgens moet die eerste gesamentlike boedel eers afgehandel word wat die prelegate van die eerssterwende (eerste boedel) betref, alvorens die boedel kragtens die tweede gesamentlike testament verdeel kon word.[340]

Nie alleen die prelegate nie maar ook die boedel van die eerste eggenoot (helfte van gesamentlike boedel) moet volgens die "gebruik in hierdie kolonie" eerste afgehandel word.[341]

'n Beroep is veral op die Romeins-Hollandse reg (soos in die *Hollandsche consultatien* beskryf) gemaak ten einde die posisie uit te klaar of kinders wel 'n eis het as hulle deur die erflater verbygegaan is.[342]

4 3 *Fideicommissa familia*

Die *fideicommissa familia* wat reeds in die Romeinse reg bestaan het, het ten doel gehad om bepaalde bates na die dood van die erflater in die familie te hou.

Dit blyk dat die hof aanvaar dat daar in die Kaapse praktyk voorsiening gemaak is vir 'n *fideicommissa familia*.[343] Die Nederlandse reg het egter steeds 'n groot rol gespeel in die interpretasie of daar direkte of *fideicommissêre* substitusie ter sprake was. In verskeie sake was daar selfs 'n geskil oor die vraag of hierdie *fideicommissum* wel in die Kaap aanwending gevind het.

In een saak is aangevoer dat die *fideicommissa familia* as gevolg van die feodale reg verder uitgebou is. Alhoewel een van die partye betoog het dat die feodale reg nie in die kolonies (selfs die hele Afrika) toepassing kon vind nie, blyk dit dat die hof die standpunt aanvaar het dat dié reg soos deur die Romeins-Hollandse outeurs "verwerk" is wel toepassing kon vind. Die hof het wel die plaas aan die seun as oudste erfgenaam laat toekom maar hom verplig om aan sy susters hul "intestate erfdeel" waarop hul andersins geregtig sou wees, te gee.[344] 'n Mengsel van Hollandse gewoontereg en Romeins-Hollandse reg is toegepas.

4 4 Formaliteite, *clausule reservatoir* en *querela inofficiosi testamenti*

Die formaliteite van testamente het deur die eeue verskeie ontwikkelings ondergaan. Die nie-nakoming van hierdie formaliteite het meestal nietigheid van die testament tot gevolg gehad. Aangeleenthede wat met 'n beroep op gebreke in die formaliteite ter sprake gekom het, was die *clausule reservatoir* (waarkragtens die erflater vir homself die reg voorbehou om in 'n ander skriftelike stuk 'n bemaking te maak), kodisille, *querela inofficiosi testamenti* (klag teen die onpligmatige testament), die aanstel van die eksekuteur, bevoordeling van getuies en die legitieme porsie.

Aan die Kaap is daar hoofsaaklik van oop en geslote notariële testamente gebruik gemaak. Die grootste problematiek was of 'n kodisil of testament opgestel kragtens 'n *clausule reservatoir* aan sekere vormvereistes moet voldoen.

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340 *Eksteen v Eksteen* 1823 GH 48/2/59 1–14.
341 *Roux en Hamman (Disch) v Nielen* 1811 CJ 1534 140–378.
342 *Ventura (Janssens) v Danielse (De Oude)* 1810 CJ 1509 264–544.
343 *Laubscher v Orphan Chamber* 1819 GH 48/2/38 235–329.
344 *Laubscher v Orphan Chamber* 1818 CJ 1677 320–566; 1819 GH 48/2/38 235–329.

Aangesien die notariële testament 'n Middeleeuse en na-Middeleeuse ontwikkeling toon, word daar hoofsaaklik op Romeins-Hollandse gesag gesteun.[345]

Uit die pleitstukke blyk dit dat die verskillende regsverteenwoordigers telkens meld dat hulle standpunte aan die plaaslike reg getoets moet word. Ook in die geval van formaliteite word daar gereeld na regspraak van die Howe van Holland en die Hooge Raad verwys. Die gevalle waar gepleit is dat die testateur nie by sy volle positiewe was toe die testament verly is nie, is telkens deur mediese getuienis verwerp en daar moes teruggeval word op ander moontlike formaliteitsgebreke. Daar is verder aangevoer dat 'n merk nie voldoende ondertekening van 'n kodisil is nie of dat die handtekening van 'n testateur vervals was. In beide gevalle was 'n geslote testament ter sprake en het die hof hierdie verwere verwerp.[346]

In 'n bepaalde geval was die notaris met die suster van die erflater getroud – dié verbintenis het geen uitwerking op die geldigheid van die testament gehad nie. In 'n ander geval was die aanstelling van 'n eksekuteur nietig omdat hy die testament namens die erflater geskryf het. Slegs die aanstelling van die eksekuteur is nietig verklaar. Daar is bevind dat op grond van Kaapse gebruike die eksekuteur 5% van die boedelinkomste ontvang en dat dit op 'n voordeel neerkom. Waar een van die getuies binne vyf grade van die erflater verwyder was, was die latere testament gemaak op grond van die *clausule reservatoir* ook nietig. Ook in hierdie gevalle is daar hoofsaaklik op die Romeins-Hollandse outeurs en regspraak gesteun. Die Engelse regsposisie soos deur Blackstone uiteengesit, is ook bespreek maar daar is pertinent gestel dat aan die Kaap daar op die reg soos in die Nederlande beskryf is, gesteun word.[347]

Waar 'n tweede huwelik aangegaan en 'n gesamentlike testament opgestel word, blyk dit dat die tweede vrou se bemaking nie meer mag wees as die legitieme porsie wat die kinders van die eerste vrou ontvang het nie. Daar het 'n strydvraag ontstaan of *C* 5 9 6 of die gewoontereg in Holland soos deur die voor 16de-eeuse en na 17de-eeuse outeurs beskryf, toepassing moet vind. Dit lyk of die hof aanvaar het dat in sekere gevalle die Romeinse reg subsidiêr tot die Nederlandse gewoontereg gegeld het aangesien bevind is dat 'n tweede huwelik wel in gemeenskap van goed gesluit mag word. Die Romeinsregtelike posisie met betrekking tot die legitieme porsie is egter wel gevolg.[348]

4 5 Gevolgtrekking

Die erfreg aan die Kaap het uit verskillende elemente bestaan, naamlik die Romeinse reg, die *ius commune* van Wes-Europa, onder andere soos dit in die Romeins-Hollandse reg weergegee is, en in bepaalde gevalle die plaaslike Kaapse gebruike en gewoontes. Alhoewel daar verwysings na die Engelse reg was, kan op hierdie stadium nie 'n afleiding gemaak word dat wat die materiële erfreg betref daar enige beïnvloeding was nie. Uit die feit dat daar in die onderhawige tydperk deur die praktisyns aan die Kaap toenemend na beslissings van die Hooge Raad en die Hof van Holland verwys is, kan moontlik afgelei word dat die Engelse beginsel van *stare decisis* informeel toepassing begin vind het.

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345 Vgl bv *Anossi v Neethling (Smuts) v Fleck* 1806 CJ 1419 6–300.

346 *Leeson v Cruywagen* 1820 CJ 1741 2–518; GH 48/2/44 444–674.

347 *Van Druten v Le Roux* 1814 CJ 1573 33–609; *Van Druten & Sappe v Widow Kiesewetter & Haupt* 1814–1815 GH 48/2/21 578–1347.

348 *Vermaak v De Wet* 1820 CJ 1725 149–310.

AANTEKENINGE

DIE STOKVEL: ENKELE INLEIDENDE OPMERKINGS OOR TERMINOLOGIE EN OMSKRYWINGS*

1 Inleiding

Marknavorsing deur Markinor toon aan dat daar in 1993 in die metropolitaanse gebiede van Suid-Afrika nagenoeg 'n miljoen stokvel-lede teenoor 680 000 in 1989 was (Scott-Wilson "The growth of stokvels" 1992 *Markinor: new perspectives* April 3–4). Daar word geskat dat daar ongeveer vyf jaar gelede landwyd meer as 800 000 stokvels, met 'n omset van R200 miljoen maandeliks, gefunksioneer het (Cairncross "Tapping the cash potential of SA's 'stockvel' members" *Business Day* 1989-09-04 8; McGregor "Cash in hand" 1989 *Leadership* 126). Met 'n gemiddelde ledetal van tien per stokvel, kon daar in 1992 reeds geskat word dat daar min of meer agt miljoen aktiewe stokvelbydraers in Suid-Afrika is (Anon "Market in waiting – sector and individual buyer both chronically underfinanced" 1992 *Finance Week* 28).

Die indrukwekkende omvang in getalle en omset wat stokvels tans in Suid-Afrika aanneem, beteken dat hierdie fenomeen nie deur juriste geïgnoreer kan word nie. 'n Ontleding van dié regsfiguur gaan mank aan regswetenskaplike literatuur. Bronne wat wel oor die onderwerp beskikbaar is, is hoofsaaklik vanuit óf 'n populêr-wetenskaplike óf 'n antropologiese invalshoek geskryf.

Daar dien verder beklemtoon te word dat hierdie bydrae slegs inleidend en verkennend van aard is om gedagtes rondom die onderwerp te prikkel en hoegenaamd nie poog om enigsins finale oplossings te verskaf nie.

2 Terminologie en basiese konstruksie

Die stokvel kan omskryf word as die plaaslike, spesifieke verskyningsvorm van die wêreldwye generieke verskynsel van roterende kredietverenigings. Volgens Thomas ("Rotating credit associations in Cape Town" in *South Africa's informal economy* (1991) 291–292) is variasies van die woord "stokvel" wat ook dikwels aangetref word, "stockfel" en "stockfair". Ander benamings vir die verskynsel is volgens Thomas "gooi-gooi" (veral in die Wes-Kaap), "mahodisana", "mohodisana",

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* Hierdie bydrae is gebaseer op navorsing vir 'n projek van die Sentrum vir Ondernemingsreg, UOVS, befonds deur die Kleinsake-ontwikkelingskorporasie en die Getrouheidsfonds vir Prokureurs.

"kuholisana", "umgalelo" en Hindi- en Tamil-uitdrukkings in die Indiër-gemeenskap van Suid-Afrika, "chita" en "chitu".

Ardener ("The comparative study of rotating credit associations" 1964 *The Journal of the Royal Antropological Institute of Great Britain and Ireland* 201–229) ontleed roterende kredietverenigings in verskillende gemeenskappe en bespreek spesifieke verskyningsvorme daarvan in Asië, Afrika, die Wes-Indiese eilande, die Amerikas en Europa. (Sien ook Schrader "Rotating savings and credit associations – institutions in the 'middle rung' of development" *Working Paper no 148: Sociology of Development Research Centre, University of Bielefeld* (1991); Bouman "Indigenous savings and credit societies in the Third World. A message" in *Savings and development* (1977); Miracle en Cohen "Informal savings mobilisation in Africa" in *Economic development and cultural change* (1980).)

Ardener 201 definieer 'n roterende kredietvereniging as 'n vereniging wat deur 'n groep deelnemers gevorm word, welke deelnemers ooreenkom om gereelde bydraes tot 'n fonds te maak wat, in die geheel of gedeeltelik, aan elke deelnemer op 'n rotasie-grondslag oorhandig word. (Sien ook Schrader 1; Bouman (1977) 182; Bouman "Indigenous savings and credit societies in the developing world" in *Rural financial markets in developing countries* (1983) 262; Kurtz "The rotating credit association: an adaptation to poverty" 1973 *Human Organization* 50; Cope en Kurtz "Default and the Tanda: a model regarding recruitment for rotating credit associations" 1980 *Ethnology* 213; Morton "Mobilizing money in a communal economy: a Tongan example" 1978 *Human Organization* 53.)

In eenvoudige vorm sien die konstruksie van 'n roterende kredietvereniging soos volg daar uit: 'n aantal persone kom ooreen om op 'n gereelde basis (hierna die verdelingstydperk genoem) te vergader en elkeen 'n bedrag by te dra, wat om die beurt aan een van die lede oorhandig word. By die aanbreek van die volgende verdelingstydperk ontvang 'n ander lid van die vereniging die totale bydraes. Hierdie prosedure word herhaal met die gevolg dat aan die einde van 'n volledige rotasietydperk, wat gelyk is aan die verdelingstydperk vermenigvuldig met die aantal lede, elke lid 'n spesifieke bedrag bygedra het en uiteindelik presies dieselfde bedrag ontvang het (Geertz "The rotating credit association: a 'middle run' in development" 1962 *Economic Development and Cultural Change* 253; Bouman (1983) 262; Bouman (1977) 182).

3 Omskrywings

3 1 Skrywers

Volgens Lukhele (*Stokvels in South Africa* (1990) 1) is 'n stokvel 'n kredietvereniging waar 'n groep persone 'n ooreenkoms aangaan om 'n vasgestelde bedrag geld aan 'n gemeenskaplike fonds op 'n weeklikse, twee weeklikse of maandelikse basis by te dra. Afhangende van die reëls van die spesifieke stokvel, kan hierdie geld of 'n deel daarvan deur lede onttrek word, hetsy op 'n rotasiebasis of in tye van finansiële nood. Hierdie onderlinge finansiële ondersteuning is die hoofdoel van stokvels, maar hulle het ook belangrike sosiale en vermaaklikheidsfunksies (*ibid*). Lukhele (Anon "What is a stokvel?" 1990 *Black Enterprise*

Des/Jan 45) beskryf die stokvel andersyds bloot as 'n informele, roterende kredietvereniging met vermaaklikheids-, sosiale en ekonomiese funksies.

Botto (*Some aspects of the leisure occupations of the African population in Cape Town* (1954) 136–137) beskryf die prosedure tydens 'n stokvel-byeenkoms as een waar lede, gewoonlik tussen vier en agt, elke week sosiaal by die huis van 'n ander lid bymekaarkom. Laasgenoemde word dan die "eienaar" van die stokvel vir die geleentheid. Elke lid betaal 'n klein weeklikse ledegeld aan die "eienaar". Lede is geregtig op gratis verversings en daar word ook gesteun op die teenwoordigheid van betalende besoekers. Botto meld verder dat 'n lid, na betaling van die voorgeskrewe weeklikse bydrae, aan die einde van die rotasietydperk 'n relatief groot bedrag ontvang wanneer dit telkens haar beurt is om die "eienaar" van die stokvel te wees. Hierdie inkomste word verder vergroot deur die betalings van besoekers.

Krige ("Some social and economic facts revealed in native family budgets" 1934 *Race Relations* 102) wys daarop dat sosiale byeenkomste die belangrikste ontspanningswyse van die destydse tradisionele bevolking was en dat hierdie tydverdryf mettertyd toenemend met die hou van 'n "mohodisana" in verband gebring kon word. Voorts wys die skrywer op die belangrike gevoel van samehorigheid wat onderling tussen die lede van 'n "mohodisana" bestaan. Die "mohodisana" het funksies ten opsigte van beskerming, sekuriteit, ondersteuning en hulp verrig, nie net aan lede van die "mohodisana" nie, maar ook hulle gesinne.

Kuper en Kaplan ("Voluntary associations in an urban township" 1944 *African Studies* 178) meen dat 'n stokvel 'n spaarvereniging is waarvan die sirkulasie van bedrae geld tussen lede onderling enersyds en sosiale byeenkomste tussen lede andersyds die karakteristieke eienskappe is.

Coplan ("The African musician and the development of the Johannesburg entertainment industry, 1900–1960" 1979 *Journal of Southern African Studies* 137) beskryf die stokvel hoofsaaklik in terme van sy sosiale funksie en toon aan dat 'n stokvel 'n klub vir partytjies is waar die weeklikse bydraes van vroulike lede gebruik word om musiek en verversings aan betalende lede van ander klubs te verskaf.

Marais ("Regulating informal finance in South Africa" *EBM Research Conference Vista University Port Elizabeth* (1992) 5) meen dat die hoofkenmerke van stokvels die volgende is: die skepping van 'n deurlopende kapitaalpoel deur die mobilisering van spaargeld; die feit dat die hoofoorweging vir die toestaan van lenings aan lede nie die sekuriteit is wat hulle kan bied nie, maar eerder hulle karaktereienskappe; die sukses van stokvels hang grotendeels van die vrywillige insette van die lede af en handelinge word beperk tot 'n geslote kring van die lede tussen wie daar 'n gemeenskaplike band bestaan.

Die uiteenlopendheid van die omskrywings beklemtoon die wye verskeidenheid verskyningsvorme wat die stokvel in die praktyk kan aanneem.

3 2 Die Bankwet 94 van 1990

Die begrip "stokvel" word tans ook statutêr omskryf en wel vir die doeleindes van die Bankwet 94 van 1990 (hierna "die wet"). Dit is vir huidige doeleindes dienlik om die omskrywings van direk relevante terme as vertrekpunt te neem.

Die wet definieer "deposito" as 'n bedrag geld wat deur 'n persoon aan 'n ander persoon betaal word, onderworpe aan 'n ooreenkoms ingevolge waarvan 'n gelyke bedrag of enige gedeelte daarvan terugbetaal sal word en geen rente betaalbaar sal wees nie. Dit wil voorkom of hierdie definisie die handeling van inbetaling van geld deur lede van die stokvel aan die stokvelfonds en uitbetaling van die saamgestorte fonds aan die lede op 'n rotasiebasis, kan insluit. Hierdie waarneming laat die vraag ontstaan of die stokvel as 'n bank beskou kan word.

Die wet definieer die begrip "bank" bloot as 'n publieke maatskappy wat ingevolge die wet as 'n bank geregistreer is. Dit is die tradisionele stokvel ten ene male nie. Die omskrywing van die begrip "bank" word egter aangevul deur die omskrywing van "die bedryf van 'n bank".

Ingevolge artikel 1 sluit "die bedryf van 'n bank" onder andere in die neem van deposito's van die algemene publiek as 'n staande kenmerk van die betrokke bedryf en in die geval van 'n bank, ook van die persone wat by hom in diens is. Ook behels hierdie bedrywigheid die werwing van of advertering vir deposito's en die aanwending van geld of rente verdien op geld, vir die toestaan van lenings, vir beleggings of vir finansiering soos omskryf. Die verkryging van geld (as staande kenmerk van die betrokke bedryf) deur die verkoop van 'n bate aan 'n ander persoon as 'n bank onderworpe aan 'n ooreenkoms ingevolge waarvan die verkoper onderneem om op 'n toekomstige datum die bate wat verkoop is of enige ander bate van die koper te koop, ressorteer ook kragtens die wet onder "die bedryf van 'n bank". Die Registrateur van Banke kan ook na oorleg met die President van die Reserwebank by kennisgewing in die *Staatskoerant* 'n bedrywigheid tot bankbedrywigheid verklaar.

Die woordomskrywing in artikel 1 bevat egter ook 'n aantal uitsonderings deurdat "die bedryf van 'n bank" nie insluit die neem van 'n deposito deur 'n persoon wat homself nie uitgee as iemand wat op 'n gereelde grondslag deposito's neem en wat nie vir sodanige deposito geadverteer of dit gewerf het nie, met dien verstande dat die persoon nie deposito's van meer as twintig persone of wat in totaal meer as R500 000 bedra, hou nie.

Uitgesluit van die bepaling is ook 'n aantal bedrywighede ingevolge ander wetgewing wat met goedkeuring van óf die minister en/of die Registrateur van Banke geskied.

Kragtens die verbodsbepaling in artikel 11 kan alleen 'n publieke maatskappy die bedryf van 'n bank uitoefen, mits dit voorlopig of finaal as 'n bank geregistreer is. 'n Persoon wat strydig met hierdie bepaling optree, is aan 'n misdryf skuldig. Wanneer so 'n publieke maatskappy as sodanig geregistreer is, is die reëlings en toesig van die wet ten opsigte van die publieke maatskappy wat deposito's van die publiek neem, op die maatskappy van toepassing. Hierdie toesig sluit ingevolge hoofstuk VI van die wet onder meer die voorsorgvereistes van 'n minimum aandelekapitaal, onaangetaste reserwefondse, minimum likwiede bates en reëlings met betrekking tot groot blootstellings in.

Uit die omskrywings van die stokvel hierbo blyk dat die bedrywighede van sommige stokvels denkbaar binne die omskrywing van "die bedryf van 'n bank" kan val. Aan die hand van die omskrywings van "deposito" en "die bedryf van

'n bank", wil dit voorkom of finansieel-georiënteerde stokvels denkbaar binne die verbodsbepalings van artikel 11 van die Bankwet kan val.

3 3 Kennisgewings in Staatskoerant

In GK 16 (gepubliseer in *SK* 15416 van 1994-01-05) word 'n bedrywigheid aangewys wat nie binne die betekenis van "die bedryf van 'n bank" val nie. Dit is naamlik die bedrywigheid van 'n groep persone indien daar tussen die lede 'n gemeenskaplike band bestaan. Die stokvel word as so 'n groep aangewys en ook omskryf. Hierdie goewermentskennisgewing het gegeld gedurende die tydperk 1 Januarie tot 31 Desember 1994. Dieselfde bepalings is vervat in GK 2173 (gepubliseer in *SK* 16167 van 1994-12-14) en geld vanaf 1 Januarie 1995 tot 31 Desember 1995.

Volgens die woordomskrywing van "stokvel" in die onderhawige goewermentskennisgewing is 'n stokvel 'n *genus* van die spesie van groepe persone waartussen daar 'n gemeenskaplike band bestaan. By die stokvel word hierdie band verbesonder deur dit soos volg te beskryf: Die "stokvel" is 'n formele of informele roterende kredietskema met onthaal-, sosiale en ekonomiese funksies. Die stokvel bestaan in wese uit lede wat onderlinge steun ter bereiking van bepaalde doelwitte aan mekaar belowe het en wat 'n deurlopende kapitaalpoel vestig deur die verkryging van fondse deur middel van ledegelde. Die stokvel staan krediet aan en ten behoewe van lede toe, maak voorsiening vir lede om in wins te deel en om 'n bestuur te benoem en steun op selfopgelegde regulering ten einde die belange van sy lede te beskerm.

Die wetgewer maak die uitsluitingsbepaling onderworpe aan die voorwaarde dat die stokvel lid van die Nasionale Stokvel-vereniging van Suid-Afrika (NASVSA) moet wees. Ander kwalifiserende voorwaardes waaraan 'n stokvel moet voldoen wat vir hierdie bydrae relevant is, sluit ooreenkomstig paragraaf 3 van die goewermentskennisgewing in:

- die reëls van 'n groep mag geen lid te eniger tyd daarop geregtig maak om die volle bedrag van sy bydraes te onttrek nie;
- die voordele van die groep mag nie uitsluitlik bestaan uit die verskaffing van lenings wat ingevolge die reëls van die groep terugbetaal moet word nie;
- 'n groep moet rekeningkundige rekords hou;
- 'n groep moet 'n datum bepaal waarop sy finansiële jaar eindig;
- 'n groep moet binne 120 dae na die einde van elke finansiële jaar toesien dat jaarlikse finansiële state opgestel word;
- 'n groep wat ledegelde hou wat in totaal meer as R1 miljoen beloop, moet bowendien sy finansiële state voorlê aan 'n persoon behoorlik geregistreer ingevolge die Wet op Openbare Rekenmeesters en Ouditeurs 80 van 1991 vir verslagdoening aan die lede van die groep en aan NASVSA. As die rekenmeester of ouditeur nie sodanige verslag sonder voorbehoud kan maak nie, moet hy 'n stelling te dien effekte in sy verslag insluit en afskrifte van die ouditverslag van die groep binne 60 dae na voltooiing aan die lede van die groep en aan die NASVSA voorlê;

- 'n groep mag in elk geval nie ledegelde hou wat in totaal R9,99 miljoen oorskry nie. (Indien hierdie bedrag oorskry word, moet die groep aansoek doen om as 'n bank of as 'n onderlinge bank geregistreer te word.)

Bedrywighede wat deur die wetgewer ingevolge paragraaf 2 van gemelde goewermentskennisgewing aangetoon word as bedrywighede waarvoor geld deur of ten behoewe van 'n groep ontvang word ten einde vir die uitsluiting te kwalifiseer, sluit onder meer in vir:

- onderhoud tydens onmondigheid, ouderdom, weduweeskap, siekte of ander gebrek;
- die voorsiening van 'n bedrag geld wat betaal sal word by die geboorte van 'n lid se kind, by die dood van 'n lid, vir die uitgawes verbonde aan die begrafnis van 'n lid of gedurende 'n tydperk van gekluisterde rou deur 'n lid;
- doeleindes van die uitgawes verbonde aan enige ontspannings- of sosiale gebeurtenis van 'n lid;
- ondersteuning van lede tydens hulpbehoewende omstandighede;
- die voorsiening van geld vir die bevordering van die opleiding van lede;
- die vestiging van enige besigheid deur 'n lid;
- die ontwikkeling van die gemeenskap waaraan die lede behoort.

Aan die hand van die voorafgaande statutêre maatreëls is dit moontlik om saam te vat dat 'n kwalifiserende stokvel wat homself op die oog af met bankbedrywighede besig hou, nie die bepalings van artikel 11 van die Bankwet sal oortree nie omdat die bedrywighede van so 'n groep tussen wie daar 'n gemeenskaplike band bestaan, per definisie uitgesluit word van die omskrywing van "die bedryf van 'n bank".

Daar dien egter op gelet te word dat die groep persone wie se bedrywighede uitgesluit word van die omskrywing van "die bedryf van 'n bank" beperk word tot natuurlike persone. Dit beteken uiteraard dat die uitsluiting nie van toepassing is op 'n stokvel waarvan een of meer regspersone lede is nie.

4 Slotopmerkings

Daar kan denkbaar geargumenteer word dat die woordomskrywing van 'n stokvel in die onderhawige goewermentskennisgewing primêr met die oog op die voorskrifte van die Bankwet geformuleer is en dus die klem plaas op stokvels waarvan die bedrywighede ooreenkomste met "die bedryf van 'n bank" toon. Dit beoog derhalwe nie noodwendig om 'n omskrywing te verskaf vir alle tipes stokvels wat in die praktyk aangetref word nie, maar dit is nogtans die enigste regstegniese omskrywing van 'n stokvel wat in bestaande kenbronne nagespeur kon word.

Dit is verder moontlik om sekere elemente uit hierdie statutêre definisie te haal wat as die wesenskenmerke van 'n stokvel beskou kan word. Hierdie kenmerke word ook aangetref in omskrywings wat in populêre geskrifte vervat is en sluit in: roterende kredietskema, onderlinge steun, deurlopende kapitaalpoel, ledebydraes, winsdeling en ledeseggenskap oor bestuur en selfregulering.

'n Ontleding van die wesenskenmerke van die stokvel vorm egter liefs die onderwerp van 'n afsonderlike bespreking.

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VERMOEDELIKE TOESTEMMING AS REGVERDIGINGSGROND IN DIE STRAFREG*

1 Inleiding

Die regverdigingsgrond bekend as vermoedelike toestemming het, met die uitsondering van 'n kort maar waardevolle bespreking deur Labuschagne ("*Negotiorum gestio* (saakwaarneming) as verweer in die straf- en deliktereg" 1994 *TSAR* 811–814), tot dusver nog nie veel aandag in ons strafregliteratuur gekry nie. Die soort optrede wat onder hierdie hoof tuisgebring kan word, word gewoonlik deur handboekskrywers baie kortliks onder die hoof saakwaarneming of *negotiorum gestio* behandel (De Wet en Swanepoel *Stafreg* (1985) 97; Burchell en Milton *Principles of criminal law* (1991) 194; Snyman *Strafreg* (1992) 144). Sover bekend, is daar ook nie besprekings van hierdie regverdigingsgrond se rol in die strafreg in ons regspraak nie. Artikel 20(3) van die Transkeise Strafkode van 1983 bevat egter 'n bepaling wat grootliks die verweer tans onder bespreking dek. Die artikel lui soos volg:

> "No act or omission shall be an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for the person to signify consent, or if that person is incapable of giving consent and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit."

Die rede waarom besprekings van hierdie onderwerp in die regsbronne maar skaars is, is waarskynlik die volgende: Eerstens is die inbreukmaking op 'n ander se belange in baie gevalle waar hierdie regsverdigingsgrond wel ter sprake kom, van so 'n betreklik geringe aard dat die aangeleentheid nie die hof se aandag geniet nie weens die uitwerking van die stelreël *de minimis non curat lex*. Tweedens is dit, soos hierna gesien sal word, in baie feitestelle waarin hierdie

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regverdigingsgrond ter sprake kom, so voor die hand liggend dat die dader se optrede geregverdig is, dat dit nie eens by 'n mens opkom om die presiese regsgronde vir die dader se onskuld te probeer uitstippel nie. Uit hierdie oorwegings behoort na my mening egter nie afgelei te word dat die verweer maar geïgnoreer kan word of dat dit van geen belang is nie.

'n Tipiese voorbeeld van 'n feitestel waarin hierdie regverdigingsgrond in werking tree, is die geval waar 'n geneesheer 'n operasie uitvoer op 'n bewustelose slagoffer van 'n verkeersongeluk ten einde sy lewe te red of hom andersins van ernstige skade aan sy gesondheid of liggaamlike welsyn te vrywaar.

In boeke oor die Duitse strafregwetenskap word hierdie regverdigingsgrond gewoonlik beskryf as "mutmassliche Einwilligung" – vermoedelike toestemming (Jescheck *Lehrbuch des Strafrechts* (1978) 309–312; Jakobs *Strafrecht Allgemeiner Teil* (1993) 449–452; Roxin *Strafrecht Allgemeiner Teil* (1992) 516–526; Roxin "Über die mutmassliche Einwilligung" *Welzel Festschrift* (1974) 447; Maurach en Zipf *Strafrecht Allgemeiner Teil* (1987) 381–388; Schönke en Schröder *Strafgezetzbuch Kommentar* (1991) 491–494; Baumann en Weber *Strafrecht Allgemeiner Teil* (1985) 332–335; Kühl *Strafrecht Allgemeiner Teil* (1994) 300–302; Wessels *Strafrecht Allgemeiner Teil* (1990) 106–107; Triffterer *Österreichisches Strafrecht Allgemeiner Teil* (1994) 244–245). 'n Mens tref ook uitdrukkings soos "optrede ter beskerming (of bevordering) van 'n ander se belange" as beskrywing van hierdie regverdigingsgrond aan (Jakobs 449; Kühl 300; Wessels 106). Die onderliggende beginsels van toepassing op *negotiorum gestio*, vermoedelike toestemming en optrede ter beskerming van 'n ander se belange skyn egter identies te wees.

Na my mening is "vermoedelike toestemming" die beste beskrywing van hierdie regverdigingsgrond, want, ofskoon die dader se handeling altyd daarop gerig is om die klaer of beseerde se belange te beskerm, is dit in hierdie gevalle laasgenoemde party se vermoedelike toestemming wat hierdie regverdigingsgrond se mees karakteristieke eienskap is.

2 Omskrywing

Die regverdigingsgrond bekend as vermoedelike toestemming tree in werking as die dader (X in die bespreking wat volg) 'n handeling verrig wat met die eerste oogopslag beantwoord aan die verbodsomskrywing van 'n misdaad, maar wat by nadere ondersoek blyk nie wederregtelik te wees nie omdat die optrede waardeur hy oënskynlik inbreuk maak op die slagoffer (Y in die bespreking wat volg) se regte of belange in werklikheid gemik is op die beskerming of bevordering van Y se belange, in omstandighede waarin Y se toestemming voor die daad nie verkrygbaar was nie maar daar nogtans ten tyde van X se optrede redelike gronde is om aan te neem dat Y wel sou toegestem het tot X se optrede indien hy in 'n posisie was om daaroor 'n besluit te neem.

3 Tipiese voorbeelde

Tipiese voorbeelde van gevalle waarin hierdie regverdigingsgrond aangewend kan word om X van 'n skuldigbevinding te vrywaar, is die volgende:

- Terwyl Y weg is met vakansie breek 'n waterpyp in sy huis. In 'n poging om die skade van Y se huis sover as moontlik te beperk, breek sy buurman X by sy (Y se) huis in en herstel die gebreekte pyp. X kan dan nie skuldig bevind word aan huisbraak of saakbeskadiging nie.
- 'n Variasie op die vorige voorbeeld: Terwyl Y weg is met vakansie, word daar by sy huis ingebreek en sekere artikels wat in die huis is, gesteel. In 'n poging om Y se skade sover as moontlik te beperk, gaan sy buurman X Y se huis binne en dra sekere waardevolle artikels wat nog in Y se huis oorgebly het, na sy (X se) eie huis, ten einde dit tydelik te bewaar totdat Y terugkom van vakansie. X het hom dan nie aan betreding of diefstal skuldig gemaak nie (*Amod Salie v Ragoon* 1903 TS 100).
- Terwyl sakeman Y vir 'n week in die buiteland is en nie daar telefonies bereikbaar is nie, ontvang sy sekretaresse X 'n brief wat aan hom gerig en "Uiters dringend" gemerk is. Ofskoon Y normaalweg self al sy pos oopmaak, besluit X om in hierdie geval self die brief oop te maak in 'n poging om te verhoed dat Y se sake dalk skade ly. Indien dit agterna blyk dat die brief van Y se minnares afkomstig is en die inhoud daarvan uiters persoonlik was, kan X, indien sy van *crimen iniuria* aangekla word, haar suksesvol op hierdie regverdigingsgrond beroep.
- Y verloor sy bewussyn in 'n motorongeluk. X1, 'n ambulansman wat na die ongeluk ontbied is, vervoer hom na die hospitaal waar geneesheer X2 'n operasie op hom uitvoer ten einde sy lewe te red. X1 kan dan nie aan menseroof skuldig bevind word en X2 nie aan aanranding nie. Indien Y die operasie nie oorleef nie, kan X2 ook nie aan strafbare manslag skuldig bevind word nie. (In hierdie voorbeeld sou X1 hom moontlik ook op amptelike bevoegdheid as regverdigingsgrond kon beroep.) Die feit dat een en dieselfde optrede onder meer as een regverdigingsgrond tuisgebring kan word, doen egter nie afbreuk aan elk van die regverdigingsgronde se selfstandige bestaansreg nie en getuig ook nie van enige denkfoute omtrent die sistematiek van strafregtelike aanspreeklikheid nie – van deurslaggewende belang is nie die presiese beskrywing van die regverdigingsgrond waaronder X se gedrag tuisgebring kan word nie, maar die feit dat die gedrag ingevolge die *boni mores* of regsoortuiging van die gemeenskap as geregverdig (nie wederregtelik nie) beskou word (*S v I* 1976 1 SA 781 (A) 788–789).

4 Vergelyking tussen vermoedelike toestemming en sekere ander regverdigingsgronde

Die verskil tussen die regverdigingsgrond tans onder bespreking en die regverdigingsgrond toestemming is voor die hand liggend. By laasgenoemde is daar 'n werklike wilsmanifestasie deur Y, terwyl eersgenoemde 'n "normatiewe konstruksie" is (Roxin *Strafrecht* 517): 'n vermoedelike wil word aan Y toegeskryf. Daar is nietemin die volgende twee punte van ooreenstemming tussen die twee regverdigingsgronde: Eerstens moet by albei vasgestel word of daar *op die oomblik waarop X sy handeling verrig het*, werklike of vermoedelike toestemming was. Dit is nie voldoende vir X om slegs te hoop of te glo dat toestemming later verkry sal word nie. Tweedens, net soos by werklike toestemming vereis

word dat Y *bevoeg* moet wees om toestemming te kan gee (hy moet bv nie geestesongesteld of 'n *infans* wees nie), word by vermoedelike toestemming ook van die standpunt uitgegaan dat die persoon wie se toestemming vermoed word iemand is wat *bevoeg* is om geldige toestemming te gee (Jescheck 312; Maurach-Zipf 385; Wessels 106–107).

Die huidige regverdigingsgrond toon ook ooreenkoms met die regverdigingsgrond noodtoestand, veral as die reël in gedagte gehou word dat 'n mens ook in noodtoestand kan optree ter beskerming van 'n ander se belange (Snyman 125; *S v Pretorius* 1975 2 SA 85 (SWA)). Nietemin is die kern van noodtoestand geleë in die afweging van twee botsende belange, terwyl die kern van die onderhawige regverdigingsgrond geleë is in 'n beoordeling van die vraag of Y sou toegestem het tot X se inmenging in sy regsbelange. Dit gaan dus by vermoedelike toestemming nie soseer oor 'n objektiewe opweging van belange nie, maar eerder oor die vasstelling van die hipotetiese wil van Y (Schönke-Schröder 492; Roxin *Strafrecht* 517; Maurach-Zipf 386). By noodtoestand moet X doelbewus 'n keuse maak tussen twee botsende belange wat hom raak. By vermoedelike toestemming is die posisie anders: X is hier 'n buitestander wat voor die keuse te staan kom of hy gaan ingryp om 'n belang van iemand anders (die reghebbende Y) te beskerm of nie. Y se belange raak hom nie direk nie. X *hoef* nie in te gryp om Y se belange te beskerm nie. Dit staan hom vry om te besluit om passief te bly en maar toe te sien hoe Y se huis besteel word of deur water oorstroom word. As X besluit om hom wel met Y se belange te bemoei, is die deurslaggewende vraag of Y sou toegestem het tot X se optrede of nie.

5 Vereistes vir geldige beroep op vermoedelike toestemming as regverdigingsgrond

Daar word vervolgens gelet op die vereistes vir 'n geldige beroep op hierdie regverdigingsgrond.

(a) *Dit moet nie vir X moontlik wees om vooraf Y se toestemming te kry nie* (Jakobs 450; Roxin *Strafrecht* 519; Maurach-Zipf 385). Hierdie regverdigingsgrond kom ter sprake in gevalle waar Y ten tyde van die bedreiging van sy belange afwesig of onbereikbaar of bewusteloos is. Indien dit wel moontlik is om vooraf Y se toestemming (soos hierdie begrip in die reg verstaan word, nl 'n wilsuiting gegrond op 'n ware kennis van die wesenlike feite en gegee deur iemand wat oor die nodige rypheid en insig beskik wat van regsweë vereis word) te verkry, moet dit verkry en daarvolgens gehandel word. Die feit dat dit vir X moeite (soos 'n telefoonoproep) kos om Y te bereik, bied X nog geen grond om eiemagtig in Y se belange in te meng nie, behalwe as die dreigement of gevaar vir Y se belange so dringend is dat daar nie tyd is om Y nog op te soek deur middel van byvoorbeeld 'n telefoonoproep nie. Die dringendheid van die gevaar kan uit die aard van die saak slegs vasgestel word aan die hand van die omstandighede van elke individuele geval.

As Y 'n jong kind is (bv ses jaar oud), moet sy ouer of voog se toestemming versoek word (indien die omstandighede sodanig is dat daar nog tyd is om sodanige toestemming te verkry).

'n Geneesheer (X) sal nie slaag met 'n beroep op hierdie regverdigingsgrond in die volgende omstandighede nie: Y, wat bewusteloos is, word na hom gebring. Dit blyk dat, deur net 'n bietjie te wag, Y sy bewussyn sal herwin sonder dat sy gesondheid daaronder sal ly, en dat Y dán, nadat hy sy bewussyn herwin het, in staat sal wees om te besluit of hy toestem of nie tot die operasie wat X op hom wil uitvoer. X besluit egter om nie te wag totdat Y sy bewussyn herwin nie maar sommer daar en dan die operasie op Y uit te voer – wat hy dan ook doen (Roxin *Strafrecht* 519; Maurach-Zipf 387–388). Eweneens kan geneesheer X hom nie op hierdie regverdigingsgrond beroep nie as pasiënt Y vóór die operasie, terwyl hy by sy volle positiewe was, toestemming tot die operasie geweier het, want in so 'n geval is dit duidelik wat die pasiënt se wil was; daar is niks wat vermoed kan word nie.

(b) *Daar moet redelike gronde wees vir die aanname dat, indien Y bewus was van die wesenlike feite, hy geen beswaar sou hê teen X se optrede nie* (Maurach-Zipf 386; Jescheck 309). Die toets of so 'n aanname gemaak kan word, is derhalwe objektief (Baumann-Weber 334; Jakobs 451). Indien X dus subjektief glo dat Y nie beswaar sou hê teen sy optrede nie terwyl daar in werklikheid nie redelike – dit wil sê objektiewe – gronde vir so 'n aanname is nie, en hy (X) voortgaan om in te meng in Y se belange, is sy optrede wederregtelik. Indien hy aangekla word van 'n misdaad ten opsigte waarvan opset 'n element is (soos saakbeskadiging), kan hy egter aanspreeklikheid vryspring op grond van die afwesigheid van skuld (opset). Dit is dus nodig om te onderskei tussen vermoedelike toestemming en vermeende toestemming (Triffterer 244). Eersgenoemde is 'n regverdigingsgrond; laasgenoemde 'n skulduitsluitingsgrond.

Indien daar aan die ander kant wel redelike gronde is vir 'n aanname dat Y geen beswaar sou hê nie en X voortgaan om in te meng in Y se belange, is sy optrede geregverdig *selfs indien dit later aan die lig kom dat Y wel beswaar sou gehad het teen X se inmenging* (Jescheck 322; Baumann-Weber 334; Schönke-Schröder 493; Roxin *Strafrecht* 523). Die volgende voorbeeld illustreer hierdie reël. X sien dat sy buurman Y, wat vir 'n dag afwesig is van sy huis, sekere meubelstukke buite op sy grasperk laat staan het. 'n Donderstorm steek op. X vrees dat die meubelstukke in die storm beskadig kan word en dra dit tydelik na sy eie huis ten einde dit te beskerm. Die aanname dat die meubels in die storm beskadig kan word, sal na alle waarskynlikheid as redelik beskou word. Indien dit agterna blyk dat Y die meubels buite op sy grasperk geplaas het juis om vas te stel of 'n stof waarmee hy hulle behandel het die meubels waterbestand maak, en dat hy dus glad nie genoeë geneem of sou geneem het met X se verskuiwing van sy meubels nie, sal X se optrede nog steeds geregverdig wees (Roxin *Strafrecht* 523).

By die beoordeling van die vraag of daar vermoedelike toestemming is, kan die beoordelaar van die standpunt uitgaan dat Y sou optree en redeneer soos 'n normale mens (Wessels 106; Triffterer 244; Jescheck 312).

Die feit dat die toets of daar redelike gronde bestaan objektief is, beteken egter nie dat Y se besondere individuele karaktertrekke, lewensgewoontes of persoonlike voorkeure geïgnoreer moet word nie. As Y in die verlede al telkens op 'n sekere manier opgetree het, kan sodanige optrede wel in aanmerking geneem

word by beantwoording van die vraag of daar vermoedelike toestemming was (Triffterer 244; Kühl 301; Roxin *Strafrecht* 520). Dit is belangrik om in gedagte te hou dat dit by hierdie regverdigingsgrond nie gaan oor vermoedelike toestemming deur die fiktiewe redelike persoon nie, maar oor vermoedelike toestemming deur 'n bepaalde vlees-en-bloed individu. Die vraag is of 'n redelike persoon of beoordelaar sou geglo het dat Y tot X se optrede sou toegestem het. As Y dus in die verlede gereeld vrugte van bome wat in sy tuin groei aan liefdadigheidsorganisasies geskenk het, kan hierdie feit wel in aanmerking geneem word by die beantwoording van die vraag of hy vermoedelik sou toegestem het dat iemand vrugte wat van sy bome afgeval het en dreig om op die grond te verrot terwyl hy vir 'n week van sy huis afwesig is, neem en aan 'n liefdadigheidsorganisasie skenk vir uitdeling onder behoeftige mense.

Wat is die posisie indien dit vir 'n geneesheer duidelik is dat 'n operasie nodig is om 'n bewustelose pasiënt se lewe te red, maar dit blyk dat die pasiënt vroeër te kenne gegee het dat, indien die vraag sou ontstaan of hy daardie bepaalde operasie moet ondergaan, hy eerder sou kies om te sterf omdat so 'n operasie in stryd sou wees met sy godsdienstige oortuigings, of omdat hy byvoorbeeld sou verkies om eerder "dood te gaan as om vir die res van sy lewe met 'n geamputeerde ledemaat te lewe"? Na my mening moet Roxin *Strafrecht* 524 in hierdie verband gelykgegee word waar hy aanvoer dat by besluite wat letterlik oor die dood of lewe van 'n ander handel, X altyd die keuse ten gunste van 'n moontlik lewensreddende operasie moet uitoefen, en dat hy voorafgaande wilsuitinge van die pasiënt wat daarop neerkom dat hy (die pasiënt) verkies om eerder te sterf as om hom aan 'n moontlik lewensreddende operasie te onderwerp, behoort te ignoreer. Roxin voer aan – na my mening heeltemal tereg – dat Y se dood onomkeerbaar is, en dat 'n mens nooit kan weet of Y, wat vroeër geweier het om toestemming tot die bepaalde operasie te gee, nie tog wel, indien hy werklik met die aangesig van die dood gekonfronteer word, anders sou besluit het nie. Baie mense wat vroeër te kenne gegee het dat hulle eerder sou sterwe as om hulle aan 'n sekere operasie te onderwerp, verander van mening indien hulle in 'n werklik primordiale situasie kom en verkies dan om liewer verder te lewe. Dit is in elk geval meer as twyfelagtig of ons reg van die standpunt uitgaan dat 'n pasiënt oor volle outonomie beskik wat betref die vraag of hy moet lewe of sterwe. Dus: indien geneesheer X 'n lewensreddende operasie op 'n bewustelose Y uitvoer, is X se optrede geregverdig, *al sou Y voor die operasie te kenne gegee het dat hy die operasie nie goedkeur nie.* (Sien egter *Castell v De Greef* 1994 4 SA 408 (K) 421.)

(c) *Die redelike aanname dat Y nie beswaar sou hê teen X se optrede nie moet bestaan op die tydstip waarop X sy handeling verrig* (Jescheck 312; Schönke-Schröder 493). As die aanname op hierdie tydstip nie redelikerwys gemaak kan word nie, is X se optrede waardeur hy in Y se belange inmeng wederregtelik, selfs al kan so 'n aanname in 'n latere stadium weens veranderde omstandighede gemaak word. Die blote feit dat X *hoop* dat Y op 'n latere tydstip sy toestemming sal gee, is nie voldoende nie.

(d) Daar is *twee subjektiewe vereistes* vir 'n geldige beroep op hierdie regverdigingsgrond.

Eerstens moet X ten tyde van sy optrede weet dat daar redelike gronde is om te aanvaar dat Y sou toegestem het tot sy (X se) optrede (Kühl 301). Hierdie vereiste is maar net 'n toepassing van die algemene reël wat by alle regverdigingsgronde geld, dat die persoon wat hom op 'n regverdigingsgrond beroep kennis moet dra van die regverdigende omstandighede wat sy handeling regmatig maak. Hy moet met ander woorde bewustelik regmatig optree. As die regverdigende omstandighede objektief aanwesig is maar hy subjektief nie daarvan bewus is nie en optree met die opset om 'n handeling te verrig wat buite die regverdigende omstandighede val, is sy handeling nie regmatig nie (Fletcher *Rethinking criminal law* (1978) 557; Schmidhaüser *Strafrecht Allgemeiner Teil* (1975) 291–293; Jesheck 106; Snyman 105–108). Hierdie reël bring die volgende mee: indien dit op grond van die toepassing van 'n objektiewe toets blyk dat daar redelike gronde is om te aanvaar dat Y tot die ingreep sou toegestem het, terwyl X subjektief weet dat Y nie sou toegestem het nie, kan X nie slaag met 'n beroep op hierdie regverdigingsgrond nie (Roxin *Strafrecht* 517; Jakobs 452).

Tweedens moet X die bedoeling hê om Y se belange te beskerm of te bevorder (Baumann-Weber 333). Hy moet dus met 'n altruïstiese motief optree.

'n Vraag wat in hierdie verband deur sekere skrywers bespreek word, is wat die posisie sou wees indien X in Y se afwesigheid 'n artikel of artikels wat aan Y behoort, wegdra ten einde dit self – tot sy (X se) voordeel – te benut of te geniet, in omstandighede waarin dit redelik is om aan te neem dat Y geen beswaar teen sodanige optrede sou opper nie. Die volgende twee voorbeelde illustreer hierdie soort situasie. Terwyl Y weg is met vakansie, val vrugte van bome wat op sy eiendom groei op die grond. Die vrugte sal verrot voordat hy van vakansie terugkeer. X, sy buurman, tel die vrugte op en eet dit self in die geloof dat Y geen beswaar teen sy optrede sal hê nie. Of X neem in Y se afwesigheid Y se fiets sonder sy toestemming ten einde dringend 'n brief te pos voordat die posbeampte die posbus leegmaak, waarna hy die fiets weer terugbring.

Na my mening moet die skrywers wat 'n beroep op die regverdigingsgrond in hierdie omstandighede ontken (bv Maurach-Zipf 384; Roxin *Strafrecht* 521 524), gelykgegee word. Die onderhawige regverdigingsgrond moet beperk word tot optrede *ter beskerming of bevordering* van 'n ander se belange. Uit 'n regspolitieke oogpunt is dit gevaarlik, en dus ongewens, om dit uit te brei tot gevalle waar die optrede niks met beskerming van Y se belange te doen het nie maar dien ter bevordering van X se eie belange, omdat X met die oogmerk of motief optree om die saak self te benut. Dit is veels te riskant om te aanvaar dat X, bloot op grond van Y se vermoedelike toestemming, as 't ware 'n reg het tot "kompensasielose vermindering" van Y se besittings (Jakobs 451). Die erkenning van so 'n reg sal ook te veel onreg in die hand werk in gevalle waar goedere ontneem word van mense ten opsigte van wie dit bekend is dat hulle vrygewig is of "nie maklik nee kan sê" vir iemand wat hulle 'n guns vra nie (Jakobs 452).

Die vereiste dat X moet optree ter beskerming van Y se belange is nie 'n plaasvervanger vir die vereiste dat daar vermoedelike toestemming moet wees nie. 'n Mens het hier met twee afsonderlike vereistes te doen wat kumulatief geld. Derhalwe tree X wederregtelik op as hy op 'n tydstip waarop sy buurman afwesig is, sonder laasgenoemde se toestemming sy erf betree en daar sy onkruid uittrek. Die vereiste dat daar vermoedelike toestemming moet wees, voorkom

dat oorywerige optrede ter beskerming of bevordering van 'n ander se belange ook geregverdig word.

Wat hierdie pasgemelde twee subjektiewe vereistes betref, moet net terloops daarop gewys word dat die blote feit dat hierdie vereistes bestaan, verdere bewys is daarvan dat dit verkeerd is om, soos soms in die strafregliteratuur aangevoer word, te beweer dat die toets vir wederregtelikheid altyd objektief is en dat daar gevolglik nie ruimte is vir subjektiewe oorwegings nie. (Vir stellings wat die gemelde verkeerde bewering bevat, sien *S v Goliath* 1972 3 SA 1 (A) 11B–C; *Ex parte Minister van Justisie: In re S v SAUK* 1992 4 SA 804 (A) 808F–G; De Wet en Swanepoel 69.)

(e) *X se inmenging in Y se belange mag nie verder strek as dit waartoe die vermoedelike toestemming gegee is nie.* Vermoedelike toestemming deur 'n beseerde en bewustelose Y dat sy been geamputeer mag word, gee geneesheer X nie die reg om nog 'n ander operasie op Y uit te voer wat niks met die amputasie te doen het nie. As X in die afwesige Y se huis inbreek om 'n gebarste waterpyp te herstel, en hy sy taak suksesvol afgehandel het, het hy nie die reg om daarna nog in Y se huis rond te stap en sommer nog ander stukkende artikels wat geen onmiddellike gevaar vir Y se belange inhou nie, ook vir Y reg te maak nie.

(f) *Dit is nie nodig dat X se reddingshandeling suksesvol hoef te wees nie.* As X by die afwesige Y se huis inbreek om 'n gebarste waterpyp te probeer herstel maar hy nie daarin slaag om wat stukkend is reg te maak nie, of as Y na sy huis terugkeer en X daar betrap nog voordat X die stukkende pyp kon herstel het, bly X se optrede geregverdig. Die rede hiervoor is te vinde in X se motief of oogmerk, naamlik om in Y se afwesigheid sy belange te beskerm. Solank hierdie motief aanwesig is, is X se optrede regmatig.

6 Slot

Daar kan met Labuschagne 1994 *TSAR* 813 saamgestem word dat dit beter is om, sover dit die strafreg betref, die regverdigingsgrond wat hier bespreek is te beskryf as *vermoedelike toestemming* eerder as saakwaarneming of *negotiorum gestio*. Ofskoon die verweer net kan slaag as X opgetree het met die motief om Y se belange (en nie sy eie belange nie) te beskerm, val die klem by hierdie regverdigingsgrond op Y se vermoedelike toestemming.

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Daar was in die jongste tyd 'n vloedgolf van gerapporteerde beslissings en artikels in die regstydskrifte oor grondwetlike aangeleenthede en dit is moeilik om tred te hou met die regsontwikkeling op hierdie gebied. Dit blyk uit talle van die uitsprake dat die Regters toegegooi is met buitelandse gesag. Vir my is die vakgebied nuut en vreemd en ek betree dit vir die eerste keer met huiwering en 'n aansienlike gebrek aan selfvertroue (per Mclaren R in *Potgieter v Kilian* 1995 11 BCLR 1498 (N) 1512).

REFLECTIONS UPON RECONSTRUCTION AND LEGAL EDUCATION*

We are living in exciting times. Few of us will have remained unmoved by the inspiring presidential inauguration on the tenth of May [1994] and there cannot be many who did not experience the almost tangible sense of having been liberated from the past. However, the euphoria has subsided and we now must go forward to meet the exciting challenges of reconciliation and reconstruction which lie ahead.

Our programme for the week focus on some of the many issues which we as law teachers will be facing, some for the first time, in the new South Africa. These involve *inter alia*, gender law, academic development, the new constitution and fundamental rights, affirmative action and the environment. The need for change and renewal is generally recognised and against this background I would like to share with you some thoughts on reconstruction in the legal system and in legal education.

Some years ago I expressed the view that, since law and education are aspects of the culture or total way of life of a people, both the legal system and legal education should reflect the values of the particular society involved. Where the society in question was made up of various communities and thus labelled heterogeneous (as ours is) a wide perspective was needed. If the legal system was out of keeping with the values and needs of the various communities that go up to make the larger society, it would run the risk of being labelled unjust. While we could justly be proud of the Western European legal culture that was part of the South African legal heritage, to overlook our African heritage in the fields both of jurisprudence and of what may be termed "substantive law", would be not only insensitive but dangerous.

In this regard the call then was for a greater recognition of indigenous or African customary law which, it was said, would serve not only to reflect more realistically the popular legal consciousness of a large segment of South African society, but within a broad comparative perspective serve to enrich the South African legal system as a whole (see Church "Reflections on legal education" 1988 *THRHR* 155). By and large, albeit with a measure of qualification, I still subscribe to these views. I have no doubt that the narrow Eurocentric view of the past has denied or relegated to irrelevancy other enriching legal traditions, more specifically the African legal tradition. Similar views were expressed recently by Nadasen ("Changing law in a changing society: reflections from a black perspective" 1993 *SALJ* 583–586).

Writing in the same journal on the future of legal education in Namibia, John Hund ("Getting serious about legal education in Namibia" 1993 *SALJ* 594)

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* Rivised version of the presidential address delivered at the Congress of the South African Society of University Teachers of Law held at UPE in July 1994.

declares that courses in customary law have a vital role to play in the education of lawyers in that country; attempts to *extinguish* the local law would be doomed to fail; rather it should be (in his words) "confronted and treated with respect". While recognising that certain African traditions can offend against universal (and not merely "Western" principles of civilisation) he cautions that care should be taken to "separate what is universal from what is merely Western and to avoid "running over 'living law' that gives meaning to the lives of so many African citizens". Not only should there be respect for the African norm but also for the process. These views echo the earlier opinions expressed by other writers (see eg Dlamini "The role of customary law in meeting social needs" 1991 *Acta Juridica* 71).

Formalising or westernising customary courts may remove them from the very people they serve. Such steps would, moreover, militate against the possible integration and hence against the enrichment of the whole legal system to the benefit of all our people. With regard to the Western European institutions which form part of our legal heritage, Albie Sachs (*Protecting human rights in a new South Africa* (1990) 81) wrote in 1990:

> "Shorn of their associations with domination, there is no reason why these institutions should not be taken over and infused with a new spirit so as to serve the people as a whole rather than just a minority."

While one might agree with these sentiments, particularly with regard to the informal resolution of disputes in the traditional mould (see in general Van Niekerk "People's courts and people's justice in South Africa – New developments in community dispute resolution" 1994 *De Jure* 19–30), one should not overlook what has generally been recognised to have been a distortion of African tradition. (Some have even called customary law "an invented tradition" (see Chanock "Neo-traditionalism and the customary law in Malawi" 1978 *African L Studies* 80; see too Bennett "The compatibility of African customary law and human rights" 1991 *Acta Juridica* 19; Bekker and Maithufi "The dichotomy between 'official customary law' and 'non-official customary law'" 1992 *TSAR* 47.) Women particularly have been disadvantaged by this distortion which writers hold has been exploited by African men seeking to secure dominance (see eg Chanock in Hay and Wright (eds) *African women and the law: Historical perspective* (1982) 53). Apart from any manipulation of the African legal system – whether this was for party political purposes or for the acquiring of power by other groupings and which resulted in distortion – I believe it is particularly the superimposition of Western concepts, though possibly with good intention, that has led to distortion and concomitant disadvantage particularly that suffered by women. As legal academics, and particularly as those trained in a systematic civilian tradition, we must guard against *sterile* analysis. We must not forget that law is about people and their relations in society. The shaping or reshaping of our legal system and the teaching and practice of law requires not only a deep knowledge of human nature and an understanding of modern society and life, but in a multicultural society, at least a sensitive approach to the traditions of the various communities. Perhaps an example will serve to illustrate the point.

Many jurists (and I number myself among them) resorted to the use of the Western concept of "guardianship" when referring to the position of women within the traditional family. One of the results of this approach has been to "cast

in stone" and more particularly in the Black Administration Act of 1927 the idea of a "perpetual minority status" for women, for example, section 11(3)(b) of that Act determining that a woman "partner in a customary union . . . living with her husband shall be deemed to be a minor and her husband deemed . . . her guardian". As Bennett has pointed out (in an unpublished paper delivered at a colloquium of the South African Law Commission in 1994), the term "minor" when describing the woman's position under customary law fails to capture the nuances under that regime. This I now believe is a distortion of the African spirit of human dignity or *ubuntu* and the idea of shared rights. It has resulted in a denigration of women. The next step was for power seekers within the particular society to declare that the distortion was "part of our custom" and that it therefore justified behaviour which was without doubt unlawful in traditional society. This, for example, was a retort offered in response to charges of sexual offence by male students on the campus of one of our universities. (See eg Naidoo and Rajah "A survey of sexual harassment and related issues among students at the University of Natal Durban Campus" (1992); Thandabantu Nhlapo "Culture and women abuse: Some South African starting points" 1992 (13) *Agenda* 5.)

However, it must not be forgotten that both the institutions of Western and of African law will in the future be equally subject to the supreme law embodied in the new Constitution. The extent to which indigenous law has been given recognition in the new Constitution is still a matter for academic debate and one which will doubtless enjoy further attention at this congress. (The question of customary law as "a constitutional right" is discussed fully by Bennett in his *Human rights and African customary law* (1995) 11–27.) It would seem that what has been termed the "cinderella of our legal system" (see Bennett "The compatibility of African customary law and human rights" 1991 *Acta Juridica* 18) enjoys very much more than mere token recognition, particularly in view of the Second Amendment Act which came into operation on 27 April 1994. Before this amendment, traditional authorities and indigenous law were already recognised in chapter 11 of the Constitution. But, with the ambiguous rider "indigenous law shall be subject to regulation by law", the position was anything but crystal clear. Now, in terms of the amendment to the all important constitutional principles and here specifically principle XIII, the future role of indigenous law seems to be firmly entrenched. Thus the amended principle XIII not only determines that

> "the institution, status and role of traditional leadership according to indigenous law shall be recognised and protected by the constitution and further that indigenous law, *like common law* shall be recognised and applied by the courts, subject to the fundamental rights contained in the constitution and to legislation dealing specifically therewith",

but the principle now also provides that "*provisions in a provincial constitution relating to the institution, role, authority and status of a traditional monarch shall be recognised and protected in the constitution*" (my emphasis). Can we now still speak of indigenous law as only a "special" law as opposed to the "general" common law? (See too Lourens "Inheemse reg: aard en inhoud in terme van die Grondwet" 1994 *De Rebus* 856.) The matter of interpretation of the Constitution and particularly the provisions contained in chapter 3 regarding fundamental rights and the issue of women's rights amongst others, will no

doubt be hotly debated during the congress. What is important to stress here, is that legal educators must be prepared for change and reconstruction not only in the disciplines relating to constitutionalism but also with regard to gender issues. Which brings me to my next point: gender issues. In another jurisdiction it has been said that gender issues fall into an area of law teaching which has been termed "non-traditional" and which embraces such areas as critical legal studies (CLS), law and economics and, in the words of one writer – "other interdisciplinary approaches such as feminist legal studies, critical race studies and moral theory". (See eg Edwards "The growing disjunction between legal education and the legal profession" 1992 *Mich LR* 50. The incisive article by Edwards (a former law professor and now a circuit judge in the USA) drew a varied but mostly critical response from law teachers; in the year following upon its publication an entire issue of the *Michigan Law Review* was devoted to such response.)

Legal educators in the future South Africa will have to take account of feminist jurisprudence. This is not to deny that moves have already been initiated in South Africa in this regard. A notable example is the effort (and degree of success achieved) by legal scholars at the University of Cape Town. (While the Universities of the Witwatersrand and Cape Town have pioneered the teaching of gender and law courses, others have followed suit; see in general Van Zyl "Feminism and the law – teaching and theory" 1995 (2) *Codicillus* 29–36.) No doubt there are initiatives which have been taken at other universities like my own to offer courses in what, for want of a better term, may be called women's law. The very fact that we have in this year's congress programme a full morning session devoted to "gender issues" (a first, I believe, for the society) underscores the new awareness.

Feminist jurisprudence shares with critical legal studies (and also for that matter with every other method that questions the *status quo* including liberalism) a critical approach. In America CLS, and also to a lesser extent the feminist and critical race studies movements, have been subject to criticism for being nihilist as "threatening to annihilate the stability and self-assurance of long-held canons of law without offering any particular replacement" (Edwards 1992 *Mich LR* 47). Others again have reluctantly gone along with these "non-traditional" movements holding that they serve some purpose to *complement* the "real" bulk of legal scholarship. However, as Derrick Bell and Errin Edmonds ("Students as teachers, teachers as learners 1993 *Mich LR* 2025) point out in an incisive response, the non-traditional is valid not because it *complements* the "real" bulk of legal scholarship but because it *redefines* what is "real". Feminist jurisprudence is not merely "pie in the sky" theory; it has forced or seeks to force change in very real areas particularly from the point of view of women. One thinks here, for example, of areas such as sexual harassment, the law relating to rape and family law in general. Feminist jurisprudence, it is suggested, would make the law more responsive to the greater part of our population. Formal programmes should be structured which might initially take the form of certificate or even diploma courses. Ultimately and ideally, feminist jurisprudence should be included in all law degree programmes.

Closely akin to the need to take cognisance of feminist jurisprudence in shaping legal education in the new South Africa, is I believe, a need to recognise the

value of interdisciplinary study and empirical research. At a recent gathering at Unisa at which we were addressed by Ms Julie Stewart, one of our Zimbabwean guests at this congress, the necessity to conduct research at the so-called grass-roots level was highlighted. It might happen, for example, that rural women faced with a problem might find that institutions peculiar to Africa would serve them better than having recourse to a Western human rights process. As Tom Bennett ("The equality clause and customary law" 1994 *SALJ* 122) points out, "a realistic appraisal of social and economic conditions in South Africa may indicate that existing institutions can cater for individual needs, in the short term at least, more effectively than a bill of rights can". These are possible fields for empirical research to be undertaken in the interdisciplinary mode.

In this context it is clear that there is also a need for what may be termed "civic education" in the law. I think here, for example, of human rights education, education of paralegals, street law courses and other activities in which there has already been a deal of interest shown. A notable example here is the Centre for Human Rights of the University of Pretoria's faculty of law which has served over a number of years to strengthen a legal culture of democracy. Other agencies (one thinks here of organisations such as Lawyers for Human Rights and their programme for paralegals) as well as the practising profession have also been instrumental in serving this need. While all this is laudable, there is perhaps, in a programme of reconstruction, a real need for rationalisation and co-ordination. Possibly, without foregoing university autonomy and academic freedom, universities (if needs be through the Society of Law Teachers) in a spirit of joint venture, should play a co-ordinating and facilitating role in the area of civic education.

Perhaps most important of all is the role that students play in the legal dispensation and more specifically their relationship with their lecturers. There are many possible metaphors for teaching. The one chosen would depend not only on one's own identity as a teacher but also on one's conception of the relationship between pedagogy and scholarship; on the interplay between theory, doctrine and practice and especially on one's conception of the educative process. The accepted metaphor might be that the "classroom is a universal filling station where students tank up on knowledge that they will need later" or it might be somewhat more progressive, the idea that the teacher should provide the students with their own tanks of petrol on their own journeys of learning (see eg Lesnick "Being a teacher of lawyers: Discerning the theory of my practice" 1992 *Hastings LJ* 1095). I prefer the metaphor of a teacher being the co-driver with students on the road to learning and academic excellence.

Speaking of students and academic development, a long recognised need is to redress imbalance and disadvantage which has resulted from a stunted and warped educative process. Once again in our congress programme we have a full day session devoted to academic development. Possibly such programmes should be integrated in so-called foundation law courses. A quick glance through the various university year books revealed that with the apparent exceptions of RAU, the North West University and Durban-Westville, such courses variously labelled as Introduction to Law, Legal Theory and Reasoning, Inleiding tot die

Regswetenskap, Regsleer and so on, are already running at our universities. What is not clear, however, is the extent to which academic development programmes are incorporated into such courses. Here is a further area for a possible corporate research project. A similar project was initiated in the United Kingdom and is reported upon in an instructive article by Simon Gardiner and Liz Duff ("How to devise an Introduction to Law course and (not) alienate your colleagues" 1993 *Law Teacher* 244). Time prevents my discussing their findings but you might find the article interesting reading.

Finally, may I crave your indulgence to express a few thoughts on the relationship between practice and academia and on the teaching of ethics. Ideally, as has been suggested frequently in other writings on the subject, there should be conjunction rather than disjunction between academic and practical training and the practice of law. Although there have been constructive changes, the position at least according to some (BLA, eg recently called for the greater involvement of the universities in practical training) is still not ideal. In this regard the conference of law deans held annually under the auspices of the Society of University Teachers of Law and the regional and national liaison meetings held under the auspices of the Association of Law Societies, have proved fruitful forums for discussion and channels of communication. (Further proof of the fact of co-operation between the universities and the profession are the agreements which have been entered into by the Association of Law Societies and the universities regarding the Schools for Legal Practice. Participating universities host/assist in the running of these schools. The programme is recognised by participating universities, eg for purposes of a post-graduate certificate in legal practice or for purposes of a partial compliance with the requirements of the LLM degree. Apart from "host" universities, the other universities in the areas of the schools are involved in their management.)

To turn to the question of ethics, perhaps I can preface my remarks by referring to the opening sentence of one of the classics in South African legal literature. Hahlo and Kahn's *The South African legal system and its background* (1968) which reads thus: "To the layman law is a secret art, concerned mainly with the doings of the wicked." Implicit in such a statement is that to lay-people the practice of the lawyer is a mystical rite practised only by initiates. Satirical barbs aimed at the moral deficiencies of such initiates abound in popular and ancient writings. For example, one oft-quoted barb runs thus: "A witch will sail in a sieve, but the devil will not venture aboard a lawyer's conscience."

Similar satirical humour is expressed in Samuel Butler's versicle:

> "Who ever skulked behind the law's delay,
> Unless some shrewd attorney showed the way,
> By his superior skill got the ascendant,
> And led astray the innocent defendant."

Reference has also been made to an Italian proverb which runs: "It is better to be a mouse in the mouth of a cat than a client in the hands of a lawyer" and in the Gospel according to Luke, lawyers are ranked with the Pharisees and below the despised tax-collectors.

Amid such popular invective, jurists frequently and one must add rightly, highlight the fact that the legal profession is an honourable profession. Often

quoted in this regard are the stirring words of the foreword to the first edition of *Herbstein and Van Winsen* (1954) to the effect that "ours is a fine profession it is the pursuit of justice and of truth, and these are surely well worth pursuing for their own sake, regardless of reward . . ." None the less, one must agree, albeit perhaps grudgingly, with an American writer (Schrader *Ethics and the practice of law* (1988) 1) who sardonically writes:

> "The legal profession is perhaps unique among the professions, both in the amount of discussion carried on by organised groups *within* the profession regarding its ethical responsibilities, and in the pervasiveness *outside* the profession of the impression that it is wholly amoral."

Some years ago, in a scholarly address ("Is there cause for the popular discontent with the administration of justice" 1989 *SALJ* 602), Professor Ellison Kahn referred to the popular discontent with the administration of justice. In highlighting the possible cause for such discontent and its remedy, he focused on the legal process, the structure of our courts and of the legal profession itself. As we know, some of the reforms he suggested with regard to the restructuring of the courts and the hitherto divided bar, have already been effected or at least initiated.

A recent call made by Professor Reynolds, a former judge of the High Court of Zimbabwe, is that in order to address popular discontent, reform should be directed at the "lawyer's conscience". He points out in a recent article ("A lawyer's conscience" 1993 *SALJ* 153) that while in the sixties South African lawyers "were held in reasonably high public esteem and falls from grace were at least grudgingly condoned . . . the passage of thirty-odd years has brought about a marked change of sentiment". Erstwhile humorous albeit satirical comment has been replaced by, as he puts it, such caustic and denunciatory remarks as "money-grabbing shark lawyers" or "he spends his life trying to do the other side down; what do you expect?"

In suggesting various measures for reform, Reynolds acknowledges the constructive efforts that have already been made by law societies and individual lawyers to redress past wrongs and to repair the damaged reputation of the profession. One suggestion of the author that merits further attention, however, is that universities should be persuaded to include compulsory courses on legal ethics in their syllabuses, paying particular attention to what he calls "straightforward moral issues and the principles of social justice". In framing such courses reliance should not be placed merely on the existing regulatory professional codes but courses should be compiled from a more general and impartial perspective. Similar views have been expressed in other jurisdictions and I shall return to these presently.

In the South African context, the call to integrate ethics in law courses offered by our law schools, was one which found unanimous support at the recent conference of law deans in March that was held under the auspices of our Society. It is also a call which came from the profession at last year's regional and national liaison meetings which I attended.

Further afield and more particularly in the context of discussions on legal education in the USA and the often strident criticism of legal practice in that country, there have also been calls for reform which focus on the question of legal ethics. One such call comes from David E Schrader of Austin College in the very useful publication *Ethics and the practice of law*. Professor Schrader writes that

in the USA discussions on legal ethics are most often limited to the American Bar Association's various codes and that these codes, like most attempts at self-regulation, are combinations of matters of legitimate ethical concern, concern with professional etiquette as well as concern to protect the economic status of the profession. A further problem is that these codes are not systematic. I suspect that much of what Schrader says with regard to the American Bar Association's codes also applies in the South African context.

A major problem, I believe, in relying solely upon a professional code of conduct is that it encourages positivism, directed mainly at what may be termed the cognitive domain of head knowledge only. As a result, there is always the danger that it will be applied formalistically so that the ethical spirit is masked by the mere letter of the law. Perhaps there is a need for ethical theory in order to counteract the shortcomings of the formalistic application of a mere code of ethics. It is a view I would support.

Another American writer who has expressed himself on the question of ethics is Professor Jonathan R Macey of the Cornell University Law School. In a paper delivered during a symposium on Civic and Legal Education held at Stanford ("Civic education and interest group formation in the American law school" 1993 *Stanford LR* 1937), he argues strongly against what he terms a "gatekeeper" approach to education in general and legal education in particular. Such an approach fosters the maintenance of self-interest groups and militates against what he regards as a necessary self-criticism and even cynicism. The mere classification of law as a profession, he argues, justifies the maintenance of a "gate-keeper" membership: After meeting the qualifications for entry into the profession and having undergone professional certification and examination by persons already designated "lawyers", initiates would be more than willing to accept rigid control of the established hierarchy within the profession. Where legal education at the university and later is focused on the profession, an inexorable process of preference formation and the maintenance of an interest group culture begins the moment a student enters law school. The result is that the students will view their own welfare as inextricably linked to the welfare of the profession and thus changes in societal and legal norms that may harm the profession are viewed as harmful to themselves, changes potentially beneficial to the legal profession as beneficial to themselves. This "interest-group capture" of the law student, as he puts it, leads to the situation that the emergent lawyers will see only the benefits but none of the drawbacks of constructing a society in which they play a dominant role in every facet of life. This leads to a deeply embedded assumption that lawyers are good and more lawyers are better and the concomitant honestly held belief that the interests of justice are best served by expanding the role of lawyers. Although one may not agree with all that Professor Macey says, it does seem that self-justification and rationalisation can lead to tremendous injustice. Certainly, as he suggests, a self-critical and even sceptical approach is called for, not only by lawyers in respect of lawyers, but of the legal system as a whole. The example he gives to illustrate this argument bears repetition (1993 *Stanford LR* 1953):

> "The amazing complicity of the French legal system during the Holocaust is perhaps the greatest testament to the inability of a legal system to distinguish

> between moral and legal positions. A healthy scepticism for the value of the law is perhaps the best defense against this sort of subversion."

As Schrader points out in this context, the profession itself must be morally justifiable. Perhaps a more critical approach can be achieved by compulsory incorporation of ethics into the law curriculum and the development of ethical theory rather than a mere regulatory professional code of ethics. Although an ethical theory will not invariably yield ready answers, it can provide a means of focusing on and sorting out various issues at stake. It can provide a general line of justification for each of competing claims which in turn will provide an approach to the resolution of competing claims. Furthermore, the development of ethical theory may help to overcome subjective prejudice for, as he points out:

> "Whatever one may say about the subjective factors involved in the genesis of a theory or in an individual's acceptance of a theory, there is still an important sense in which any theory is objective. A theory has logical consequences. An ethical theory like any other theory is couched in general terms, but as with all theories, when it is conjoined with descriptions of concrete states of affairs, it will yield some very concrete implications."

Where one might place such compulsory course in ethical theory in a law curriculum, is a matter for debate. Obviously a course in jurisprudence could accommodate it. I would like to suggest that it should permeate the various courses at various levels and that this should begin with the very first introductory course. The learning and practice of legal ethics should be more than a stab in the dark. Ethical issues arise in a context and these should be identified and subjected to critical analysis.

Often addresses of this nature are concluded with the by-now trite *ex Africa semper aliquid novi*. I shall therefore not so conclude my address, but rather express the desire that whatever new should come out of what over the centuries, has been called the "slumbering giant", should be based upon the enrichment of the past. Our Western European, just like our African heritage should not be denied. I would like to believe that with enthusiasm and real commitment, our legal system and legal education should be so reconstructed as to reflect reconciliation and serve as a model in the global context.

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DIE BEVOEGDHEID VAN DIE HOF OM BEDRAE IN STRAFBEDINGE TE VERMINDER

Artikel 3 van die Wet op Strafbedinge 15 van 1962 verleen aan die hof die bevoegdheid om buitensporige strafbedrae te verminder en bepaal soos volg:

> "Indien dit by die verhoor van 'n eis om 'n strafbedrag vir die hof blyk dat daardie bedrag buite verhouding is tot die nadeel deur die skuldeiser gely weens die doen

> of late ten opsigte waarvan die straf beding is, kan die hof die strafbedrag verminder in die mate wat hy onder die omstandighede billik ag: Met dien verstande dat die hof by die bepaling van die omvang van bedoelde nadeel nie slegs die skuldeiser se vermoënsbelange in ag neem nie, maar ook enige ander regmatige belang wat deur die betrokke doen of late geraak word."

Wanneer 'n strafbeding as gevolg van kontrakbreuk ter sprake kom, is die normale verloop van sake dat die eiser hom op die strafbeding beroep en dat die verweerder dan vir vermindering van die strafbedrag kan vra (*Maiden v David Jones (Pty) Ltd* 1969 1 SA 59 (N); *Bloemfontein Munisipaliteit v Ulrich* 1975 4 SA 785 (O); *Smit v Bester* 1977 4 SA 937 (A); *Portwig v Deputation Street Investments (Pty) Ltd* 1985 1 SA 83 (D); *Chrysafis v Katsapas* 1988 4 SA 818 (A); *Bank of Lisbon International Ltd v Venter* 1990 4 SA 463 (A); Van Rhyn en Van Rensburg "Die bewyslas ten aansien van die buitensporigheid van 'n strafbeding" 1977 *THRHR* 261 ev; Visser en Potgieter *Skadevergoedingsreg* (1993) 321; De Wet en Van Wyk *Die Suid-Afrikaanse kontraktereg en handelsreg* I (1992) 246; Christie *The law of contract in South Africa* (1991) 659). Die vraag na die ligging van die bewyslas in gedinge wat oor strafbedinge handel, het vroeër telkens in die howe ter sprake gekom en is aanvanklik verskillend beantwoord (sien *Cous v Henn* 1969 1 SA 569 (GW); *Maiden v David Jones (Pty) Ltd* 1969 1 SA 59 (N); *Bloemfontein Munisipaliteit v Ulrich* 1975 4 SA 785 (O); Van Rhyn en Van Rensburg 1977 *THRHR* 261 ev). Na aanleiding van die verwarring wat geheers het, het Van Rhyn en Van Rensburg 1977 *THRHR* 261 'n volledige bespreking van sowel hierdie uitsprake as die begrippe "bewyslas" en "weerleggingslas" gelewer, welke bespreking met goedkeuring deur die appèlhof in *Smit v Bester* 1977 4 SA 937 (A) aangehaal is. Dié skrywers wys daarop dat die bewoording van artikel 3 minstens op 'n geïmpliseerde bedoeling dui dat die skuldenaar die bewyslas moet dra (1977 *THRHR* 263; sien ook die aanhaling in *Smit v Bester* 1977 4 SA 937 (A) 941). Hulle kom tot die gevolgtrekking dat

> "die woorde ... 'vir die hof blyk dat daardie bedrag buite verhouding tot die nadeel deur die skuldeiser gely ... is' net kan dui op 'n bewyslas wat op die skuldenaar geplaas word. Die skuldeiser steun juis op die strafbeding en dit kan nie van hom geverg word om die hof te oortuig dat die bedrag van die strafbeding buite verhouding is tot die nadeel wat deur hom gely is nie. Die las kan tog nie op hom rus om sy eie saak te benadeel nie. Dit is sekerlik die taak van die skuldenaar om te bewys dat die strafbedrag buite verhouding is tot die nadeel deur die skuldeiser gely, want hy is die party wat die bestaande stand van sake wil verander" (263).

Hierdie standpunt is deur die appèlhof nagevolg in *Smit v Bester* 1977 4 SA 937 (A) 942:

> "Na my mening blyk dit dat waar 'n hof met 'n strafbedrag te doen kry, rus die bewyslas op die skuldenaar om te bewys dat die strafbedrag buite verhouding is tot die nadeel wat die skuldeiser gely het en dat dit gevolglik verminder behoort te word en tot welke mate. In werklikheid is dit 'n vergunning wat die skuldenaar vir die hof vra, nl dat die hof sy diskresie om die strafbedrag te verminder, in sy guns uitoefen omdat dit anders onregverdig teenoor hom sou wees as dit nie gedoen word nie. Wanneer die skuldenaar *prima facie* bewys gelewer het dat die strafbedrag verminder behoort te word, dan rus daar 'n weerleggingslas op die skuldeiser om die skuldenaar se *prima facie* saak te ontsenu, indien dit vir hom moontlik is. Hierdie siening word deur die huidige appellant se pleit versterk. Na alles is dit die skuldenaar wat beweer dat die strafbedrag buite verhouding is en

> verminder behoort te word. Dit is ook erkende reg dat hy wat beweer gewoonlik die bewyslas daarvan dra."

Die bewyslas om die buitensporigheid van die strafbedrag te bewys, rus dus op die skuldenaar (Van der Merwe ea *Contract: General principles* (1993) 319; Visser en Potgieter 320; De Wet en Van Wyk I 246; Christie 659).

'n Vraag wat uit die kwessie rondom die bewyslas voortvloei, is of die hof *mero motu* vermindering kragtens artikel 3 kan toepas. Die woorde "indien dit . . . vir die hof blyk" is al uitgelê as sou dit beteken dat die hof nie hoef te wag vir een van die partye om vermindering te opper nie, maar dat die hof uit eie beweging die *prima facie* buitensporigheid van die strafbedrag in ag mag neem (*Western Credit Bank Ltd v Kajee* 1967 4 SA 386 (N); *Ephron Bros Holdings (Pty) Ltd v Foutzitzoglou* 1968 3 SA 226 (W); *Maiden v David Jones (Pty) Ltd* 1969 1 SA 59 (N); *South African Mutual Life Assurance Society v Uys* 1970 4 SA 489 (O); *Du Plessis v Oribi Estates (Pty) Ltd* 1972 3 SA 75 (N); *Western Bank Ltd v Lester & McLean* 1976 4 SA 200 (O); *Smit v Bester* 1977 4 SA 937 (A); Van Rhyn en Van Rensburg 1977 *THRHR* 266; Visser en Potgieter 320; De Wet en Van Wyk I 243). Hierdie benadering word veral by aansoeke om summiere (*Premier Finance Corporation (Pty) Ltd v Steenkamp* 1974 3 SA 141 (D)) of voorlopige vonnis aangetref. (Vgl *Du Plessis v Oribi Estates* 1972 3 SA 75 (N) 80 waar voorlopige vonnis gegee is vir die skuld maar nie vir die strafbedrag nie aangesien dit *prima facie* buite verhouding tot die nadeel was. Die eiser kon by die verhoor op die strafbedrag aanspraak maak en dan sou dit op die getuienis beslis word.) Dit word ook by vonnis by verstek gevolg (*Smit v Bester* 1977 4 SA 937 (A) 942). Ten aansien van bestrede sake blyk die posisie egter onduidelik te wees. In *Bank of Lisbon International Ltd v Venter* 1990 4 SA 463 (A) maak die hof die stelling (475) dat 'n hof nie ongevraagd in 'n bestrede saak vermindering kan toepas nie. Daar word op *Smit v Bester* 1977 4 SA 937 (A), *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A) en *Chrysafis v Katsapas* 1988 4 SA 818 (A) as gesag vir hierdie stelling gesteun. 'n Ondersoek van elk van hierdie sake toon egter dat nie een van hulle werklik hierdie standpunt inneem nie.

In *Smit v Bester* (in die gedeelte 942D–G waarna die hof in die *Venter*-saak verwys) bespreek die hof slegs die verweerder se bewyslas. Die hof sê naamlik dat die skuldenaar *prima facie* moet bewys dat die strafbedrag verminder moet word, waarna daar 'n weerleggingslas op die skuldeiser rus. Net 'n paar paragrawe verder (942H) maak die hof egter die volgende stelling:

> "Die Hof kan natuurlik *mero motu* die strafbedrag ook verminder wanneer dit *prima facie* uit die pleitstukke blyk dat die strafbedrag buite verhouding is tot die nadeel wat die skuldeiser gely het. *Hierdie gevalle kom gewoonlik voor waar vonnis by verstek aangevra word* [my kursivering] vandaar die feit dat die Hof uit 'n oogpunt van billikheid die skuldeiser 'n geleentheid bied om die *prima facie* siening wat die Hof van die strafbedrag huldig, te ontsenu."

Uit hierdie gedeelte blyk dat die hof geen algemene reël wou skep dat vermindering slegs in onbestrede sake *mero motu* toegepas kan word nie, maar dat dit slegs 'n voorbeeld van 'n bepaalde geval wou gee.

Uit *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A) 906D–I kan ook nie 'n reël teen *mero motu*-vermindering in bestrede sake afgelei word nie. Die hof bespreek weer eens die bewyslas aan die hand van *Smit v*

Bester 1977 4 SA 937 (A) en gaan dan voort om die gebreke in die besondere verweerder se pleitstukke aan te toon. Die pleitstukke het geen verwysing na die Wet op Strafbedinge bevat nie en dit het ook geensins daaruit geblyk dat die strafbedrag *prima facie* buitensporig was nie. In teenstelling met die afleiding wat deur die hof in die *Venter*-beslissing uit die *Magna Alloys*-bespreking gemaak word, wil dit voorkom of die hof wel ongevraagd vermindering sou oorweeg het indien dit enigsins *prima facie* uit die pleitstukke geblyk het dat die strafbedrag buitensporig was.

Die uitspraak in *Chrysafis v Katsapas* 1988 4 SA 818 (A) skep dieselfde indruk as dié in *Magna Alloys* en steun dus nie die hof se stelling in die *Venter*-saak nie. Die hof sê naamlik in die *Chrysafis*-saak (828I):

> "Upon a reading of the affidavits filed in the application, so it seems to me, it does not appear *prima facie* that the penalty stipulated is out of proportion to the prejudice suffered by the sellers. Accordingly the *onus* is on the debtor (the respondent) to show that the forfeiture is disproportionate to the prejudice suffered by the creditors; and to what extent it should be reduced."

In die lig van hierdie uitsprake en die bedoeling van die wetgewer om skuldenaars teen uitbuiting deur middel van strafbedinge te beskerm, is dit te betreur dat die appèlhof so pertinent in die *Venter*-beslissing *supra* 475A aandui dat die hof nie in bestrede sake *mero motu* 'n strafbedrag mag verminder nie.

Kerr ("The role of the court in civil cases. The Conventional Penalties Act" 1991 *SALJ* 245 ev) kritiseer ook die appèlhof se uitspraak in die *Venter*-saak. Hy wys daarop dat, hoewel dit nie die hof se funksie is om getuienis te vind om 'n bepaalde punt te bewys nie, dit steeds die hof se plig is om die punt te opper. Hy maak die stelling (247) dat "[a] fortiori [it] is the duty of a judge to raise and consider questions of *law* relevant to the matter before him". Om hierdie verpligting na te kom, hoef die hof nie slegs aan beslissings wat deur die partye se regsverteenwoordigers uitgewys word, aandag te skenk nie. Hy moet ook ander sake oorweeg en in die *Venter*-saak het die hof nie na enige van die vorige (provinsiale) sake (sien bv *Western Credit Bank Ltd v Kajee* 1967 4 SA 386 (N); *Ephron Bros Holdings (Pty) Ltd v Foutzitzoglou* 1968 3 SA 226 (W); *Maiden v David Jones (Pty) Ltd* 1969 1 SA 59 (N); *South African Mutual Life Assurance Society v Uys* 1970 4 SA 489 (O); *Du Plessis v Oribi Estates (Pty) Ltd* 1972 3 SA 75 (N); *Western Bank Ltd v Lester & McLean* 1976 4 SA 200 (O); *Smit v Bester* 1977 4 SA 937 (A)) verwys waarin beslis is dat die hof wel *mero motu* vermindering van 'n strafbedrag kan oorweeg nie (sien ook Van Rhyn en Van Rensburg 1977 *THRHR* 266; Visser en Potgieter 320; De Wet en Van Wyk I 243).

Die vraag aangaande *mero motu*-vermindering skep ook geruime tyd reeds probleme in die Nederlandse (sien Reehuis en Slob *Parlementaire geschiedenis van het Nieuw Burgerlijk Wetboek: Boek 6 – Algemeen gedeelte van het verbintenissenrecht* (1990) 1261; Zeben en Du Pon *Parlementaire geschiedenis van het Nieuwe Burgerlijk Wetboek. Boek 6: Algemeen gedeelte van het verbintenissenrecht* (1981) 323 ev; Hofmann *Van Opstall: Het Nederlands verbintenissenrecht: Algemene leer* I (1959) 247; Diephuis *Het Nederlandsch burgerlijk regt* X (1886) 324) en Franse reg (sien *Cass com 2 octobre 1984*, 1985 *JCP* II 20433; Paisant "Dix ans d'application de la réforme des articles 1152 et 1231 du code civil relative a la clause pénale (loi du 9 juillet 1975)" 1985 *RT* 675). 'n Ernstige debat is voor aanvaarding van die *Nieuw Burgerlijk Wetboek* in die Nederlandse

parlement daaroor gevoer (sien Zeben en Du Pon 323–330), maar uiteindelik is die standpunt aanvaar dat vermindering of vermeerdering slegs op aanvraag van die skuldenaar of skuldeiser kan geskied. Boek 6 artikel 94 *NBW* bepaal nou uitdruklik dat vermindering of vermeerdering slegs "op verlangen van de schuldenaar" kan geskied. (Let daarop dat die Nederlandse en Franse howe nie alleen 'n verminderingsbevoegdheid het nie maar 'n strafbedrag selfs kan vermeerder.)

Ook in die Franse reg bestaan daar onsekerheid sover dit *mero motu*-vermindering aangaan (sien *Cass com 2 octobre 1984*, 1985 *JCP* II 20433; Paisant 1985 *RT* 675). Artikel 1152 *alinéa* 2 van die *Code Civil* bepaal slegs dat die hof 'n strafbedrag *kan* verminder of vermeerder, maar maak dit nie duidelik of die hof dit uit eie beweging mag doen nie. In *Cas com 2 octobre 1984* (1985 *JCP* II 20433) het die hof beslis dat hy nie vermindering kan toepas "sans qu'elle lui ait été demandée" nie. Dié beslissing word egter gekritiseer as synde strydig met die wetgewer se bedoeling om skuldenaars teen misbruike te beskerm (sien Paisant 1985 *RT* 675: volgens dié skrywer sou die wetgewer uitdruklik *mero motu*-vermindering verbied het indien dit nie mag plaasvind nie).

Dit wil dus voorkom of die Suid-Afrikaanse appèlhof in die *Venter*-saak dieselfde rigting as die Nederlandse parlement en die Franse positiewe reg inslaan. Dié standpunt blyk egter strydig met die bedoeling van die wetgewer te wees en daar kan slegs gehoop word dat dit, in die lig van 'n al groter wordende neiging tot verbruikersbeskerming (sien bv die voorgestelde Wet op die Beheer van Onbillike Kontraksbedinge in Werkstuk 54: Projek 47 van die Suid-Afrikaanse Regskommissie: *Onbillike kontraksbedinge en die rektifikasie van kontrakte* (1994)), in die toekoms reggestel sal word.

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THE "CONSTITUTIONAL ATTACK ON PRIVATE LAW": ARE THE FEARS WELL FOUNDED?

Professor PJ Visser is very concerned about what he perceives as an assault on the domain of private law by the court in *Gardener v Whittaker* 1995 2 SA 672 (E) (see "A successful constitutional invasion of private law" 1995 *THRHR* 745). Unfortunately his criticism of the judgment is composed mainly of broadsides and snide remarks rather than well-founded legal argument. His reference to a "total onslaught" and to a "constitutional attack on private law" is emotional and politically loaded language that is reminiscent of the "old order". It may be appropriate to confrontational rhetoric, but certainly not to an academic discussion.

It is indeed true that many of the rules and principles of private law that were for many years regarded as bordering on holy writ, will now be subjected to closer scrutiny in the light of South Africa's new supreme Constitution (the

Constitution of the Republic of South Africa Act 200 of 1993). We have already seen the possible impact of constitutional principles on the law of contract (see eg Van Aswegen "The future of South African contract law" 1994 *THRHR* 448; "The implications of the bill of rights for the law of contract and delict" 1995 *SAJHR* 1; Hawthorne "The principle of equality in the law of contract" 1995 *THRHR* 157), the law of delict (Van Aswegen 1995 *SAJHR* 1), property law (Kroeze "The impact of the bill of rights on property law" 1994 *SA Public Law* 322; Van der Walt "A critical analysis of the civil-law tradition in South African property law" 1995 *SAJHR* 169), employment law (previously seen as falling pretty squarely within the sphere of pure contract), family law (both the law of persons and the law of husband and wife), and so on. But, of course, it did not need a supreme Constitution with a justiciable bill of rights to tell us that the traditional lines between public and private law have been becoming increasingly blurred as lawyers the world over have come to grips with the idea that legal theory and legal practice are often poles apart, and that what we fondly imagined to be relationships and transactions between equals are anything but that (see Cockrell "Can you paradigm? – another perspective on the public law/private law divide" in *Administrative law reform* (1993) 227; Wiechers "Administrative law and the benefactor state" in *Administrative law reform* 263).

Visser's first complaint is that the Constitution is vague. Yes, it is. And yes, the interpretive problems to which it can give rise are legion. But no constitution can ever be cast in stone (to use one of the current buzz-phrases). Because constitutions are living documents they must be capable of adaptation to meet the needs of the time; for this reason they must be rather more open-ended (a euphemism for "vague"?) than other statutes. In this regard Visser shows that he is not really *au fait* with constitutions and constitutional interpretation at all, and is therefore sailing in unfamiliar waters. He is also nailing his colours to the positivist (textual) mast: the courts may only apply the law as they find it, and the legislature will always try to enact the legislation in as much detail as possible.

It is an incontrovertible fact that *all* statutes are notoriously susceptible to differing interpretations. Absolute truth and absolute certainty in law are unattainable. If this were not so, we would not have all that case law to wade through once a month. (Interestingly, an absolutely and exclusively correct answer is not to be found even in so allegedly "pure" a science as mathematics, as the American constitutional authority Mark Tushnet ("Following the rules laid down: a critique of interpretivism and neutral principles" 1983 *Harv LR* 822) illustrates via the following example: If the question is asked: "Which pair of numbers comes next in the series 1, 3, 5, 7? (a) 9, 11; (b) 11, 13; (c) 25, 18", any of the three answers can be correct, and who knows how many more possibilities may exist? The first two options are more obvious than the third, which requires a more complex rule to be applied.) This applies to legal as well as mathematical rules – the same principle can give rise to a divergent number of answers, each arguably correct – or, at any rate, not demonstrably incorrect.

Secondly, Visser accuses Froneman J of making the "very general and radical assumption" that all aspects of the common law, including the law governing defamation, must be approached in the light of the Constitution. In fact, section 35(3) of the Constitution is a peremptory provision: a court of law *must* interpret

and develop the common law in the light of chapter 3. Froneman J was doing no more than this: after all, the Constitution is the supreme law. What is more, certain rules of public international law and international human rights law have become required reading in all branches of the law (see Neville Botha "International law and the South African interim Constitution" 1994 *SA Public Law* 245). Section 35(3) is part of the reality of the new constitutional order. If Visser does not approve of section 35 (as is his democratic right), and finds it "radical" and unacceptable, he must take issue with the new legal order, not with the judiciary.

Visser avers that judges interpreting the new Constitution are free to use what he terms "endless methods of interpreting it in order to achieve the desired results". It sounds rather as if he is accusing the judiciary of throwing integrity overboard and reducing the process of adjudication to a search for pretexts for subjective decisions which cannot stand proper scrutiny. If this is so, it is a very serious charge. He returns to this tack later, stating rather sarcastically that judges and academics writing on constitutional interpretation seem to feel that anything goes as long as the result is politically correct. This is an unwarranted attack on the integrity and good faith of both judges and commentators, unsupported as it is by any evidence whatsoever.

The judges are berated for using what Visser terms free floating interpretive methods based on suspect criteria. He avers that the generous, liberal, purposive and benevolent approaches to interpretation are "nebulous" and "pseudo-scientific" and that they are used to distort the literal meaning of words. He dismisses them as arbitrary and as "anchored in subjective political ideas and not legal principles". Among these "subjective and political ideas" he classifies the concept of "regstaatlikheid" which he describes as "high-sounding"! One can hardly shrug off the *regstaat* concept or its Anglo-Saxon equivalent, constitutionalism, as nothing but a high-sounding political notion. It is not as if these concepts have fallen out of the sky in response to the South African situation. (The history and provenance of the *regstaat* and constitutionalism are too well-documented and familiar to merit further consideration here.)

As for the criticism of the above-mentioned approach to constitutional interpretation: it is a well-established principle of our common law that there is a presumption that the interpretation most benevolent (generous, liberal) to the individual must be adopted in the unequal relationship between state and subject. The fact that the terms "liberal" and "conservative", when used in this context, do not refer to political ideology but to a doctrinal approach, also surely does not need to be emphasised. Even the most superficial study of American case law (on every subject under the sun) makes it abundantly clear that so-called politically conservative judges are often doctrinally more progressive and liberal, and *vice versa*.

Nor is the purposive approach to statutory interpretation a parvenu trying to gate-crash the upper-class party. (See Simmons "Unmasking the rhetoric of purpose: the Supreme Court and legislative compromise" 1995 *Emory LJ* 129: "Throughout the twentieth century, purposivism ... has been the dominant approach to statutory interpretation.") Again the writing advocating a purposive

approach to the interpretation of *all* statutes is too voluminous to mention in detail. The inherent logical weaknesses of the literalist/textualist/intentionalist approach have been exposed so often that they, too, hardly bear repeating. In the words of the famous American judge, Felix Frankfurter: "The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification" (in his dissenting judgment in *United States v Monia* 317 US 424 431–432 (1943)). One certainly hopes that intentionalism will be abandoned, not because it is politically incorrect, but because it is unsound and unscientific and gives rise to inconsistent and often absurd results. (If Visser refuses to be persuaded by Du Plessis and Christo Botha, there are also others such as Devenish, Kruger, Cowen and Labuschagne who have pointed this out.) The intentionalist approach to interpretation is about as *passé* as beehive hairdos, with (one can only hope) even less chance of making a comeback. (An intriguing thought: if one were to pursue this metaphor further, what would the fashion equivalent of the Critical Legal Studies movement be – grunge, perhaps?)

The sarcastic reference to the "legislative skills" of the judges also indicates a lack of understanding of judicial law-making. Froneman J dealt with this issue in *Matiso v The Commanding Officer, Port Elizabeth Prison* 1994 4 SA 592 (SE) 597I–598D:

> "The values and principles contained in the Constitution are, and could only be, formulated and expressed in wide and general terms, because they are to be of general application. In terms of the Constitution the Courts bear the responsibility of giving specific content to those values and principles in any given situation. In doing so Judges will invariably 'create' law. For those steeped in the tradition of parliamentary sovereignty the notion of Judges creating law and not merely interpreting and applying the law is an uncomfortable one. Whether that traditional view was ever correct is debatable, but the danger exists that it will inhibit Judges from doing what they are called upon to do in terms of the Constitution. This does not mean that Judges should now suddenly enter into an orgy of judicial law-making, but that they should recognise that their function of judicial review, based on the supremacy of the Constitution, should not be hidden under the guise of simply seeking and giving expression to the will of the majority in Parliament. Judicial review has a different function, but it is still subject to important constraints. And recognition of those constraints is the best guarantee or shield against criticism that such a system of judicial review is essentially undemocratic. Judicial law-making in the form of judicial review is fundamentally different from making law by legislation. In contrast to legislative law-making the process of judicial review is not partisan in the sense that it is initiated by the law-makers themselves. Judges do not initiate litigation; individual litigants do. And the adjudication process 'creating' law is done by an impartial and independent Judge; not by the majority party who initiates legislation in the Legislature."

Lester's brilliant critical analysis of the myths surrounding the lawmaking discretion of the English judges ("English judges as lawmakers" 1993 *Public Law* 286–290) should be read by all those who are still not convinced about these matters.

Positing a purposive approach to the interpretation of all statutes does not mean that the text is ignored or that common sense is jettisoned altogether. It is simply that reliance on the text and on one's own mother-wit may produce a distorted answer. As Feliciano ("The application of law: some recurring aspects of the process of judicial review and decision making" 1992 *The American Journal of Jurisprudence* 55–56) puts it:

> "Textuality cannot be simply pushed out of mind and casually disregarded . . . Not words alone, of course, but texts *in full context* are among the chief raw materials of judicial applications. The need to connect authoritative texts to the results reached in decision provides a constraining influence. That connection must be made by the disciplined undertaking of the intellectual operations of applying law" (emphasis supplied).

Visser's claim that Christo Botha ("Steeds 'n paar tekstuele ikone teen die regstaatlike muur" 1995 *THRHR* 523) is intent on jettisoning the "common sense and traditional" rules of interpretation, merely reaffirms that he misconceives the essentials of constitutional interpretation. Botha specifically refers to those traditional principles of statutory interpretation (eg plain meaning, a meaning attached to every word, etc) which are indeed "common sense", but were, in the past, given a primary status that was not justified. This resulted in a rigid text-only interpretive methodology. Section 35(1) and (3) has in fact discarded the textual foundations of statutory interpretation; unfortunately there are still decisions based on the traditional method of statutory interpretation. (In *Kalla v The Master* 1995 1 SA 261 (T) 269C–G the court held that the traditional rules of statutory interpretation still form part of the law of the land and that they have not been affected by the 1993 Constitution. Consequently, the orthodox "plain meaning" rule was applied: if the text is ambiguous, the traditional rules of interpretation of statutes may be applied to find the "intention of the legislature".) Generally, however, the courts have adapted very well to the purposive and contextual method of statutory interpretation, as illustrated by Froneman J in *Matiso supra*:

> "The interpretative notion of ascertaining 'the intention of the Legislature' does not apply in a system of judicial review based on the supremacy of the Constitution, for the simple reason that the Constitution is sovereign and not the Legislature. This means that both the purpose and method of statutory interpretation in our law should be different from what it was before the commencement of the Constitution on 27 April 1994."

Purposive and contextual interpretation serves to make good the deficiencies of a sterile text-bound intentionalism. Visser's denunciation of the adherents of the purposive or teleological approach to statutory interpretation and of the critics of the intentionalist school of thought as symptomatic of political sycophancy not only shows that he is out of touch with jurisprudential developments in this field – it is downright defamatory. (If the proponents of the purposive approach were to "convert" to intentionalism to suit political ends, that would be another matter; but then some evidence of such inconsistency should at least be put forward.)

It must be conceded that our courts tended to conflate purposive and generous interpretation to start with, but perhaps one should not be too hard on them. (After all, our rugby players had some difficulty in adapting as well, and still managed to win the World Cup at their first attempt.) In more recent judgments the courts have made it clear that "purposive" and "generous" are not necessarily synonymous (see eg *Phato v Attorney-General, Eastern Cape* 1994 5 BCLR 99 (E); *Nortje v Attorney-General of the Cape* 1995 2 BCLR 236 (C); *De Klerk v Du Plessis* 1994 5 BCLR 124 (T)).

Another source of discontent is Du Plessis's contention ("Enkele gedagtes oor die historiese interpretasie van hoofstuk 3 van die oorgangsgrondwet" 1995

THRHR 504) that *travaux préparatoires* may be used as an interpretive source, albeit a *secondary* one. This has indeed been done elsewhere in the world without the sky falling. And as for his reference to Heidegger (1995 *THRHR* 511), Du Plessis in fact quotes the original German before giving the English translation, describing it as "kwalik vertaalbaar". It is only fair not to quote without giving the full context. (See also Du Plessis and Corder *Understanding South Africa's transitional bill of rights* (1994) 73–74 who warn that *travaux préparatoires* can never determine the final meaning of the Constitution.)

Terms such as "freedom and equality" and "open and democratic society" are also criticised as too vague. In fact both freedom and equality are features of our common law, and the inclusion of both, side by side, signifies a compromise, since there is an inherent tension between freedom and equality which will have to be addressed in the event of actual conflict between the two. The notion of an open and democratic society is not all that esoteric either; it is encountered, explicitly or implicitly in all constitutions professing to be democratic. And even if it is nothing more than a reaction to the evils of secret and autocratic government, it can only be a plus.

Visser deals with the question whether the Constitution creates a hierarchy of rights in somewhat cavalier fashion. He states baldly that the court in *Gardener's* case erred in holding that there is no such hierarchy. To support this conclusion he relies on the Constitutional Court's judgment in *S v Makwanyane* 1995 6 BCLR 665 (CC) – the capital punishment case – averring that the court had held that the right to life and the right to dignity are the most important fundamental rights. From this Visser deduces that the right to one's *fama* as part of the right to dignity, ranks above the right to freedom of expression. What the court (more accurately, some of the judges) actually said, was that, although other rights are also in issue in the consideration of the death penalty, the right of life enjoys primacy and that all other rights are subsumed by it. The inquiry about the death penalty should therefore start with the right to life. Further, that without life there can be no right to dignity. The court also said that the weight to be given to any particular fundamental rights or claims would depend on the circumstances of each case. The issue of the relative weight of *competing* rights was not addressed at all. Obviously the right to life and to dignity will always weigh heavily, as they should; but the court did not say that they would invariably override other rights. The Constitution itself does not create a hierarchy of rights. What it has done is to redress the imbalance between the rights of the individual and the state. When a Constitution is being interpreted, its provisions may not be read in isolation: the Constitution must be read in its entirety and every provision must be seen in context (*Nyamakazi v President of Bophuthatswana* 1992 4 SA 540 (B) 556C; *Qozeleni v Minister of Law and Order* 1994 1 BCLR 75 (E) 78G–79E). This is a basic principle of statutory interpretation.

In the context of competing rights, reference may also be made to *Coetzee v The Government of the Republic of South Africa; Matiso v The Commanding Officer, Port Elizabeth Prison* 1995 10 BCLR 1 19 fn 45 (CC), in which the following *dictum* of Wilson J in *Edmonton Journal v Alberta AG* 45 CRR 1 (1989) 26–26, quoted by Dickson CJC in *R v Keegstra* (1990) 3 SCR 697, was cited with approval:

> "[A] particular right or freedom may have a different value depending on the context. It may be, for example, that freedom of expression has greater value in a political context than it does in the context of disclosure of the details of a matrimonial dispute. The contextual approach attempts to bring into sharp relief the aspects of any values in competition with it."

As for the remark that Roman-Dutch law was created and shaped largely by white males – well, yet, it was. Probably that is why marriage law has needed (and still needs) what Visser calls drastic reconstructive surgery. And why a woman wanting to open a bank account is still often treated like a half-wit by a bank clerk half her age. And why the word "person" was deemed to mean "male person" for purposes of admission to the legal profession earlier this century (so much for the plain meaning of words). And why the phenomenon of slavery was accepted with so much equanimity for so long. And so on and so forth.

Visser is aghast at the admission of Kentridge AJ in *S v Zuma* 1995 2 SA 642 (CC) 662 that judges have personal, moral or intellectual preconceptions, and by the statement of Cameron (1993 *SALJ* 63) that the idea that judges are dispassionate oracles who dispense justice without personal or political predilections is a myth, and a harmful one at that. Yet his entire comment is an overtly political diatribe in which his own political and subjective prejudices and preferences are paraded boldly and without apology. Is it in order for academic lawyers to wave political banners, but taboo for judges to admit that, no matter how objective and neutral they strive to be, they are, after all, only human? And would he deny that we had many "politically correct" judgments in the old South Africa, or has that been conveniently forgotten? Perhaps the words of Friedman (in his well-known work, *Legal theory* (1960) 402) could serve as a timely warning here:

> "On the whole those lawyers who are unconscious of their legal ideology are apt to do more harm than their conscious colleagues for their self-delusion makes it psychologically easier for them to mould the law in accordance with their beliefs and prejudices without feeling the weight of responsibility that burdens lawyers with a greater consciousness of the issues at stake."

As Feliciano points out (42), the most important task of any judge is to establish the community values or interests that are at stake. (Nor is this a fanciful idea dreamed up by some impractical politically-obsessed lawyer: our courts have been working with concepts such as the *boni mores* since time immemorial, and with the task of translating the abstract notion of morality into concrete terms in the case before them.) However, it must be acknowledged that Feliciano is right when he says that

> "[t]here is clearly a substantial amount of subjectivity and indeterminacy involved in the enterprise of clarifying and specifying community values in the course of adjudication, whether constitutional or ordinary. It is idle chatter to pretend that this is not so . . ." (54–55).

We must acknowledge, like Mr Justice Harlan Stone did as far back as 1936 ("The common law in the United States" 1936 *Harv LR* 20) that

> "law is not an end – the adequate control and protection of those interests, social and economic, which are the special concern of government and hence of law; . . . that *within the limits lying between the command of statutes on the one hand and the restraint of precedents and doctrines . . . on the other*, the judge has liberty of choice of the rule which he applies, and that his choice will rightly depend upon the relative weights of the social and economic advantages which will finally turn the scales of judgment in favor of one rule rather than another" (emphasis supplied).

It is clear that the recognition of the presence of subjective factors, the determination of societal values and the utilisation of purposive and teleological modes of interpretation *do not* give any judge *carte blanche* to decide a case in accordance with whim rather than principle, or to say, in an Alice-in-Wonderland sense, that "words mean whatever I say they mean". When the contextualists argue that there must be a balance between the text and the context, it does not mean that the legislative text may be ignored. After all, the context has to be anchored to the particular text in question. Dealing with constitutional interpretation, Kentridge AJ explained this principle succinctly in *Zuma supra* 652I–653B:

> "While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single 'objective' meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral perceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean. We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination."

The contextual (purposive) approach therefore does not propagate a "free floating" method of statutory interpretation, but merely seeks to move away from the rigid legalistic and text-based approach to statutory interpretation and to restore the balance between text and context.

Certain provisions of the Constitution are deemed to be objectionable because they represent political compromises. In fact it makes quite a nice change from our previous constitutions which were thrust on us and subjugated everyone, willy nilly, to the ideologies of one group. All constitutions that profess to represent the will of the people will inevitably be the product of compromise. The alternative is totalitarianism.

Visser slates the inclusion of a postscript (or afterword, postamble, commitment, what you will) to the Constitution, headed National Unity and Reconciliation. It is true that this postscript, like the preamble, now enjoys the same status as the rest of the Constitution, and that it is in the nature of a political manifesto (albeit not the manifesto of a single party). In fact chapter 3 of the 1993 Constitution, in particular, represents a compromise between proponents of the maximalist and the minimalist approaches, as well as between the libertarians and the liberationists (see Du Plessis "The genesis of the chapter of fundamental rights in South Africa's transitional constitution" 1994 *SA Public Law* 1). The reality is that all constitutions are political as well as legal documents and it serves no purpose to pretend that our previous constitutions were apolitical. Does Visser really believe that we did not mix politics and law (and not only constitutional law) before? Constitutions articulate ideals and aspirations in addition to embodying legal principles and rules. The 1983 Constitution started with the phrase "In submission to Almighty God" and expressed ideals such as the maintenance of Christian norms, the equality of all under the law, the protection of human dignity, life, liberty and property, and so on. Little came of these high-sounding ideals, but that does not mean that they were included in the Constitution cynically and hypocritically.

The constitutional and political realities in South Africa cannot be wished away. There was indeed conflict, strife and injustice in the past. And, as Visser points out, this is still so. He adds that he has little faith in the ability of the present Constitution, the present government or any judge to change this. Leaving aside the fact that they have not yet had much of a chance to do so: the fact is that no constitution, no matter how well drafted and how scientifically applied, can ever aspire to being a panacea for all the social, political and economic ills of the society it serves. It can only provide a framework, as we all know. But at least the framework we have now (as rickety as it is) does not entrench and structuralise the inequalities and injustices that were built into the old one. No morally or intellectually honest person can deny this.

Visser deplores what he describes as the practice of European colonist bashing and one-sided views of history (and quite rightly too). But what about the more literal bashing that South African citizens were subjected to before, often by the very organs of the state that were supposed to protect them? And of course it cannot be denied that there is backwardness, lack of discipline, genocide, lawlessness and spiritual darkness to be found on the African Continent. However, these are not the sole preserve of this Continent or – dare we say this? – of its indigenous inhabitants. (Which of us, in any case, can arrogate to ourselves the right to act as arbiters on the issue of spiritual backwardness? How much wickedness has not been perpetrated down the ages – and even in our time – in the name of Christianity?)

Finally, we are told that the supremacy of the Constitution is a myth and that the Constitution is in fact clay in the hands of the "most powerful judges in the country". All the judges in the *Makwanyane* case took pains to emphasise that they were not expressing their own views and preferences, but establishing, to the best of their ability, *what the Constitution actually says and means*. This despite the fact that they do have their own backgrounds, cognitive styles, moral and ethical standpoints, and so on. Certainly constitutional supremacy holds the danger that it could develop into judicial supremacy. That is a real dilemma and an important one. But what is the alternative to constitutional supremacy? Legislative supremacy, which holds the even more real danger of naked majoritarianism? We had a limited form of legislative supremacy for many years, which took the form, not of simple majoritarianism, but of a bureaucratically controlled oligarchy ("en kyk hoe lyk ons nou!").

Visser poses three questions in his penultimate paragraph. The answers are quite straightforward: (a) Yes, what else could the legislature have intended with section 35(3)? Other courts have followed the same line of thinking: *Qozeleni, Shabalala, Makwanyane, Nortje, Khala*, to mention but a few. Even if one reads 35(3) in its literal sense, it still means what Froneman J has held it to mean. (b) Surely legal practitioners have always had to keep up with changes and developments in the law, whether these come by way of legislation or via case law? And what earthly difference does it make whether they are advising their clients on private law or on public law issues? (c) No. The presumed intention of the legislature has been replaced by the rule that the *purpose* of the legislation must be found (and tested) in the light of the fundamental rights in the supreme Constitution.

It would be easy to dismiss Visser's outburst as the knee-jerk reaction of a politically conservative private lawyer who has discovered that the future is no longer what it used to be. (Why the rules of private law should be so sacrosanct that they should enjoy special protection even when they give rise to arrant discrimination and injustice, is a mystery.) But the issues he raises are important ones. There *is* the danger that our judges, unaccustomed as they are to a system of constitutional supremacy, may founder either against the Scylla of excessive deference to the legislature (out of habit) or against the Charybdis of insufficient judicial restraint. It *is* important that the horizontal application of the bill of rights be approached with circumspection. (In this regard one could do worse than to look at the courageous attempt by Friedman J in *Baloro v University of Bophuthatswana* 1995 8 BCLR 1018 (B) to draw a workable line between the vertical and the horizontal spheres of application of the South African bill of rights. Whether one feels that he went too far in allowing horizontal application of the bill of rights is neither here nor there.) It *is* important that we should not wake up one morning to find that we have traded an imperial executive for an imperial judiciary, and that constitutional supremacy should indeed prevail. And, above all, it *is* vital that our judiciary should be perceived to be legitimate by the entire community. This will depend not only on the quality of its judgments, but on its perceived impartiality and integrity. (Also, of course, on the legitimacy of the system of government as a whole, something which is beyond the control of the judges themselves.)

Much has been said and written about the proper role and function of the judiciary. But what of the proper role and function of academics, specifically academic lawyers? They are not part of the body politic, are not representative, do not have a role in the democratic process. But does this mean that they are accountable to no-one? Obviously they are accountable to the institution by whom they are employed and to the students they teach. The Constitution protects their academic freedom, arguably a form of freedom of expression. Thus they may teach what they like, how they like, may write what they like, within certain limits. Do they not have a more specific responsibility, not only to teach their students what the law is and should be, but also to teach them by word and example the virtues of objective and sober analysis? And do academics not also bear a responsibility to the legal profession in general, and to the broader community? We suggest that they do: the responsibility to comment and criticise. Heaven forbid that academics should be required to genuflect pusillanimously rather than to speak out when they see the judiciary worshipping what they perceive to be false gods. That would not be in keeping with the courageous academic tradition of this country, as exemplified by men like Tony Mathews (and others). The tendency among some academics to dispense malicious *bon mots* purely in order to score points off other academics and the bench is also to be deplored. Academic lawyers owe it to the students they teach and to the legal fraternity they serve to ensure that their criticism is responsible and constructive, based on proper research, logically defensible and well articulated.

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THE SYSTEM OF THE NEW DUTCH CIVIL CODE

The first question that arises, is: what does the word "system" mean in the context of private law? A system is a well ordered arrangement of legal concepts, such that a specific aim will be reached by a specific method. The specific aim of the system is to entrench the description to acquire a complete representation, even though the depiction of any single figure might remain incomplete. The specific method is classification, the creation of sets, groups or classes, composed of figures with common features. Common features are to be found in such rights as ownership, servitudes, pledge and hypothec on the one hand, and in sale, lease and mandate on the other. This leads to the creation of classes, named after the common features: the class of real rights and the class of obligations deriving from contracts. In turn these classes however, must be classified as well. The real rights are part of the superior class of patrimonial rights. The civil law tradition distinguishes between three types of obligations and classifies these three types (namely the obligations deriving from contracts, from torts and from other sources, such as unjust enrichment) in a higher class, a general class of obligations. The latter example is striking, since it is typical of the Roman law tradition which prevails on the West European continent; the English common law knows the law of contract as well as the law of torts and the law of restitution, but the step towards the creation of a superior class consisting of the law of obligations from any source was never made. This being the case, one would expect that the creation of higher and superior classes is a relatively late development. This may be true, generally speaking, but counter-examples are imaginable. Once a superior class has been established, the creation of a new figure as a component part of the class is impossible. Only when the law of sale has come into existence, is it imaginable that the figure of payment by instalments could start to develop. Classification and specification are movements in the opposite direction, but both movements form the conceptual tools by which a private law system is created.

This idea is not a new one, however. In fact, classification and specification have formed part of the juridical methodology from the early days of Roman law (since Scaevola wrote his book: *De iure civili in artem redigendo*) to the modern European codifications. Or better still: this methodology is not even restricted to the legal field. It was within the framework of Greek medicine that this type of classification was invented. They used the wording: *dogmatike techne*, which is the source of our modern word *dogmatic*. What belongs together organically because of its structure, function, genesis and/or treatment, should be grouped together. Classification may deal with legal concepts (as in our previous examples), as well as with legal rules, as we shall see later on.

Classification however, is not a family game that has its aim in itself. Classification should be functional, that is to say: by categorising the concepts, an abbreviated description of the ordered phenomena, concepts and rules is aimed at (Occam's razor), since similar features are attributed to the various elements of a

category. This opens the question of the boundaries of the classification. Where does it start, and how far does or may it proceed? If a classification of legal rules should go too far, the disadvantages are clear. An advanced classification may reach a level of abstraction at which the range of the general rules is no longer to be estimated, nor is it of practical value. An example is to be found in the classical legal precepts: to live honestly, not to wound another person and to give everyone his fair share (*D* 1 1 10). Ulpian has given us a marvellous ethical slogan, but its level of abstraction from daily reality is too remote for forensic applicability.

How far a lawgiver wants to proceed in classifying legal concepts and legal rules is for the greater part a matter of scholarly tradition and of taste. The Germans have gone very far. Any codification preceding the *Burgerliches Gesetzbuch* mainly followed the system of the Institutes of Justinian, which is not too different from the system of the Institutes of Gaius. Some scholars want to exclude the French Civil Code from this judgment, since – as Meijers put it – "it is well known, that the French Civil code lacks every systematic division and classification". The German Civil Code was the very first to choose a principally different classification and division. It not only treats the main subjects in a different order – which is a matter of minor importance – but it contains a general part (*Allgemeiner Teil*) consisting of rules which are considered to be of value for the whole body of private law.

After 1900 any legislature was faced with a discussion about the merits and the significance of such a general part. The Swiss legislature was of the opinion that it should not follow the German example. A general part based on the German model is however to be found in the codifications of Japan, China, Brazil, Argentina and Soviet Russia. Before the Second World War France considered the possibility of recodification; the legislature accepted a general part concerning the concept of a juridical act.

The basic idea of the German general part (*Allgemeiner Teil*) embraces the following notions: private law regulates the legal relations between the citizens mutually. Any legal relation consists in a subject and an object. As a consequence the lawgiver has to deal firstly with the legal subject in general, the legal object in general, and the facts that give rise to legal relations, such as the concept of a juridical act in particular.

This reasoning, although it may appear sound at first glance, gives rise to a considerable number of difficulties. A legal subject in general may be an interesting topic for a legal anthropologist, but a lawyer has hardly anything to say about a legal subject beyond any relation. The same holds true for the notion of any object: may be the geologists are able to discover the specific features of this concept in general, but legal scholars are not, if they are obliged to leave the law aside. Huber, one of the main scholars involved in the Swiss restatement of the law, stated his reasons for not following the German example of a general part of the private law by saying that anything that is to be said about the person in general belongs to the law of persons (including the law of corporations); that anything that is to be said about movables, immovables, real estate and so on, belongs to patrimonial law. It is useless to classify these concepts outside their immediate context. An effort to do so would furthermore, as Huber feared, detract

from the accessibility of the Civil Code, in which the law of obligations was restated as early as 1885.

It is, however, imaginable that a different assessment may be made of the concept of a juridical act. This notion plays a considerable part not only in patrimonial law and in the law of persons, but also in the law of procedure and even in public law. But the question arises whether the juridical acts in these various spheres have enough features in common in order to be categorised in the same class. Leaving the juridical act in the realm of public law aside for the present, there are various considerable dissimilarities between the juridical acts in the fields of the law of persons and patrimonial law. The rules governing juridical acts performed under the influence of coercion, error, deceit or abuse of circumstances are distinct, whether one is dealing with the law of contract or with matrimonial law. What is said about contracts under resolutive or suspensive conditions is strictly limited to patrimonial law and is not applicable in the realm of matrimonial law. The liablility of the proxy exceeding his commission is not the same in both fields; it is unimaginable that the representative of the bridegroom in a wedding by proxy would be compelled to fulfil the promises himself if he goes to the alter with the wrong bride.

The aforementioned reasoning leads to two conclusions: (a) the New Dutch Civil Code will maintain the primary distinction, which dates back to the Roman law, between patrimonial law and the law of persons, the latter being codified in the first two books of the code; (b) a general section of the civil law is possible and desirable, but it will only compromise the law of property and the law of obligations (both the law of contract and the law of tort), not the law of persons, nor family law.

However, those who know the development of the scholarly work of the late Professor Meijers, will not be surprised by these conclusions. From his PhD thesis (1905) on *Dogmatic jurisprudence*, to his *magnum opus* on *The general concepts of private law*, which Meijers wrote during the war, he gathered a corpus of precepts within the framework of private law which are to be considered to be of a general character. These general precepts are codified in the third (perhaps also in the fourth) book. One speaks about a layered structure: the general precepts precede the more specific ones. What is general need not be reiterated when the more specific items are dealt with. This is the aim of a system, such as that referred to above. Let us consider a few examples.

The concept of a juridical act is certainly one that should be considered in a general section. And indeed, title 3.2, (from par 3 32 onwards) discusses the general requirements for juridical acts to come into being (the person acting should express his will; under certain circumstances the other party may rely on this expression even where it varies from the real will), the form of juridical acts, nullity and the new rule governing the consequences of juridical acts entered into by those not competent to do so. The conversion of juridical acts which would otherwise be null and void and judical rectification, etcetera, are also considered. In the former Civil Code these themes were governed (if at all) in the chapter on contracts, as was the case in the French Civil Code. The chosen solution for problems of this type is rather simple: if a juridical act is directed towards one (or more) specific counterparty, this action may be voidable in cases of error,

incapacity, and so on. This means that the act can be nullified only by a judicial pronouncement. Before such a pronouncement is made, any juridical act is considered to be totally operative (par 3 34 no 2 and 3 44 no 4). The only juridical act which can be considered totally null and void *ipso iure* is the unilateral juridical act, which is not directed at a counterparty, such as the making of a will, the rejection of an inheritance, or the giving up of a share in common property. In this respect termination of a contract, such as a labour contract, is not considered to be a unilateral juridical act, since it derives its effect mainly upon acceptance of its terms. If there is a curator or guardian appointed for a minor or a lunatic, this representative may be summoned to declare whether he intends to request annulment or not (par 3 55 no 2).

These statements about the validity and annulment of juridical acts in general precede the more specific rules. As a consequence, the general statements are applicable to very different specific juridical acts such as wills, current accounts, the transfer of property, making of contracts, and so on. In more practical terms the modern and detailed rules governing the formation of contracts (s 6 5 2) stands within the framework of the preceding general regulation governing the juridical act (title 3 2). The same holds true for the validity, annulment or revocation of an offer, the offer being a specific juridical act. Supplementary rules applicable specifically to offers are found under the specific rules governing contracts (6 218).

The examples given above may be augmented as follows: In order to judge whether a sale under the hire-purchase system is valid or not, one starts by reading title 3 2 (juridical acts in general), then proceeds to title 6 5 (contracts in general), to section 7 1 1 (law of sale, including law of sale of consumer goods) under which section 7 1 11 (on the hire-purchase system) is particularly relevant. At another level of abstraction, the general section on indemnification (6 1 10) precedes the special ones on the claims of damages originating from different sources, for example, tort, contract or restitution.

It is tempting to recall another example in this context. The example itself is not incorrect, but it contains a terminological complication. I am referring to the fact that prescription which is common in pledge (s 3 9 2) and hypothec (s 3 9 3) is contained in a more general (and for that reason earlier) section (3 9 1). The framers of the New Civil Code, however, were faced with the meaning of the words *res*, which originally (in Roman law) meant only a corporeal thing, but had changed its meaning down the ages. An increasing number of incorporeals are called *res* as well, more specifically *res incorporales*. As a consequence, rules and enactments which were originally written for *res corporales* found analogous application when *res incorporales* were dealt with. The transfer of obligations for example via cession, was modelled on the transfer of property. The obligation is considered to be a *res incorporalis* and the cession was assimilated to the transfer of such *res incorporalis*. This concept, however, gives rise to a great many problems. What is the position of a debtor who innocently pays a debt to his original creditor, not knowing that the obligation is subject to a cession? Is he obliged to pay twice, because the obligation has been transferred?

The Swiss Civil Code was the first codification to return to the original meaning of *res* as a corporeal thing. This brings with it other problems, however,

since the enactments relating to incorporeal things need their own description. The New Dutch Civil Code follows the method of classification we are discussing at the moment. It starts with a general ruling pertaining to *res corporales* as well as *res incorporales*, which is contained in the third book; the special rules for *res corporales* follows in the fifth book, the one for the obligations in the sixth. Transfer of property and cession of obligations for example, have a number of features in common, which are contained in the third book: they are valid only if performed by a person who has capacity to act and if they are preceded by a just cause. However, the formalities are different for movables, immovables and obligations. The same applies to prescription, possession, common titles, usufruct, pledge, hypothec and rights of seizure, attachment and sequestration. All these rights could possibly be applied to incorporeal things like shares of a limited company or to debts as well as to real estates; in consequence they are contained in the third book. Servitudes, emphyteusis, superficies, the rights and duties between neighbours pertain only to immovables, and therefore dealt with in Book 5.

The concept of "connecting statements" must be dealt with. A lawgiver who wants to subsume as many cases as possible under as limited as possible a set of rules, which set should be conveniently arranged, sees himself confronted with the need to formulate general rules. Two different techniques can be used in this context. The first approach is the one we have referred to several times: the lawgiver begins by formulating general rules, which cover as many situations as possible; these rules are followed by narrower ones, which cover more specific cases. The main problem emanating from this procedure is the rate of abstraction that remains acceptable. The more general the rule is, the higher the level of abstraction turns out to be, but at a certain stage of abstraction, contact with the juridical reality will be lost. A lawgiver cannot restrict itself to concepts like good faith, the good housefather, the good possessor, and so on, however important they might be.

The second procedure is different. It implies that the lawgiver drafts a more specific set of rules while dealing with the legal figure for which this specific set of rules is of special importance, but states expressly that the range of this specific set of rules is not confined to the legal figure mentioned but is expanded via similar application to other legal figures. It is conceivable – though not inevitable – that these legal figures may be indicated exhaustively. The Swiss Civil Code, which does not contain a general part – as mentioned before – states in paragraph 7 of its Introduction, that the general rules of the law of obligations dealing with the formation, fulfilment and cancellation of contracts are applicable to similar private law relations (Schweizerisches *Zivil Gesetzbuch* par 7: *Die allgemeinen Bestimmungen des Obligationenrechts über die Entstehung, Erfüllung und Aufhebung der Verträge finden auch Anwendung auf andere zivilrechtliche Verhältnisse*). Paragraph 1324 of the Italian Civil Code states that the rules governing contracts are, as far as is possible, correspondingly applicable to unilateral juridical acts between living persons within the field of patrimonial law (art 1324 CCI: *salvo diverse disposizioni di legge, le norme che regolano i contratti si osservano, in quanto compatibili, per gli atti unilaterali tra viventi aventi contenuti patrimoniale*). The same effect can be achieved even without an explicit statement as was seen in the case of the French Civil Code and the old

Dutch Civil Code (the latter being based on the former), which did not contain general statements about juridical acts. In these legal systems the rules about contracts were correspondingly applied to other juridical acts by implication.

The principal feature of the Dutch Civil Code is the layered structure of concepts and rules: the general rule precedes the more specific one, and the same holds true for the concepts. Nevertheless the lawgiver has made use of statements about the corresponding use of paragraphs in other branches of law as well. These are called as said, connecting statements. A good example of a connecting statement is paragraph 6 216, which is to be found in the sixth book dealing with the law of obligations, under the fifth title containing the general statements of the law of contract, in section one, the general remarks.

In order to understand this connecting statement, one should know that the New Dutch Civil Code follows the Roman system, in which the concept of contract denotes only the obligatory juridical act. The juridical act to pass title (*traditio;* conveyancing) may build on the obligatory contract, but is in principle a completely different type of juridical act. The Dutch lawgiver has now made general statements about the formation, fulfilment, cancellation and nullity of juridical acts in book 3 title 2. The bilateral obligatory contract is dealt with in the sixth book, title five. General remarks precede the specific rules. The last general remark in the section dealing with the law of contract states, however, that the rules governing bilateral, obligatory contracts may be used in other corresponding bilateral juridical acts within patrimonial law, at least as long as the tenor of these statements, viewed in the context of the substance of the juridical acts, does not indicate otherwise.

What does this connecting statement imply? Section 6 5 1–4 are, systematically viewed, written only for the obligatory contracts. Nevertheless, they may be applied to other bi- or multilateral juridical acts within patrimonial law, such as other contracts. Several examples of these non-obligatory contracts are to be found throughout the Civil Code. In the third book one finds statements about the conveyancing of property (3 84 ff; 3 98). Consent is required there, but this cannot be called an obligatory contract: the consent means to fulfil, and thus to extinguish an obligation, not to create an obligation. The rules governing obligatory contracts may nevertheless be applied to the conveyancing of property subject to the conditions mentioned. The same holds good for several other contracts, such as the contract to settle a dispute (title 7 15), the contract about the modes of proof that will be accepted in legal proceedings (7 15 1 par 3), compromise and so on, but also for bi- or multilateral juridical acts which are not contracts in the proper sense of the word, such as the waiver of a claim (6 160); the cession of contractual debts (6 155 ff); the taking over of obligations (6 159); arrangements between co-owners and similar associates (3 168); decisions about the administration of or dispositions by co-owners, etcetera (3 170); decisions concerning partnership, administration or management (7 13 14) and so on; division of jointly owned property (3 178); divorce settlements, etcetera. This paragraph 6 216, the connecting statement referred to, declares that the paragraphs which codify the principles of good faith (reason and equity, according to the wording of the New Code, see par 6 248) are applicable outside the realm of the obligatory contract; for example, the principle that obligatory contracts

should be capable of adaptation in case unforeseen circumstances may make such an adjustment desirable.

Other examples of connecting statements are to be found in paragraph 3 15, which makes the principles of good faith, reason and equity and the concept of abuse of competence applicable even outside patrimonial law; in terms of paragraph 3 59 the rules governing juridical acts may be of value in the law of persons as well; paragraph 3 98 states that the rules governing the conveyancing of property regulate the creation of real rights in general, and so on.

It has been said by several authors that these connecting statements – especially the most general ones – are superfluous. What they do is mainly to prescribe analogous interpretation. There is no need for such a prescription, since history shows that the judicature normally has a strong tendency towards analogous interpretation, certainly in cases which are to be subsumed under the guiding principle of good faith, even without using similar connecting statements. Secondly, it is not the task of the legislature to prescribe its own modes of interpretation. There is, however, a certain difference between the situation in which the judicature itself has developed a strong tendency towards analogous interpretation, and the situation in which a connecting statement enjoins the judge to use an analogous interpretation in principle. The latter situation seems to entail a heavier burden of argumentation, especially for the party who desires to escape that analogy.

General principles often require a certain refinement in order to avoid too unsophisticated an application. In a codified system the judge has to face the interpretation techniques of analogy and refinement. At the legislative level there is the similar problem of connecting and disconnecting statements. This thesis may be illustrated by the principle of the law of restitution.

The main problem in developing a law of restitution is the question whether there should be one general action covering all cases, or whether a restricted number of specific actions should be preferred. Roman law recognised a limited number of specific actions, like the *condictiones*, such as the *condictio indebiti*, which may be described more or less as an action for the undue payment and receipt of money; and the *actio negotiorum gestorum*, an action that has no exact parallel in English law, but which is an action for reimbursement of expenses by an agent who conducts the affairs of another without any instructions. As a consequence, the French Civil Code codified a similarly restricted number of actions, as did the Dutch Civil Code. The development of the French jurisdiction is noteworthy however: since the famous *Boudier* case the *actio negotiorum gestorum* has received a very wide interpretation; it almost seems to have become a general action. The case dealt with the lessor of a parcel of land who had bought a certain quantity of manure, which had been spread over the land by the seller. The bill had remained unpaid. After the lessor became bankrupt, it was the owner of the land who gained a far superior harvest at the expense of the seller. At the moment when the manure was delivered, the seller certainly had no intention to act as an agent on behalf of the owner. On the contrary, he had carried on his own affairs as a seller. Nevertheless the *actio negotiorum gestorum* was granted, and the owner of the land had to pay the bill.

This is an example of analogy. The development in German and Italian law has been exactly the opposite. Both systems have codified a general action for

unjust enrichment, but the judicature refined this general action as if their countries had codified the Roman system. In both systems the general action for unjust enrichment is a subsidiary one. As a consequence the carpenter, who contracted with the lessor to improve the house the lessor lived in, and whose bill remained unpaid because of the bankruptcy of this lessor, has no direct claim against the owner, since this action is considered to be a subsidiary one. The primary action lies against the lessor, who is the party involved in the contract.

The New Dutch Civil Code has adopted the general action for unjust enrichment, however, without stating whether this action is of a subsidiary nature or not.

Which are the main, principally new, features of the Dutch Civil Code? Long lists of differences between the old and the new code have been published. I do not intend simply to restate these. I have selected a few purely according to taste.

The first point is the restoration of the original unity of private and commercial law. After the French model we used to have a separate Commercial Code. This separation is, however, useful only in countries where there are separate commercial courts and where bankruptcy is a measure exclusively for the benefit of merchants. In the Netherlands bankruptcy has not been restricted to the merchants since 1896, the special mercantile court having already disappeared in 1838. The separation between mercantile and non-mercantile affairs, between merchants and non-merchants, was abrogated by law in 1934: it therefore seemed justified to return to the system of Roman and Roman-Dutch law, as was proposed in 1789 by the commission named after its chairman, the Van der Linden Commission. The main commercial act, the contract of sale, has always been governed by the Civil Code.

The general part on patrimonial law, which is contained in book 3, is completely new. The first notable innovation is the enormously increased protection of a third person who acquires something from a seller who is not entitled to alienate it. If it is an immovable, the acquirer receives full title if he acquires in reliance upon incorrect registration in the public registers for immovables (3 24–26; 3 88); if it is a movable, the rule that "en cas de meubles possession vaut titre" taken over in the Dutch Civil Code from the French Civil Code, has been interpreted by the Dutch supreme court so that a person acquiring the thing in good faith and by onerous title from another who is not the owner, acquires full title. This rule has been extended to things lost and found and to stolen things, provided the acquirer is a consumer who acquires the thing in the ordinary course of the seller's business (3 86). The lack of a valid title cannot even be invoked against a third person who acquires in good faith (3 88), although in general the transfer of property requires a legitimate title (3 84).

To the consensual defects, which date back to the days of Roman law, namely threat, fraud and error, a fourth one has been added: abuse of the situation. This consensual defect, which renders a juridical act invalid, is defined in 3 44 4, as a situation of necessity, dependency, wantonness, abnormal mental condition or lack of experience. Financial loss is not required for a claim based on this abuse of the situation.

There are many more innovations in the law of obligations than in the law of property. The main innovation may be linked with the explicitly increased role of good faith: it is, I believe, the fact that the judge may modify or even on

occasion set aside the terms and the effects of contracts in case of unforeseen circumstances which are of such a nature that in accordance with criteria of reasonableness and equity the co-contracting party may not expect the contract to be upheld without modification (6 258). The same holds for judicial moderation or reduction of contractual and other indemnification (6 109) and for legacies and servitudes.

The section on reparation of damage (6 95–110) applies to all kinds of liability, contractual and extra-contractual. The notion of solidary obligations will become much more important, since it will apply to all cases where several persons are liable to repair the same damage (6 102).

In the law of torts (6 162 ff) the main development is a shift from liability based on fault to liability based on risk. In the past the law operated with a presumption of fault, but the presumption could be rebutted by the defendant. Paragraph 6 173–183 now creates strict liability for the possessor. In the very near future products liability will be governed in the conformity to the relevant EEC Directive on the subject. On the same grounds the New Dutch Civil Code will extend the liability of employers and even independent contractors for the actions of their employees.

There will be a general action for unjust enrichment (6 212), and finally, there will be a general ruling in cases of non-performance of contractual obligations. Bilateral contracts may be rescinded in the case of non-performance (6 265–279) regardless of whether the debtor is liable in damages or whether the non-performance is due to superior force; the rescission may be effected – either totally or partially – merely by notice in writing, but it will lack retroactive effect.

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If we are to speak of the law as our mistress, we who are here know that she is a mistress only to be wooed with sustained and lonely passion – only to be won by straining all the faculties by which man is likest to a god. Those, who, having begun the pursuit, turn away uncharmed, do so either because they have not been vouchsafed the sight of her divine figure, or because they have not the heart for so great a struggle (Holmes *The law speeches* (1913) 17).

VONNISSE

CONSTITUTIONAL COURT SOUNDS THE DEATH KNELL FOR CAPITAL PUNISHMENT

S v Makwanyane 1995 6 BCLR 665 (1995 3 SA 391 (CC))

"Though justice be thy plea, consider this –
That in the course of justice none of us
Should see salvation; we do pray for mercy
And that same prayer doth teach us all to render
The deeds of mercy."
(Shakespeare *The Merchant of Venice* Act 4 sc I)

The Constitutional Court's decision on the constitutionality of the death penalty attracted a great deal of attention, both from the legal fraternity and from the general public. Although a moratorium on executions had been operative in South Africa for more than five years, the death penalty was still on the statute book, and courts were still imposing it, several judges making their feelings on the matter very clear.

The accused in the *Makwanyane* case had been convicted of murder without extenuating circumstances and sentenced to death. The convictions were upheld on appeal, but the finding on the sentence held in abeyance pending the decision of the Constitutional Court. The appeal court did, however, find that the crimes committed by the accused were heinous in the extreme, and stressed that the heaviest sentences permitted by law should be imposed.

The applicable provisions of the Constitution (the Constitution of the Republic of South Africa Act 200 of 1993) were sections 8(1), 9, 10, 11(2), 33(1), 35 and the provision at the end of the Constitution which has variously been referred to as the postscript, the epilogue, the afterword, the commitment or the "postamble". Section 8(1) provides that every person shall have the right to equality before the law and to equal protection of the law; section 9 simply states that every person shall have the right to life; section 10 provides that every person shall have the right to respect for and protection of his or her dignity, and section 11(2) that no person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment. Section 33(1) is the limitation clause; it provides that all the rights entrenched in chapter 3 of the Constitution (the bill of fundamental rights) shall be subject to limitation, and further contains the

requirements for a valid limitation. Section 35 enjoins the courts, in interpreting the provisions of chapter 3 of the Constitution, to promote the values which underlie an open and democratic society based on freedom and equality and, where applicable, to have regard to public international law applicable to the rights entrenched in the chapter. They may also have regard to comparable foreign case law. The final section, which I shall refer to as the commitment, is headed "National Unity and Reconciliation" and describes the Constitution as 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. It emphasises reconciliation, a need for understanding but not vengeance, a need for reparation but not for retaliation, a need for *ubuntu* (an African concept which features strongly in a number of the judgments; it will be dealt with in greater detail later) but not for victimisation. Unlike the Namibian Constitution, the interim South African Constitution does not expressly proscribe the death penalty; the reason for this is that the framers of the Constitution decided to entrust this very controversial issue to the Constitutional Court. (The President of the court, Justice Arthur Chaskalson, referred to this "Solomonic solution" in his judgment (681G).)

All eleven judges found that the death penalty is unconstitutional in terms of the South African Constitution, and each handed down an individual judgment emphasising a particular aspect. Delivering the judgment of the court, Chaskalson P focused mainly on section 11(2). He nevertheless emphasised that this provision should not be construed in isolation, but in context, having regard to the history and background to the adoption of the Constitution and the other provisions of the Constitution, particularly those in chapter 3. Thus the constitutionality of any punishment must meet the requirements of sections 8, 9, 10 and 11(2) as well as those of the limitation clause (s 33(1)).

Section 8(1)

It may seem at first glance somewhat odd that the court should have devoted so much attention to the equal protection clause when it had so much other ammunition with which to bombard the death penalty. There is no doubt, however, that equality is one of the "core values" of the 1993 Constitution (whatever else one may say about the comparative status of the rights entrenched in chapter 3). Several of the judges found that capital punishment conflicts with the right to equal protection of the law. Chaskalson P pointed out that even if a law is neutral on the face of it, it may nevertheless be arbitrary in its application. There is an element of chance at every stage of a trial; when the trial is one for murder, the importance of this element becomes crucial. He mentioned the following as factors that could affect the outcome of a trial: the way in which the case is investigated by the police and presented by the prosecutor; the effectiveness of the defence (*pro deo* counsel who defend indigent accused are conscientious but generally inexperienced, and may have to consult with their client via an interpreter); the attitude of the trial judge (and possibly of the judges of appeal); and, inevitably, the race of the accused. Judges are obviously aware of all these

factors, and take them into account, but the defect of inherent arbitrariness cannot be eliminated altogether. Reference was made to the American case of *Furman v Georgia* 408 US 238 (1972) in which the court had found that any law that is non-discriminatory on the face of it may be applied in a way that violates the equal protection clause of the Fourteenth Amendment of the American Constitution. In the words of Douglas J in the *Furman* case, statutes which confer discretion (like the provisions of the South African Criminal Procedure Act which provide for the imposition of the death penalty) are "pregnant with discrimination".

Chaskalson P pointed out that the United States courts have attempted to address this problem via the due process requirement. One of the results of the creation of a system of wide-ranging (and apparently interminable) appeals and reviews has been the so-called "death row phenomenon". Prisoners in the United States may remain on death row for many years while they exhaust every possible avenue that could lead to a reprieve. Paradoxically, therefore, the quest for absolute procedural fairness has led to "appellate procedures that echo down the years" (*Pratt and Morgan v Attorney-General for Jamaica* [1993] 3 WLR 995 (PC) 1014) which in turn result in unacceptable cruelty to the prisoner who may live in the shadow of the gallows for years. The problems attendant on the American approach persuaded Chaskalson P that South Africa should not follow the "due process route" in order to bring the death penalty into line with section 8(1).

Ackermann J agreed that the American "due process" route should not be followed, but felt that "the inevitably arbitrary nature of the decision involved in the imposition of the death penalty ..." merited special attention (725B). He pointed out that the South African Constitution does not raise the same problems as the American Constitution in this regard and stressed that South Africa has

> "moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional state where State action must be such that it is capable of being analysed and justified rationally" (725J–726A).

Ackermann J emphasised that the death penalty differs both in degree and in substance from any other punishment, because it is final and irreversible. He concluded that the provisions of the Criminal Procedure Act

> "leave such a wide latitude for differences of individual assessment, evaluation and normative judgment, that they are inescapably arbitrary to a marked degree. There must be many borderline cases where two courts, with the identical accused and identical facts, would undoubtedly come to different conclusions" (792C–D).
>
> "Where the arbitrary and unequal infliction of punishment occurs at the level of a punishment so unique as the death penalty, it strikes me as being cruel and inhuman ... To allow chance, in this way, to determine the life or death of a person, is to reduce the person to a cypher in a sophisticated judicial lottery" (729G–H).

Didcott J referred to section 8(1) in much the same terms, concluding that the imposition of the death penalty is inherently arbitrary. Since the punishment is irreversible and possible errors irremediable, the arbitrariness is such that the requirements of reasonableness and justifiability laid down by section 33(1) for valid limitations of fundamental rights, cannot be met.

Likewise finding that the death penalty conflicts with the provisions of section 8(1), Mohamed J emphasised that the fault does not lie with the sentencing court, since judges will conscientiously seek to avoid any impermissibly unequal treatment of accused, but with the process which is inherently arbitrary. Like Chaskalson P he listed a number of factors which can influence the outcome of a trial. Among these are the poverty or affluence of the accused, which affects his ability to retain the services of experienced and skilled counsel and expert witnesses and his resources in pursuing potential avenues of investigation, tracing and procuring witnesses and establishing facts relevant to his defence and credibility. In the same context, the levels of literacy and communication skills of the different accused militate against their ability effectively to transmit to counsel the nuances of fact and inference often vital to the probabilities. Since many accused cannot communicate adequately in either English or Afrikaans, use has to be made of interpreters, whose training and skills may not be everything that is desired. (See *S v Ngubane* 1995 1 BCLR 121 (T) in which it appeared, in a trial in a magistrate's court, that the accused was Zulu-speaking, and the interpreter, who did not understand Zulu, was translating from English/Afrikaans to Tswana. The magistrate stopped the proceedings and sent the matter on review. It was held that the accused was entitled to have the proceedings translated to him in a language with which he was properly familiar.) Related to this is the problem of the inadequacy of resources which has resulted in the defects in the *pro deo* system mentioned above. There are differences, not only in race, but in class, gender and age, between the accused and those who try him. (One cannot but feel that these are inevitable, and the debate about the extent to which they militate against the ideal of a fair trial has by no means burnt itself out.) Finally, there is the temperament and sometimes unarticulated but perfectly *bona fide* values of the sentencing officer and their impact on the weight to be attached to mitigating and aggravating factors.

The inescapable presence of arbitrariness led Blackmun J (in *Collins v Collins* 114 S Ct 1127; 127 Led 2d 435 [1994], quoted by Mahomed J 762C–D) to conclude that

> "it is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question – does the system accurately and consistently determine which defendants 'deserve' to die? – cannot be answered in the affirmative".

The court acknowledged that arbitrariness is also present in the imposition of any other sentence. However, the crucial difference between the death sentence and imprisonment or another sentence is not merely quantitative, but qualitative: the death penalty is irreversible, and destroys every other fundamental right, something which even a long term of imprisonment does not do.

Section 9

A number of the judges felt very strongly that, even though there may be other arguments against the acceptance of the constitutionality of the death penalty, the fact that it conflicts with the right to life must be regarded as the most cogent reason for its abolition. Although the right to life was not the main focus of

Chaskalson P's judgment, he referred to the Hungarian Constitution, which links the right to life and to human dignity, as well as to the Constitutions of the United States and India, and the provisions of the European Convention on Human Rights and the International Covenant on Civil and Political Rights. He pointed out that the South African Constitution differs from the other three Constitutions in that the right to life is not qualified in the Constitution itself. The international conventions, likewise, expressly tolerate capital punishment for very serious crimes. In this regard the protection afforded the right to life in the South African Constitution is stronger. Yet the Hungarian Constitutional Court has found the death penalty unconstitutional (see Decision No 23/1990 (X31) AB) and there are judgments of American and Indian courts and of international tribunals, in which capital punishment was held to be impermissible. This strengthens the arguments against the retention of the death penalty in South Africa (Chaskalson P 701–703).

Didcott J's starting point was that capital punishment violates the right to life as protected by section 9, in addition to contravening the prohibition of cruel, inhuman and degrading punishment in section 11(2). He did not venture to give an exact and comprehensive definition of what was encompassed by the right to life, except that at the very least, it means the right not to be deliberately put to death by the state. Langa J took much the same line, as did Kriegler J, who stated that, while he did not disagree with his colleagues about the importance of the rights protected in sections 8, 10 and 11(2), "I see them as ranking below the right to life. Indeed, they are subsumed by that most basic of rights" (749H). Although Mahomed J, too, did not give a comprehensive legal definition of what this right entails, he distinguished between the case where a medical doctor may be faced with the decision to withdraw mechanical aids to life if a patient is said to be "brain dead", the case where a person takes the life of another in self-defence and the death penalty, which he defined as "the deliberate annihilation of the life of a person, systematically planned by the State, as a mode of punishment" (760G). The irreversible nature of the penalty excludes not only the possibility of reparation in the event of error, but of repentance, rehabilitation or redemption. Furthermore, the objective of capital punishment cannot be achieved without the destruction of human dignity, not only of the criminal, but of society as a whole.

O'Regan J also stressed the primacy of the right to life as the right which is antecedent to all other rights. According to her, the Constitution cherishes the right to human life, not merely the right to life as organic matter. This concept is at the centre of South Africa's constitutional values. The Constitution seeks to establish a society where the individual value of each member is recognised and treasured. The right to life incorporates the right to dignity, which is particularly important in South Africa in the light of the denial of a common humanity which had marked the system of apartheid. Referring to the rejection of capital punishment by the Hungarian court, she pointed out that without life there can be no dignity.

Sachs J also felt that, while the death penalty undoubtedly offends against section 11(2), the starting-point should be the right to life, which is enshrined in

section 9. He pointed out that section 9 provides for the right to life and section 33(1) for limitations on rights. Executing someone does not limit his life – it extinguishes it. The enjoyment of life can be qualified, its existence cannot. Even if one adopts an objective approach to the enjoyment of the right to life (see the discussion of the concept of the "essential content of a right" below), in the sense that the state has a duty to create conditions to enable everyone to enjoy that right, this does not mean that the state is entitled intentionally to obliterate anyone's right to life. The objective approach can be used to qualify subjective enjoyment of the right, but not to eliminate it entirely.

In the view of Sachs J, in the absence of clear contextual indications that the framers of the Constitution intended the contrary, the right to life must be taken to mean that the individual cannot be intentionally deprived of it by the state.

Otherwise, "the killer unwittingly achieves a final and perverse moral victory by making the State a killer too, thus reducing social abhorrence at the conscious extinction of human beings" (784E).

Section 10

The logical link between the right to life and the right to human dignity has already been referred to. As O'Regan J said: "The importance of dignity as a founding value of the new Constitution cannot be overemphasised" (777H). The new Constitution, she pointed out, is a rejection of the denial of dignity in the past and an affirmation of the equal worth of all South Africans. In the words of Dworkin: "Because we honour dignity, we demand democracy" (*Life's dominion* (1993) 239, quoted by O'Regan J 778D). Thus dignity is essential to all democracies. The entrenchment of a justiciable bill of rights was designed, in part, to protect those who are the marginalised, the dispossessed and the outcasts of South African society. The methodical and deliberate destruction of life which the death penalty entails, cannot but be a denial of the right to life and to dignity. Both the manner of execution and the circumstances in which convicted criminals await execution are destructive of dignity.

Chaskalson P also adverted to the interdependence of the right to life and the right to dignity. He referred to the judgment of the Hungarian Constitutional Court in 1990 (see above), in which it had been held that the effect of capital punishment on these rights is to negate their essential content in such a way as to eliminate them irrevocably. The Hungarian court stressed the relationship between these two rights and their absolute nature when considered in tandem. They form the basis of all other rights, and other rights are inconceivable if they are impaired. He pointed out that the concept of human dignity forms the core of the prohibition of "cruel and unusual punishments" by the Constitution of the United States of America and that human dignity features prominently in German and Canadian law in this context. (See *Gregg v Georgia* 428 US 153 (1976) 230 per Brennan J: "The fatal constitutional infirmity in the punishment of death is that it treats members of the human race as non-humans, as objects to be toyed with and discarded"; *Trop v Dulles* 356 US 86 (1958); *Furman v Georgia supra*; *The People v Anderson* 493 P2d 880 (Cal 1972); the so-called *Life Imprisonment Case* [1997] 45 *BVerfG* 187 in Germany; *Kindler v Canada* [1992] 6 CRR (2d)

193 SC.) The view of Cory J in the *Kindler* case that the death penalty is the supreme indignity that can be visited on an individual, was quoted by Chaskalson P with approval (696A).

Section 11(2)

As is mentioned above, this provision forms the core of Chaskalson P's judgment. He felt that because the death penalty is so manifestly in conflict with the provisions of section 11(2), it was not necessary to deal in detail with the other possibilities, which leave more room for argument. He surveyed the manner in which the prohibition of cruel and inhuman punishments has been approached by the United Nations Committee on Human Rights, the Hungarian Constitutional Court, the Canadian Supreme Court and the courts of Massachusetts and California. In all these cases capital punishment was found to be impermissibly cruel, degrading or inhuman.

Mahomed J agreed that the death penalty constitutes cruel, inhuman or degrading punishment and therefore conflicts irreconcilably with section 11(2). He acknowledged that this finding involves a value judgment, but emphasised that it is one that must be objectively formulated with regard to the following: the ordinary meaning of the words used in section 11(2); the consistency of the provision with the other rights protected in the Constitution and the constitutional philosophy and humanism expressed both in the preamble and in the afterword to the Constitution; its harmony with the national ethos identified in the Constitution; the historical background to the structures and objectives of the Constitution; the discipline of proportionality to which it must legitimately be subject; the effect of the death sentence on the right to life; its impact on human dignity; and its consistency with constitutional perceptions evolving both in and outside South Africa relating to emerging values central to the permissible limits and objectives of punishment in a civilised society. Kentridge J focused on the cruel, inhuman and degrading nature of capital punishment and the effect of the "death row phenomenon". (The cruelty inherent in undue delay in the execution of a death sentence was highlighted in recent judgments such as *Pratt and Morgan v Attorney General for Jamaica, supra* and *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General, Zimbabwe* 1993 2 SACR 423 (ZS). See Carpenter and Botha "Death row doldrums: capital punishment and human rights" 1993/94 *SAYIL* 184.)

Section 33(1)

Once the court had found that the death penalty was *prima facie* in conflict with any provision of the Constitution, it had to determine whether the statutory rule in question could be saved in terms of the limitation clause. Section 33(1) provides that the rights entrenched in chapter 3 of the Constitution may be limited by law of general application, provided that the limitation (i) is reasonable; (ii) is justifiable in an open and democratic society based on freedom and democracy; and (iii) does not negate the essential content of the right in question. Limitations of certain rights (including the right to human dignity (s 10) and the right not to be subjected to torture or to cruel, inhuman or degrading punishment (s 11(2)) must, in addition to being reasonable, also be necessary.

The reason why the provisions of section 11(2) were regarded by some members of the court as decisive of the matter, is not difficult to find. Once it is found that the death penalty is cruel, inhuman or degrading, one would be hard put to it to argue persuasively that the retention of such a punishment is indeed necessary, even if one is prepared to concede reasonableness or justifiability.

The court followed the same "two-stage" approach which had been adopted by Kentridge AJ in the first case to be decided by the Constitutional Court (*S v Zuma* 1995 4 BCLR 401 (CC)), and which is substantially the same as that used in the interpretation of the Canadian limitation clause. (Since the United States Constitution does not contain a limitation provision, the American courts have had to address the limitation issue in a different way.) In the first stage the onus of proving that a fundamental right has in fact been infringed rests on the aggrieved party. Once that onus is discharged, the onus is on the other party seeking to justify the imposition of the limitation.

Chaskalson P explained how the constitutionality of the death penalty had to be established in terms of section 33(1): competing interests and values have to be balanced against one another and weighed up; ultimately an assessment has to be made that is based on the principle of proportionality. He said that while it is possible for certain general principles to be identified, the application of these to particular cases has to take place on an individual basis. The considerations to be addressed included the nature of the right in question, its importance to an open and democratic society based on freedom and quality, the purpose of the limitation and the importance of such a limitation to a society such as the above. The scope and efficacy of the proposed limitation had also to be considered, and, particularly where the limitation had to be necessary, it had to be asked whether the desired purpose could reasonably be achieved by other, less stringent, measures.

The first question was whether there was a rational connection between capital punishment and the purpose for which it was prescribed. (The "rational connection" test is one that is derived from Canadian law. See *R v Oakes* [1986] 19 CRR 308 337: "[T]he measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective" (per Dickson CJC).) However, this was not enough: since the death penalty was found to be arbitrary, unfair and essentially irrational, these defects were fatal to constitutionality. In addition, the requirement that wherever possible, the "lesser means" of achieving the purpose to be served, must be adopted, had not been met: life imprisonment was the alternative to be considered, and it had not been shown that it was a less effective means of achieving the purpose of the death penalty (punishment or retribution, deterrence, protection of the community).

The main argument in favour of the retention of the death penalty was based on its averred value as a deterrent. All the judges rejected this contention as unfounded. They found the evidence that the death penalty is a more effective deterrent to would-be murderers than life imprisonment unconvincing. Chaskalson P concluded that it could not be said that the death sentence "impaired the right as little as possible" (the second requirement laid down by the Canadian court in the *Oakes* case).

The criterion of proportionality, which is to be found in the jurisprudence of a number of modern states, also received attention. Proportionality (*Verhältnismässigkeit*) played a major role in the development of German constitutional law, whence it found its way into South African legal thinking. (It has also featured in English law: see eg Jowell and Lester "Proportionality: neither novel nor dangerous" in Jowell and Oliver (eds) *New directions in judicial review* (1988) 51–71.) It was first employed in South Africa as a means for determining the reasonableness and hence the constitutionality of a limitation on a fundamental right in *Smith v Attorney-General Bophuthatswana* 1984 1 SA 196 (BSC). Several of the judges in the *Makwanyane* case also used the notion of proportionality to determine whether the retention of capital punishment would be reasonable.

According to Sachs J, a full conceptualisation of the right to life involves the examination of a multitude of complex issues, each with its own contextual setting. Apart from capital punishment, there are other circumstances where proportionality can indeed play a role in regard to the right to life, whether section 33 is applicable, whether proportionality will enter into the ambit of the definition of the right itself or whether the proportionality will refer simply to competition between two people as to their right to life. For example, in abortion cases, foetal rights have to be balanced against the rights of the mother; likewise, a balancing process takes place when the issue is killing in self-defence, as a response to hostage-taking or in police action against escaped criminals. In his words:

> "In the case of other constitutional rights, proportionate balances can be struck between the exercise of the right and permissible derogations from it. In matters such as torture, where no derogations are allowed, thresholds of permissible and impermissible conduct can be established. When it comes to execution, however, there is no scope for proportionality ... (782I–783A) ... life by its very nature cannot be restricted, qualified, abridged, limited or derogated from in the same way [as other rights]. You are either alive or dead" (783D).

Chaskalson P said that the objectives of capital punishment were said to be deterrence, prevention and retribution. The only one of these which really fits the bill is retribution, and retribution should not be accorded a disproportionate value in the balancing process. Society's moral outrage can also be expressed otherwise than via capital punishment. It could therefore not be proved that the retention of the death penalty was necessary.

Like his colleagues, Mahomed J found the deterrence argument speculative and therefore unconvincing; he expressed the opinion that the reason why criminals are not deterred from crime is that they believe that they will not be caught at all. As he pointed out, this belief is regrettably justified in South Africa, where between 60 and 70 per cent of those who commit serious crimes are not apprehended at all, and a substantial proportion of those who are, are not convicted. He would have found it useful to study the results of research dealing with the relationship between the rate of serious offences and the proportion of successful arrests and convictions. The judge commented further that crime is a multi-faceted phenomenon and that successful deterrence involves the addressing of socio-economic conditions such as poverty, illiteracy and disease.

Didcott J took the view that if it could be proved that capital punishment is a unique deterrent, this could conceivably serve to justify its retention. The question is not whether it has *some* deterrent effect, but whether that effect is significantly *greater* than that of any alternative sentence. The judge found that it had not been proved unique in this sense.

Mokgoro J also addressed the issue of the high level of crime in South Africa, and the argument that the death penalty is necessary to counter this. She rejected this argument on two grounds: first of all, it has not been shown that the death penalty is the best available practical form of punishment to serve the purpose of reconstructing the damaged moral fabric of South African society. Secondly, even if it were, the end did not justify the means. Capital punishment "instrumentalises the offender for the objectives of state policy" (773I). It sanctions vengeance by law.

Like Mokgoro J, Mahomed J acknowledged that retribution was sometimes raised as a justification for retention of the death penalty:

> "Retribution has indeed constituted one of the permissible objects of criminal punishment because there is an inherent legitimacy about the claim that the individual victims and society generally should, and are entitled to, enforce punishment as an expression of their moral outrage and sense of grievance" (767B–C).

While this is indeed so, as the judge pointed out, the unarticulated fallacy in the argument calling for the death penalty is that the punishment must take the same form as the offence committed. Since one does not burn down the house of an arsonist or subject a rapist to rape, why should murder be a permissible punishment for murder (767F)?

O'Regan J explained that in determining whether capital punishment can be saved by section 33(1), competing interests have to be balanced against one another. Sections 9 and 10 contain rights which weigh very heavily; while prevention and deterrence, too, are important legislative objectives, it has not been proved that they cannot be adequately achieved by means other than the death penalty.

The general consensus was that the law providing for the death penalty could not be saved by section 33(1), and in fact that it fell down on the very first hurdle, namely the requirements of reasonableness and necessity. It was consequently not necessary for the court to consider the other requirements, although the issue of what would be regarded as justifiable in an open and democratic society based on freedom and democracy did receive some attention. The court acknowledged that there are a number of states that certainly qualify as open and democratic societies based on freedom and democracy, but which nevertheless accept that capital punishment is permissible. (The United States is one such country; see the judgment of Chaskalson P (688). It is of interest that, as recently as 1989, the sentence of death imposed on a 16-year-old was held not to be "cruel and unusual punishment" in *Stanford v Kentucky* 492 US 361 (1989). It must be remembered, of course, that the US Constitution expressly sanctions capital punishment. The Fifth Amendment refers specifically to capital punishment, and the Fourteenth Amendment merely provides that the states may not

deprive any person of *life*, liberty or property *without due process of law*.) The general trend in democratic states is, however, towards abolition of the death penalty. (See the statistics quoted by Chaskalson P 685D–G.)

The most difficult element of section 33(1), the "essential content" requirement (*Wesensgehalt*), was touched on obliquely only. Chaskalson P did, however, make some comments about this requirement, which is of German provenance. (Article 19(2) of the German Basic Law provides: "In keinem Fall darf ein Grundrecht in seinem Wesensgehalt angetasten werden.") He pointed out that the phrase has been the subject of considerable academic debate even in Germany, and that the German Constitutional Court has not dealt with the issue directly, but has subsumed the enquiry into the test for proportionality. In the South African context, Hiemstra CJ attempted to clarify the *Wesensgehalt* concept in *Smith v Attorney-General, Bophuthatswana supra* 202. He explained that

> "[t]he 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 upon the essence of a fundamental right, it will apply the process of an interplay of forces, or 'Wechselwirkung' as the Germans call it . . ."

The question is whether the concept should be interpreted subjectively, that is, from the point of view of the individual (the accused) or objectively, that is, from the point of view of the nature of the right and its place in the legal and constitutional order. From the subjective (more literal) point of view, capital punishment would inevitably negate the essence of the convicted person's right, and so would the possibility of killing someone in self-defence or to prevent a person from escaping from police custody. This is patently absurd. (When it comes to most of the other fundamental rights, the concept may indeed be subjectively construed without leading to absurdity.)

Ackermann J referred to a large body of German case law and other authority on the issue of the essential content of the right (730G) but declined to express any view on the matter *in casu*. Mahomed J also found it unnecessary to examine the question whether the death penalty negates the essential content of the rights protected in the relevant provisions. He nevertheless signified that there could be a third angle, in addition to the "objective" and "subjective" approaches referred to by Chaskalson P, namely a relative approach which focuses on the distinction between the *essential* content or central core of a right and what he termed the "peripheral outgrowth". He suggested that there may be rights that are inherently capable of incremental invasion and rights that are not.

There is no doubt that the *Wesensgehalt* concept gives rise to considerable philosophical difficulties, as Du Plessis and De Ville point out ("Personal rights: life, freedom and security of the person, privacy, and freedom of movement" in Van Wyk *et al* (eds) *Rights and constitutionalism* (1994) 214(a) 215(b) 227–228). They explain that the essential content can be understood as embodying either the principle of proportionality or the notion that every basic right can be understood in abstract terms and caution that the essential content concept will be even more difficult to deal with in the context of abortion than in that of

capital punishment (this was before the Constitutional Court's judgment in *Makwanyane*).

The court's approach to constitutional interpretation

Chaskalson P dealt at some length with the legislative history of the 1993 Constitution, with specific reference to the role that the background to a statutory enactment may play. He emphasised that in countries where the constitution is the supreme law, it is by no means unusual for courts to have regard to the circumstances existing at the time when the constitution was adopted, and mentioned the examples of the United States of America, Canada and India. The European Court of Human Rights and the United Nations Committee on Human Rights also permit their deliberations to be informed by *travaux préparatoires*.

Given the important new role that public international law is to play in South African constitutional law, reference to international human rights law was most apposite. (See s 35(1) and (3) 116(2) 227(2) 231; Botha "International law and the South African interim Constitution" 1994 *SA Public Law* 245; Dugard "The role of international law in interpreting the bill of rights" 1994 *SAJHR* 208. The court's handling of international law sources is discussed in greater detail below.)

The members of the court all emphasised that it was essential to adopt a purposive rather than an intentionalist approach to constitutional interpretation. O'Regan J pointed out that the interpretation of section 9 requires that the purpose for which the right was included in the Constitution must be established:

> "This purposive or teleological approach to the interpretation of rights may at times require a generous meaning to be given to provisions of Chapter 3 of the Constitution, and at other times a narrower or specific meaning" (777A–B).

In some of the earlier cases, South African judges were inclined to equate "generous" with "purposive" in interpreting the scope of fundamental rights. (In *Government of the Republic of Namibia v Cultura* 1994 1 SA 407 (NmSC), eg, Mahomed CJ (as he then was) posited a broad, liberal and purposive approach to constitutional interpretation, the avoidance of the "austerity of tabulated legalism" and constructions which are "most beneficial to the widest possible amplitude".) However, later judgments appear to have heeded the warning of the Canadian author Peter Hogg ("Interpreting the Charter of Rights" 1990 *Osgoode LJ* 217; *Constitutional law of Canada* 814) that the two are not necessarily synonymous. (In *Phato v Attorney-General, Eastern Cape* 1994 5 BCLR 99 (E), Jones J stated that while a wide, liberal, beneficial or purposive construction rather than a narrow or legalistic interpretation was required, "purposive" does not necessarily mean liberal or generous. He pointed out that giving a wide interpretation to a right and relaxing the standard of justification required for limiting the right could have the same practical effect as taking a more restricted view of the purpose of a right and requiring a higher standard of justification for any limitation, and warned that the former of these approaches could lead to a greater volume of cases coming before the courts. In *Nortje v Attorney-General of the Cape* 1995 2 BCLR 236 (C), Marais J agreed with Hogg that the confines of a fundamental right should be determined with reference to the purpose of the

conferment of the right, followed by a "paring down" of the right to the extent which the purpose of the right requires. Once that has been done, a "stringent standard of justification" should be applied to any proposed limitation of the right. In *De Klerk v Du Plessis* 1994 5 BCLR 124 (T), Van Dijkhorst J took the view that "generous" and "purposive" are not two separate concepts, but that, in the context of constitutional interpretation, "generous" is qualified by "purposive"; to treat them disjunctively would result in a construction which is not anchored in the aims of the Constitution, which in turn could lead to an interpretation based on the personal predilections and preferences of the judges.)

Referring to the difference between constitutional interpretation under the old order based on legislative supremacy, and under a supreme Constitution, Mokgoro J stated that the task of interpretation frequently involves the making of constitutional choices by balancing competing rights and freedoms. Often this must be done with reference to a system of values extraneous to the constitutional text itself, where the principles concerned constitute the historical context in which the Constitution was adopted, thus explaining the text. The Constitution requires the courts to develop the entrenched fundamental rights in terms of a cohesive set of values which are to be found in an open and democratic society.

The role of public opinion in constitutional adjudication

One of the arguments put forward in favour of the retention of the death penalty was that public opinion favoured it. Several members of the court commented on this contention, stressing that their task was to interpret the Constitution, and thus to establish whether capital punishment was permitted by the Constitution itself; not whether they, or the general public favoured it. In the words of Kriegler J, the methods to be used in answering this question are essentially legal, not moral or philosophical. This does not mean that the law operates in a moral or ethical vacuum; value judgments have always been required of the courts. But the starting point, the framework and the outcome of the exercise must be legal (747G).

Mahomed J explained the differences between a political choice made by a legislative organ and a decision reached by a judicial organ. Political preferences and public opinion play an important, sometimes decisive, part in the resolutions of the legislature, but not in the judicial process. The function of the court is to examine the relevant provisions of the Constitution, both text and context; the interplay between the various provisions; legal precedent both in South Africa and abroad; domestic common law and public international law relating to the problem; factual and historical considerations having a bearing on the issue; the significance and meaning of the language used in the provisions being considered; the content and sweep of the ethos expressed in the Constitution; and the balance that needs to be struck between different and potentially conflicting interests and considerations reflected in the text. After a judicious interpretation and assessment of all these factors, the court must determine what the *Constitution* permits and what it prohibits (759F–I).

Mokgoro J emphasised that the issue before the court was one of constitutionality. Thus the members were not engaged in a debate about the desirability

of abolishing or retaining the death penalty. However, the very nature of the court's interpretative role, as defined in section 35, obliged the court to make value choices. In this context she stressed the (ideal) indigenous value systems of South Africa, which she described as enduring values which are not to be equated with public opinion. The judge acknowledged that the warning expressed in the European Court of Human Rights by Walsh J in *Dudgeon v United Kingdom* [1982] 4 EHRR 149 that, in a democracy, the law cannot afford to ignore the moral consensus of the community, could not be altogether ignored in the process of constitutional interpretation. The distinction between constitutional adjudication and the legislative process (in which public opinion is of paramount importance) must nevertheless be maintained.

Sachs J also pointed out that it is the business of the Constitutional Assembly to decide what public opinion demands of it, and not that of the court. The court's function is to interpret the Constitution as it stands. The judges' personal views about capital punishment therefore do not enter the argument at all. He continued: "This Court is unlikely to get another case which is emotionally and philosophically more elusive, and textually more direct" (782E). He pointed out that the Constitution not only protects unpopular minorities from abuse, but rescues the majority from marginalisation. The latter is primarily the function of Parliament, where the will of the majority is expressed directly within the system of fundamental rights. The court's function is to interpret this Constitution with due regard to all the values of society.

The values sought to be protected by the Constitution

In his characteristically intense, often impassioned style, Mahomed J set out his ideas about the values expressed in the South African Constitution. He commented as follows (757J–758B):

> "All constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation; the values which bind its people, and which discipline its government and its national institutions; the basic premises upon which judicial, legislative and executive power is to be wielded; the constitutional limits and the conditions upon which that power is to be exercised; the national ethos which defines and regulates that exercise; and the moral and ethical direction which that nation has identified for its future."

He explained that while the constitutions of some countries merely formalise an historical consensus of values which have evolved to accommodate the needs of the present and the future, the South African Constitution for the most part represents a decisive break with and ringing rejection of a past which was in many respects racist and repressive; the commitment of the new Constitution is to a democratic, universalistic and aspirationally egalitarian ethos. The contrast between the past and the present is nowhere more clearly symbolised than in chapter 3 of the Constitution: section 8 enshrines equality where once there was institutionalised inequality; section 10 protects dignity, the past was redolent with statutes that denied it, and so on. Most particularly, the "postamble" opens a new chapter in the history of the country, and articulates a need for *ubuntu*. (See the discussion of this concept below.) The death penalty, the "planned and calculated termination of life itself", which was permitted in the past, had to be examined against this background.

The court emphasised throughout that the finding that capital punishment is unconstitutional under the South African Constitution did not by any means imply that the rights of law-abiding members of society were subservient to the rights of criminals. Chaskalson P stressed the importance of the right of law-abiding members of society to be protected by the state: "If the State fails to discharge this duty adequately, there is a danger that individuals might feel justified in using self-help to protect their rights" (731D). Given the current climate of crime and violence in South Africa, society is understandably concerned about the possibility that unreformed murderers or rapists will murder or rape again if the death penalty is abolished and they are released from prison. Priority should be given to ensuring that criminals are apprehended, duly convicted and that they get their comeuppance. But this did not mean that the death penalty was the only condign punishment for even the most serious crimes. Kentridge AJ said that however despicable and cruel the criminal's act towards the victim, it did not mean that the state should respond to such an act with matching cruelty and barbarity. The state's role is to be "institutionalised civilisation". While the striking down of the death penalty recognised that even the worst and most vicious criminals are not excluded from the protection of the Constitution, it by no means signified any sympathy for the murderer or condonation of his crime.

Langa J also stressed that the state has to be a role model for society, engendering a culture of respect for human life and dignity. Its actions have to conform to the values expressed in the Constitution. The state therefore cannot afford to convey a message that the value of human life is variable. It is nevertheless essential that those who destroy human life be punished severely, but society's justifiable anger must be expressed in a way that preserves its own morality. He quoted the words of Mr Justice Schaefer ("Federalism and state criminal procedure", Oliver Wendell Holmes Lecture, Harvard Law School 1956 *Harv LR* 26): "The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilisation may be judged" (751E).

Sachs J explained the dilemma of the death penalty in the following terms:

> "Decent people throughout the world are divided over which arouses the greatest horror: the thought of the State deliberately killing its citizens, or the idea of allowing cruel killers to co-exist with honest citizens. For some, the fact that we cold-bloodedly kill our own kind, taints the whole of our society and makes us all accomplices to the premeditated and solemn extinction of human life. For others, on the contrary, the disgrace is that we place a higher value on the life and dignity of the killer than on that of the victim. A third group prefer a purely pragmatic approach which emphasises not the moral issues, but the inordinate stress that capital punishment puts on the judicial process and, ultimately, on the Presidency, as well as the morbid passions it arouses in the public; from a purely practical point of view, they argue, capital punishment appears to offer an illusory solution to crime, and as such actually detracts from really effective measures to protect the public."

The judge dealt at some length with the development in civilised countries towards a greater acceptance of the humanity of even the most despicable criminal. He referred to the gruesome and barbarous modes of execution that were in vogue in past centuries, and commented that the horror of these public

killings was perfectly logical, since if executions are indeed to have a deterrent effect, they should receive the maximum publicity, and the murderer should be subjected to agony which equals that inflicted on the victim. The response of the incumbent judges at the Cape to the decision of the British colonial administration to abolish torture and to substitute hanging for the various other more horrific modes of execution is interesting, and ironic: they protested "that whatever may have been appropriate in Britain, in the conditions of the Cape to rely merely on hangings, corporal punishment and prison was to invite slave uprisings and mayhem" (789F–H)!

Sachs J observed further that it would not be surprising if the framers of the South African Constitution felt that a further qualitative evolution had taken place in the two centuries that have passed. Of South Africa's immediate neighbours, Zimbabwe has retained capital punishment with full effect, Mozambique and Namibia have abolished it, and Lesotho, Swaziland and Botswana have virtually stopped executions, even though the death penalty remains on the statute book. (Note, however, that the death penalty was recently found to be constitutional in Botswana in the case of *S v Ntesang* 1995 4 BCLR 426 and that for the first time in about five years, five murderers were hanged in Botswana in August 1995.) The judge commented that Germany, Italy, Portugal, Peru, Nicaragua, Brazil, Argentina, the Philippines and Spain all abolished capital punishment for peacetime offences after emerging from a period of severe repression. There has also been a move away from capital punishment in the countries of Eastern Europe after the ending of totalitarian one-party rule there.

He said it was not unreasonable to think that similar considerations influenced the framers of the South African Constitution as well. In his view, "the framers could not have been unaware of the fact that the time to guard against future repression was when memories of past injustice and pain were still fresh" (790E–G). He explained that the first thrust towards constitutionalism was associated with the overthrow of arbitrary power and the attempt to ensure that government functioned according to established principles and processes and in the light of enduring values. It was based on the twin propositions that all persons had certain inherent rights that came with their humanity, and that no-one had a God-given right to rule over others (789H–790A).

The second great wave of constitutionalism after World War II, likewise, was a reaction to gross abuse of power, institutionalised inhumanity and organised disrespect for life. Constitutionalism in South Africa also arrived simultaneously with the achievement of equality and freedom, and of openness, accommodation and tolerance.

The concept of *ubuntu* and African constitutional sources in general

Several of the judges suggested that greater value should be accorded to African sources in the identification of the values sought to be espoused in the Constitution. Particular attention was given to the concept of *ubuntu*, which was mentioned earlier. *Ubuntu* is not a word which can be satisfactorily rendered by a single English word or phrase, and several of the judges attempted to define it.

Langa J defined *ubuntu* as follows (751G–752A):

> "It is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all."

To support his definition, the judge quoted from the judgment of the Tanzanian Court of Appeal in *DPP v Pete* [1991] LRC (Const) 553 556b–d. He continued, explaining that an outstanding feature of *ubuntu* in the community sense is the value it places on life and human dignity, and referred to the other side of the coin, namely the victims of those for whom the death penalty was being sought and whose right to life had been violently terminated without any recourse to law. He rejected the tentative argument that certain murderers have forfeited their right to life. The abolition of the death penalty does not mean condonation of violent and abhorrent acts or the absence of moral outrage and righteous anger. It is a matter of not stooping to the level of the criminal, "simply to get even". In the words of Brennan J in *Furman v Georgia* (*supra* 273, quoted in the judgment at 753J (fn 10)) "even the vilest criminal remains a human being possessed of common human dignity".

Madala J also paid attention to the concept of *ubuntu* which, though it features only in the commitment, permeates the Constitution generally. *Ubuntu* necessitates recognition that the possibility of rehabilitation can never be discounted altogether, even in perpetrators of the most heinous crimes. The judge cited a number of cases in which the notion of *ubuntu* had been applied by the South African courts, though not in so many words (755G). At the very least, the imprisonment of a criminal ensures that society will be protected, even if rehabilitation cannot be achieved. The inhumanity resulting from the "death row phenomenon" is inevitable and means that the death penalty cannot be saved by section 33(1).

According to Mahomed J, *ubuntu* expresses an ethos of capacity for love of one's fellow human beings, recognition of their innate humanity, reciprocity in interaction with the collective humanity and the richness of the creative emotions which it engenders and the moral energies which it releases, both in those who give and in the society they serve (759A–B).

Mokgoro J translated *ubuntu* as "humaneness", or, in its most fundamental sense, as "personhood" and "morality". Metaphorically, it represents the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity (771J–772B). The judge pointed out that the concept has parallels in Western culture as well: respect of and value for life, humanity and *menswaardigheid*. The harshness of the death penalty was in keeping with the constitutional heritage of the past which has been rejected and replaced with a new culture, that of *ubuntu*, which supports the two basic values of life and dignity. It cannot be said that respect for and protection of human dignity has always been a central value of the South African Constitution. Hence the total break with the past.

The matter of indigenous African sources was also raised. Counsel for the Black Advocates' Forum had argued that the opinion of the black population of the country should be canvassed if the requirement of conformity to the norms of an open and democratic society (s 35) were to be met. This was rejected by the court, several judges expressing regret that indigenous African sources, which certainly are available, were not put before the court. Mokgoro J placed particular emphasis on the relevance of indigenous South African values, and said that the opportunity effectively and appropriately to put forward the contribution of the value systems of those sections of South African society that had been marginalised previously should have been taken.

Sachs J agreed that the traditions, beliefs and values of all sectors of society must be taken into account. The values peculiar to African society should have been placed before the court. Although he did not claim to have done exhaustive research into this issue, he found nothing to indicate that, had such sources been properly presented and subjected to the rigorous analysis that the judicial procedure calls for, the decision of the court would have been different. In fact, the materials he unearthed point to a source of values entirely consistent with Chaskalson P's judgment, and in particular with the constitutionally acknowledged principle of *ubuntu*.

He continued with an analysis of a number of works on systems of indigenous law, and found that "the sources indicate that it is necessary to acknowledge that systems of law enforcement based on rational procedures were well entrenched in traditional African society" (787F). More specifically as regards capital punishment, Sachs J found that "the relatively well-developed judicial processes of indigenous societies did not encompass capital punishment for murder" (788F).

The court's use of foreign law and public international law

It has been mentioned above that section 35(1) of the South African Constitution states that courts *shall* have regard to public international law *applicable to the protection of the rights entrenched in chapter 3 of the Constitution*, and *may* have regard to comparable foreign case law. Although South African courts have always been able to refer to foreign law, it may be argued that the specific mention of such law in the Constitution itself enhances the persuasive value of foreign jurisprudence. It may also be argued that section 35(1) in effect *obliges* courts to have regard to foreign law; how else are they to identify the values which underlie an open and democratic society based on freedom and democracy? Such values can surely only be determined with reference to the standards applicable in other democratic societies.

The court in *Makwanyane* referred extensively to American, German and Canadian sources in particular. The Hungarian Constitution was also found to be very helpful, and the position in India and Tanzania was also referred to. The court did, however, sound a warning that the approach of other jurisdictions should not be followed slavishly; differences in wording, however slight, as well as differences in circumstances must be taken into account.

The ostensibly straightforward provision relating to public international law requires some further elucidation. Which rules of public international law would be applicable to the protection of fundamental rights? Clearly not all the rules of public international law, but only those rules that constitute what is known as international human rights law (IHRL) (see Botha 1994 *SA Public Law* 245 246). Next, it must be determined which rules of IHRL are covered by the qualification "where applicable". This is by no means obvious either, though it would seem to be safe to assume that IHRL will be applicable in any dispute about the South African bill of rights (ch 3). However, section 231 of the Constitution provides that the application of public international law must not be inconsistent with the Constitution, so that the rules of IHRL must be read with the provisions of the Constitution as a whole. Botha (1994 *SA Public Law* 248) is nevertheless of the opinion that general provisions of public international law (eg the rules providing for state sovereignty) will have to give way to rules of IHRL if there is a conflict.

The main sources of IHRL are basic international documents such as the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), the European Convention for the Protection of Human Rights and Fundamental Freedoms, the African Charter on Human and Peoples' Rights (the Banjul Charter) and other regional charters. Other sources are decisions of municipal courts interpreting domestic bills of rights, decisions of municipal courts interpreting international charters and covenants and customary public international law (which is expressly recognised in s 231(4) of the South African Constitution).

The decisions of international tribunals such as the European Court of Human Rights, in particular, must be regarded as authoritative sources of IHRL. Such decisions are not foreign case law, but part of applicable public international law. South African courts *must* have regard to them, but are not bound by them. Decisions of municipal courts on both international instruments and domestic bills of rights, on the other hand, constitute persuasive but not binding authority to which the court *may* have regard. (It is clear from the judgment in *Filartiga v Pena Irala* 1980 ILM 966 that the development of customary international law takes place on a right-by-right basis; thus the role of customary law will be largely to supplement provisions in bills of rights. This is not, however, to say that it is irrelevant.)

In the light of the above, it appears that a South African court seeking to apply foreign law and public international law in terms of section 35 should distinguish between the decisions of foreign courts and those of international tribunals. In *Makwanyane* Chaskalson P devoted some attention to these sources, but largely under one heading, that of International and Foreign Comparative Law (685 *et seq*). He pointed out that capital punishment is not prohibited by public international law, but cautioned that the wording of international human rights instruments differs from that of the South African Constitution. The ICCPR, the American Convention on Human Rights, the European Convention and the African Charter refer specifically to *arbitrary* deprivation of the right to life, whereas section 9 of the South African Constitution expresses this right in

unqualified terms. Unfortunately the judge did not distinguish in any way between foreign law and public international law in this regard.

In his discussion of the right to dignity, Chaskalson P referred both to foreign case law and to the decisions of the Human Rights Committee of the United Nations and the European Court of Human Rights (695–698) again without distinguishing between them as regards binding force. In the event, this somewhat haphazard approach to international sources did not influence the outcome of the decision, since the South African Constitution itself provides stronger textual and contextual authority for the abolition of capital punishment than the international instruments (and most of the foreign jurisprudence) examined by the court. It is nevertheless essential that the Constitutional Court (and, naturally, the other South African courts as well) should come to terms with the precise role of public international law under the Constitution.

Conclusion

The task facing the judges of the Constitutional Court in this case was indeed an onerous one – not only because of the responsibility it entailed, but also because of the sheer weight of the material they had to wade through and evaluate. The issues were addressed with reference to the widest imaginable range of authority and evidence. The judgment arrived at is, I think, the only one which the court could have reached; the relevant provisions of the South African Constitution do not logically permit of any other interpretation.

It may therefore seem a trifle churlish even to mention any criticisms or reservations (such as that relating to the treatment of public international law above). The possible role of public opinion, which featured prominently in several of the judgments, is, however, an intriguing one. Nor is it something that will go away if ignored – the Constitutional Court will undoubtedly have to consider it again when the issue of abortion arises.

The legitimacy of a system of government (and this includes the legitimacy of its judicial system) is unquestionably affected by public perceptions. South Africa in fact opted for a specialist constitutional court because of the legitimacy crisis experienced by the previous judiciary. It was felt that even a total change of system would not be enough to ensure the legitimacy in constitutional issues of the judiciary inherited from the previous regime. It would be ironic if a perception were to take hold that the Constitutional Court is an "ANC court" just as there was a perception among many South Africans that the previous court was a "National Party court" or even an "apartheid court". The fact that counsel for the government in the capital punishment case espoused the abolitionist view, strengthened the perception among members of the lay public that "the government abolished the death penalty", no matter how emphatic the court's insistence that the matter was one of constitutional interpretation and not of personal or political opinion. The confusion in the mind of the public is, moreover, exacerbated by the fact that most people do not yet understand that parliamentary sovereignty is a thing of the past and that it is indeed the business of the Constitutional Court, and not of Parliament, to decide on matters of constitutionality.

It is unquestionably true that, as a matter of principle, parliaments should be influenced by public opinion, and that courts should not. Public opinion is too fickle to serve as a basis for judicial decision, and may even be irrational. Yet the realities require that more thought be given to the relationship between public opinion and judicial credibility. (See Carpenter "Public opinion, legitimacy and the judiciary" 1996 *SA Public Law* 1.) A judiciary that is perceived to be out of touch with the lives of ordinary people could do harm to the cause of constitutionalism and the development of a rights culture in South Africa. Perhaps the solution, as Constitutional Court judge John Didcott has suggested, is more effective and accurate media coverage of judicial decisions? The reasoning behind the court's decision in *Makwanyane* was certainly not adequately conveyed to the public at large.

No-one reading the judgment of the Constitutional Court can fail to be persuaded that it is legally correct, and, moreover, that the problem of violent crime in South Africa will not be solved by executing a handful of the worst offenders every so often. Unfortunately, the credibility and legitimacy of the Constitutional Court will not be determined solely by the quality of its judgments, but also by the perceptions of a public which is still largely ignorant, constitutionally speaking, and by the success of the other branches of the body politic in the creation of a rights culture and a true constitutional state.

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A NEW AND QUESTIONABLE USE OF THE WORD "IMPLIED"

Eskom v First National Bank of Southern Africa 1995 2 SA 386 (A)

A cheque drawn by the appellant in favour of "Construction Equipment Services" was expressed to be payable only to that firm, crossed, and marked "not transferable"; the words "or order" did not appear after the name of the payee. It was stolen after it was posted, and a new account was opened, presumably by the thief, in the name of a non-existent close corporation called "Construction Equipment Services CC". The respondent honoured the cheque and money was drawn out of the account of the non-existent corporation. After the fraud was discovered, what was left in the account was repaid to the appellant but there remained a loss of R199 029,09. Appellant claimed this amount, with interest and costs, from the respondent (388D–389B). The main ground was an alleged breach of the contract between the parties which bound the bank to pay only the named payee (388J–389A). The bank excepted that the claim lacked averments necessary to sustain a cause of action, one of the grounds of exception being, in the words of EM Grosskopf JA (389C–D)

> "that s 79 of the Act [the Bills of Exchange Act 34 of 1964] was an implied term of the mandate given by the applicant to the Bank; that the appellant did not plead

averments to the effect that the Bank was not protected from liability to the appellant by the provisions of s 79; and that without such averments, the appellant's claim against the Bank could not be sustained".

This exception was upheld by the court *a quo* but the Appellate Division upheld the appeal and dismissed the exceptions with costs (400H–I).

The relevant part of section 79 is quoted at 389G:

"If the banker on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker ... the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof."

The court dealt with the following two questions as one per EM Grosskopf JA (389H–I):

"1. Who bears the *onus* in regard to s 79? Must a person claiming from a bank show that the bank is not protected by the section, or must the bank invoke the section and prove its applicability?"

The learned judge of appeal made it clear that in this question the word "*onus*" means the overall *onus* (390F–G). The Appellate Division drew attention to the fact that in the court *a quo* the respondent had contended that section 79 was "an implied term of the mandate given by the appellant to the Bank"; that the appellant had not denied "that the provisions of s 79 formed part of the contract between the parties"; and that the court *a quo* decided the case on that basis (390H).

Much of the debate in the court *a quo* was "misconceived", said the learned judge of appeal (391A) and continued (391B–C):

"A banker who is, in terms of s 79, 'entitled to the same rights and ... placed in the same position as if payment of the cheque had been made to the true owner thereof' may debit his customer's account with the amount of the cheque even although payment may have been made to somebody who was not the holder. This does not, however, arise from *consensus* between the parties. It arises from a legislative act. If the statutory origin of s 79 were kept firmly in mind, no great harm would be done by regarding it as creating an implied term in the banker-customer relationship. Nothing is gained, however, by so regarding it, and it may tend to mislead, as happened in the present case."

Confusion over the meaning of the word "implied" abounds (see the authorities referred to in my *The principles of the law of contract* (1989) 255–258 269–295 (*Contract*) and the two notes in 1993 *THRHR* 116–118 and 1994 *THRHR* 279). There is insufficient information in the opinion to decide in what sense the word was used in the court *a quo*. In the Appellate Division, the strict sense of the word, that is, as applying to a provision which passes the hypothetical bystander test, was ruled out by the court's statement that the banker's protection "does not ... arise from *consensus*" because any provision which does pass the hypothetical bystander test is based on unexpressed *consensus* (see *Contract* and the two notes referred to above *loc cit*). If one were to look only to the court's statement (391C–D, quoted above) that nothing is gained by regarding section 79 as "an implied term", one would think that the Appellate Division was of the opinion that section 79 was "a statute applying to the contract" and not a term of the contract at all. If the section was not a term of the contract, the word "implied" would not be applicable. This interpretation, however, is excluded on two grounds.

(a) EM Grosskopf JA left the question open:

> "Whether or not s 79 is deemed to form a part of the contract between the parties, its nature and effect must be ascertained by the ordinary processes of statutory interpretation" (391D).

This in itself does not rule out the possibility that section 79 creates a residual provision of contracts in the relevant class, since residual provisions may originate in statutes (*Contract* 292). Nor does it rule out the possibility that the parties may have had the provisions of section 79 in mind, namely that the hypothetical bystander may have received an affirmative reply (*idem* 285). The opinion, however, does not indicate that the effect of section 79 could be avoided by agreement between the parties (see below); nor does it mention the hypothetical bystander test.

(b) At the end of his exposition on this aspect of the case the learned judge described section 79 as "a statute which engrafts qualifications onto a common-law contract" (394A–B). Something which is "engrafted" onto something else becomes part of it: so on this interpretation of the position section 79 does become part of the contract. But what part? Not being based on *consensus*, section 79 could, on this approach, only be either a residual or an invariable provision, using these two terms as described in *Contract* (*loc cit*). Residual provisions are sometimes described as "implied by law", but this does not seem to have been what the court meant, because provisions which are residual form part of the contract only if the parties do not agree otherwise expressly or impliedly (in the strict sense). There is nothing in the opinion to indicate that the court considered this to be the position in relation to section 79. It may be arguable, but it does not seem to have been argued in this case or to have been in the mind of the court. Thus EM Grosskopf JA said that "[i]n the present case s 79 provides relief to a banker from his normal obligations if certain features are present" (394B–C). It follows that when the court said that section 79 was "engraft[ed] onto [the] common-law contract", what it meant was that it was in the contract whether the parties wished it to be there or not; in other words, it became an invariable provision of the contract using that term as in *Contract (loc cit)*. As the court had previously said (391B–C, quoted above) that nothing was to be gained by such an approach, it is likely that when next the question comes before the court it will want to reconsider the whole matter.

To use the word "implied" to describe an invariable provision of a contract is to give the word a new meaning. With respect, this usage is questionable. Legal expositions, whether by courts or writers, would in my view be clearer if the word "implied", when used in relation to provisions of a contract, were to be restricted to those that pass the hypothetical bystander test. Giving the word a meaning not previously in use is to adopt an approach which, in my respectful opinion, ought not to be followed.

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CAVEAT SUBSCRIPTOR – BEWARE THE HIDDEN SURETYSHIP CLAUSE

Diners Club SA (Pty) Ltd v Livingstone 1995 4 SA 493 (W)

Almost a century ago, in *Burger v Central South African Railways* 1903 TS 571 578, it was decided that it is a sound principle of law that when a person signs a contract, he is bound by the ordinary meaning of the words contained in it. He may be able to escape liability by asserting that he did not know or understand the terms of the document, but the grounds are very limited (*Diners Club SA (Pty) Ltd v Thorburn* 1990 2 SA 870 (C) 874; see also *George v Fairmead (Pty) Ltd* 1958 2 SA 465 (A) 470; *Du Toit v Atkinson's Motors Bpk* 1985 2 SA 893 (A) 903).

The recent judgment of Labe J in *Diners Club v Livingstone* once again alerts one to the dangers of appending one's signature to a document without having carefully examined it, which finds expression in the maxim *caveat subscriptor*. In this case, Falkirk Industries (Pty) Ltd wished to apply for Diners Club cards to be issued to the company and the various directors of the company. To this end, the first defendant ("the defendant") signed a document headed "Diners Club Corporate Account Enrolment Form" on behalf of the company. He did this with the intention of allowing the company and directors to obtain the use of the Diners Club credit card (494). An application for summary judgment was subsequently brought by Diners Club against the defendant in his personal capacity. The basis of the claim was that the defendant had bound himself as surety and co-principal debtor with the company for charges incurred on the corporate account. In resisting summary judgment, the defendant stated that he merely intended to sign an application form on behalf of the company which Diners Club could either accept or reject. Labe J construed the defence contained in the affidavit resisting summary judgment as being similar to that raised in *Kempston Hire (Pty) Limited v Snyman* 1988 4 SA 465 (T) 468 where the defendant relied on *justus error*.

The defence in *Diners Club v Livingstone* was one of unilateral mistake. A unilateral mistake arises where one party mistakenly believes that his intention as declared in the document conforms to his real intention. In contrast, the declared and real intention of the other party are the same. Although there is no consensus because of the unilateral mistake of the first party (*Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* 1992 3 SA 234 (A) 238), this does not mean that only the one party is mistaken about the other party's intention. Usually each party will be mistaken about the other's intention, unless the party relying on the declared intention had no real basis for doing so, or the first party had deliberately formulated his declared intention incorrectly (Reinecke "Toepassing van die vertrouensteorie by kontraksluiting" 1994 *TSAR* 375; see also Kerr "Good faith in negotiating a contract – the duty to enquire if there is a perceived or apparent mistake in communication" 1993 *THRHR* 299). The unilateral mistake

must be both essential (material) and reasonable (*justus*) before it will render the contract void (Hutchison (ed) *Wille's principles of South African law* (1991) 418; Gibson *South African mercantile and company law* (1988) 61; Van der Merwe *et al Contract: general principles* (1993) 33; see also Christie *The law of contract in South Africa* (1991) 383–384). Whether the mistake is essential and reasonable is a question of fact to be decided on the evidence (*George v Fairmead supra* 472).

In *Diners Club v Livingstone* the question whether the mistake was essential (material) was not in issue. The crux of the matter was whether it was reasonable (*justus*). (For a summary of some of the meanings given to *justus error* by our courts, see Hutchison and Van Heerden "Mistake in contract: a comedy of (justus) errors" 1987 *SALJ* 524. On the *justus* requirement in *justus error* see Février-Breed "A perspective on the *justus* requirement in *justus error*" 1995 *TSAR* 300.) It seems that the circumstances in which a party can rely on *justus error* to escape liability are very limited (*National & Overseas Distributors Corpn (Pty) Ltd v Potato Board* 1958 2 SA 473 (A) 479; *Diners Club v Thorburn supra* 874).

In considering whether a party may repudiate his apparent assent on the basis of *justus error*, Fagan CJ in *George v Fairmead supra* 471 stated that our courts have asked whether the party in question has been to blame in the sense that

> "by his conduct he had led the other party, as a reasonable man, to believe that he was binding himself ... If his mistake is due to a misrepresentation, whether innocent or fraudulent, by the other party, then, of course, it is the second party who is to blame, and the first party is not bound".

(Although our courts have referred to mistakes caused by misrepresentation – see eg *ibid*; *National & Overseas Distributors v Potato Board supra* 479; *Kempston Hire v Snyman supra* 468 – it should be borne in mind that confusion could arise, as the word "misrepresentation" may be used in either a wide or a narrow (legal) sense. See, in this regard, McLennan "Reliance and justus error: theories of contract" 1994 *SALJ* 236–237.) The mistaken party could have been misled by the other party's words or conduct. This would include conduct which may have led the mistaken party not to expect to find a specific clause in the document. (See eg *Mans v Union Meat Co* 1919 AD 268; *Shepherd v Farrell's Estate Agency* 1921 TPD 62; *Du Toit v Atkinson's Motors Bpk supra*; *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 1 SA 303 (A) 316; *Kempston Hire v Snyman supra* 468; *Dlovo v Brian Porter Motors Ltd t/a Port Motors Newlands* 1994 2 SA 518 (C) 526. See also the English case of *Curtis v Chemical Cleaning and Dyeing Company Limited* 1951 1 All ER 631 (CA). See, however, *Diners Club v Thorburn supra* 874–875. For a discussion of the interrelationship between mistake and rectification, see Février-Breed "Mistake and rectification" 1992 *TSAR* 306.) The mistaken party may well have been misled by the other party's silence (see *Spindrifter v Lester Donovan supra* 316; *Kempston Hire v Snyman supra* 468).

Generally, a party will not be able to rely on *justus error* unless he can show that the other party knew or had reason to know of, or caused the mistake (*Logan v Beit* 1890 7 SC 197 215; Christie 383; see also *George v Fairmead*

supra; *Kempston Hire v Snyman supra*). This was interpreted by Coetzee J in *Horty Investments (Pty) Ltd v Interior Acoustics (Pty) Ltd* 1984 3 SA 537 (W) 540 to mean that the fault principle underlies the doctrine of *justus error*. However, Harms AJA in *Sonap Petroleum supra* 240 criticised this point of view. Apart from the fact that he could not find any authority to support this proposition, the judge asserted that it causes practical difficulties and in any event seems to be unnecessary. (Cf Floyd and Pretorius "A reconciliation of the different approaches to contractual liability in the absence of actual *consensus*" 1992 *THRHR* 671–673; Van der Merwe and Van Huyssteen "Kontraksluiting en toerekenbare skyn" 1993 *TSAR* 496.)

Harms AJA in *Sonap Petroleum supra* 239 corrected the perception that a mistake can only be reasonable if it was caused by a misrepresentation made by the other party to the contract. After considering the *justus error* doctrine, the judge concluded that the decisive question in the case of mistake is (239–240):

> "[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? . . . To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party's intention; secondly, who made that representation; and thirdly, was the other party misled thereby? . . . The last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled?"

(This has been interpreted to mean that the doctrine of *justus error* is an indirect application of the reliance theory: Reinecke 1994 *TSAR* 375 378. For a comment on the use of the phrase the "common intention expressed", see Kerr 300.)

Even though the court in the *Sonap Petroleum* case made it clear that a misrepresentation is not necessary for a mistake to be reasonable (cf Hutchison and Van Heerden 1987 *SALJ* 527), this analysis concentrates on the situation where a mistake has arisen as a result of words or conduct of one of the parties to the contract. This is because the question that arose in *Diners Club v Livingstone* was whether the defendant's mistake was reasonable in the light of the fact that the get-up of the application form, drafted by Diners Club, was misleading (495).

Illustrations of the principle that a party will be entitled to resile from an apparent contract where the mistake was caused or induced by the other party, can be found in our case law. In *Mans v Union Meat Co supra* the appellant signed a memorandum written on the counterfoil of a cheque which included a guarantee, under the misapprehension created by the respondent's representative that he was simply acknowledging receipt of the cheque. The respondents sought to hold the appellant to the terms of the memorandum. The court found that the agreement was an oral one, and that the writing on the counterfoil of the cheque was merely evidence of the oral agreement. On the evidence, the court found that the respondents had not proved that the guarantee had in fact been given. Although the appellant had not read the memorandum, the court held that he was not bound by his signature.

Another example is the case of *Shepherd v Farrell's Estate Agency supra*. Here an advertisement by the defendant read "Our Motto – No Sale No Charge". The appellant signed a document authorising the respondent estate agency to sell the appellant's business. The document conflicted directly with

the advertisement in that it gave the respondent a sole mandate and the right to claim commission if the business was sold within three months, whether through the agency or not. The business was subsequently sold but not by the respondent estate agency, who claimed commission in terms of the contract. The appellant was held not to be bound to the contract because the respondent had not pointed out to him that the terms of the document differed materially from the advertisement.

In *Curtis v Chemical Cleaning and Dyeing Company Limited supra*, an English case, the plaintiff took her wedding dress to the defendant to be cleaned. When she handed over the dress, a representative of the defendant asked her to sign a document. The plaintiff asked why she had to sign the document and was informed that the defendant would not accept any liability for damage to beads or sequins on the dress. It subsequently transpired that the document contained a clause attempting to exempt the defendant from liability "for any damage howsoever arising". The court found that the defendant could not rely on the wider exemption clause as the plaintiff had been induced to sign the document by an innocent misrepresentation (634). (On the question whether a mistake induced by an innocent misrepresentation should be regarded as *justus*, see Hutchison and Van Heerden 1987 *SALJ* 526.) Lord Denning put it as follows in *Curtis*:

> "When one party puts forward a printed form for signature, failure by him to draw attention to the existence or extent of the exemption clause may in some circumstances convey the impression that there is no exemption at all, or, at any rate not so wide an exemption as that which is in fact contained in the document" (634).

Du Toit v Atkinson's Motors Bpk supra provides another example of a case where a party was held not bound to a contract which he had signed. Here a car, described as a 1979 model, was offered for sale. Relying on the advertisement, the appellant signed a document to purchase the car. This document excluded the respondent's liability for representations in respect of the car, including the year of manufacture. When the appellant discovered that the car was a 1976 model, he attempted to cancel the contract. The court found that the advertisement was inconsistent with the terms of the document and that by not alerting the appellant to the effect of the exclusion clause, the respondent had misled him. It was held that the appellant's mistake was indeed a reasonable one and that he was not bound by the exclusion clause in so far as it excluded liability for representations.

As is apparent from the above-mentioned examples, the defence of unilateral mistake is most often raised in situations where the mistake is induced or caused by the previous advertisement or description of the transaction in terms inconsistent with those contained in the document. However, it may be that the document itself is structured in such a way that it misleads the party who signs it. Just as a person can be misled by an advertisement or representation, so too can he be deceived by the get-up of the document (*Diners Club v Thorburn supra* 875). We submit that Fagan CJ in *George v Fairmead* was correct in stating that there is no difference in principle between a misdescription of the document and a misrepresentation of the contents of the document (472). What is important is that the party must have been misled about what the document contains.

The question that arises is whether a signatory to a document, who admits that he has not read the actual offending clause, can rely on *justus error* to escape from the contract on the grounds that he was misled by the get-up of the document as a whole. This issue arose in *Keens Group Co (Pty) Ltd v Lötter* 1989 1 SA 585 (C), where the defendant signed a document headed "Confidential: Application for Credit Facilities" as director on behalf of his company. One of the clauses contained in the document provided as follows:

> "I, by my signature, do hereby bind myself in my private and individual capacity as surety and co-principal debtor with the applicant for the payment to the creditor of any amounts which may at any time become owing to the creditor by the applicant, from whatever cause arising" (587).

It was alleged by the defendant that the whole get-up of the document was of such a nature that it caused him to overlook the fact that it contained the above-mentioned clause binding him, the signatory, as surety and co-principal debtor, for the debts of the company of which he was a director. He was under the impression that he was simply signing an application form on behalf of his company in order to obtain credit from the plaintiff company. The defendant would not have signed the document if he had realised that he was undertaking a personal suretyship (587). After admitting that he was negligent in not "reading it through" (589), the defendant submitted that the question that the court had to decide was whether he should have expected to find a surety agreement hidden away within the conditions contained in the application for credit (590).

Tebbutt J stated that the onus was on the plaintiff company to show on the facts that the defendant knew that he was undertaking a personal obligation (588). The judge extracted the following principle from previous cases:

> "[I]f a signatory to a document signs it under a misapprehension as to its real effect and for that misapprehension the other party is itself to blame then the signatory will not be bound" (590).

In discussing the appearance of the document, Tebbutt J said that the fact that the document was headed "Application for Credit Facilities", and was intended for use by a company as all the details requested related to a company or firm, created the impression in the defendant's mind that he was applying for credit on behalf of his company (590). The signature required on the form was that of the "applicant" (which was the company) or "its duly authorised agent". Although the clause containing the suretyship obligation was not in a particularly inconspicuous place and appeared directly above his signature, Tebbutt J was not convinced that the defendant had necessarily seen and read it. The fact that the signatory had sufficient time to read the document did not affect the position (591). The plaintiff should have alerted the defendant to the unusual obligation placed on him as no one would reasonably expect to be bound as a surety at a stage where he signs an application for credit facilities which could be accepted or rejected (591–592; but see Sharrock "Inappropriate wording in a contract: a basis for the defence of iustus error?" 1989 *SALJ* 462).

In commenting on the *Keens* case, Sharrock stated that the question that should have been asked was whether the signatory had been misled by the clause which preceded the terms upon which the credit facilities would be granted (*idem* 461). This clause provided that the applicant was binding itself only to

these terms. (In addition, there was a clause purporting to bind the signatory (the defendant) in his personal capacity as surety and co-principal debtor with the applicant company.) According to Sharrock,

> "[t]he fact that a particular clause or term in the document signed by the signatory would have misled a reasonable man is irrelevant if the signatory did not actually read and absorb it" (*ibid*).

We agree that the fact that a reasonable man would have been misled is irrelevant. The signatory himself must have been misled. If, however, Sharrock is suggesting that the signatory could not have been misled by a specific term if he has not actually read that particular term, we cannot agree. The signatory could have scanned the document and could have been misled by its heading and general layout. As a result, he could have signed the document under the impression that there were no onerous clauses binding him personally.

In *Diners Club v Thorburn supra* Burger AJ was of the view that it is a sound principle that a party who drafts a document in such a manner as to create a trap containing onerous clauses which would not reasonably be expected by the other party, would be to blame (875). In this case the respondent, an employee of the applicant company, signed an application for a Diners Club Air Travel Card. This form included a clause purporting to impose personal liability on the respondent as a signatory. After considering the layout of the form, Burger AJ found that it had not been drafted in such a way as to mislead the signatory. The judge regarded it as decisive that all the undertakings were contained in one clause and that the signatory had to sign immediately below this clause. He found that if the signatory was interested in what he was signing, all he had to do was to read the clause which appeared directly above his signature (875). The judge distinguished this case from the *Keens Group* case *supra*, which was relied upon by counsel for the respondent, on two grounds. First of all, in the *Keens Group* case the suretyship undertaking was contained in a clause separate from the other undertakings, whereas in the *Thorburn* case all the undertakings were together in one clause. Secondly, in the *Thorburn* case the signatory was required to sign directly below the offending clause, which was not the case in *Keens Group* (875).

This matter is by no means settled, as evidenced by the judgment in *Diners Club v Livingstone*. As said, in this case an application form (the Diners Club Corporate Account Enrolment Form) signed by the defendant contained a clause (in incredibly small print) binding him, the signatory, as surety and co-principal debtor. It was submitted on behalf of the defendant that the application form was drafted in such a way as to mislead him and that he therefore did not realise that it also contained a suretyship obligation. He never intended to sign a suretyship and, had he been aware of the existence of the offending clause, he would not have signed the form (495).

Labe J described the layout of the form. The first section requested details relating to the company and the place where the signatures were to be appended appeared to relate simply to the company itself. The name of the company was required to be printed or stamped on the document and thereafter two "authorised signatories" had to sign on behalf of the company. Under the section headed "Corporate Cards – special terms and conditions" at the back of the form,

certain conditions appeared in very small print. These conditions related to the liability of the company applying for the card and the cardholder, without any reference to the potential personal liability of the signatories of the form (495).

The judge found that the layout of the application form as a whole was misleading. A person signing the form may be deceived into believing that he was simply applying for a card on behalf of the company and that only the company was being considered as a potential Diners Club Corporate Account holder (495). There was an obligation on the plaintiff to alert the defendant to the possibility of personal liability if he signed the application form. Failure to do so may reasonably have resulted in the defendant's signing the application form without being aware of the existence of the suretyship obligation (496). (Even if a single signature can be construed as binding a person in two capacities simultaneously, it may be argued that the signatory's intention as to the capacity in which he binds himself should be decisive.)

Labe J also referred to *Diners Club v Thorburn supra* and quoted from it in some detail. He disagreed with Burger AJ's interpretation of the application form for a number of reasons. He criticised Burger AJ, first of all, for not treating the form as a whole; secondly, for not considering the conditions which appeared on the back of the application form relating to companies; and finally, for ignoring the fact that the signature required was clearly one on behalf of the company only (496–497). The application for summary judgment was therefore dismissed.

The judgment of Labe J in *Diners Club v Livingstone* centred on his assessment of the application form. Although this point was not specifically raised in the present case, it should be remembered that the document was simply an application which could be rejected or accepted in the discretion of Diners Club. No one would reasonably anticipate incurring the obligations of a surety and co-principal debtor when he signs an application for credit facilities (see *Keens Group supra* 591; cf Sharrock 1989 *SALJ* 462). Furthermore, it may be purely fortuitous who actually signs the application form (see eg *Kempston Hire supra*). It is submitted that Diners Club should have drawn Livingstone's attention to the fact that the application form contained a clause binding him in his personal capacity. Where an application for a credit card has already been accepted and the cardholder signs the back of the card, after having received the conditions relating to the card, the position may be different. Perhaps it is arguable that a cardholder could reasonably expect to be personally liable for obligations incurred by his use of the credit card. But even then it must be clear from the conditions that he is binding himself in his personal capacity. The way in which the conditions are framed should not be such as to mislead him into believing that he is simply binding the company.

In *Diners Club v Livingstone* the court seems to have followed the *justus error* approach. Labe J looked at whether Livingstone's mistake in believing that he was simply signing an application form and not also binding himself as a surety and co-principal debtor was reasonable or not, taking into account the get-up of the document. Perhaps to be more in line with the approach followed by the

Appellate Division in *Sonap Petroleum supra*, Labe J should have focused his enquiry on whether Diners Club was reasonable in relying on Livingstone's apparent consent. In *Sonap Petroleum*, Harms AJA stated that generally the law "concerns itself with the external manifestations, and not the workings, of the minds of parties to a contract" (239). However, where one of the parties alleges a lack of consensus, the court will apply the reliance theory to establish whether a contract was concluded. In terms of the reliance theory, the decisive question is whether the party whose actual intention did not conform to the common intention expressed, led the other party, as a reasonable man, to believe that his declared intention represented his actual intention (239; see *Smith v Hughes* 1871 LR 6 QB 597 607; *George v Fairmead supra* 471; *Steyn v LSA Motors Ltd* 1994 1 SA 49 (A) 61; Hutchison and Van Heerden 1987 *SALJ* 528). Where there is no *prima facie* contract, it would appear, according to Reinecke, that the reliance theory is applied directly and the party who asserts that there was indeed a contract bears the onus of proving that his belief in the existence of the contract was reasonable (1994 *TSAR* 378). However, where there is *prima facie* consensus (eg, where the parties have appended their signatures to a document) the *justus error* approach, which is an indirect application of the reliance theory, seems to be appropriate (*ibid*). According to Reinecke ("Regstreekse of onregstreekse toepassing van die vertrouensteorie?" 1989 *TSAR* 511), the underlying difficulty with the *justus error* approach is that it is not a basis for contractual liability, but simply a means of establishing when a person will not be contractually liable. The mistaken party would be required to prove that the reliance of the other party on the appearance of consent was unreasonable (*idem* 510; see also Reinecke 1994 *TSAR* 378).

If the reliance theory were to be applied indirectly to the facts of *Diners Club v Livingstone*, the question would be whether, even if Livingstone had created the impression that he intended to be bound, it was reasonable for Diners Club to believe that Livingstone's declared intention represented his actual intention. The answer to this would depend on the court's assessment of whether the document was misleading or not. That is precisely the question which Labe J addressed in his judgment. Although he construed the defence as being that of *justus error* and dealt with the issues on that basis, it is unfortunate that he did not place his judgment on a firm theoretical basis.

In conclusion, it is submitted that a reasonable man in Diners Club's position would not have relied on Livingstone's signature as reflecting his actual intention. It was the conduct of Diners Club in drafting the form in a misleading way which led Livingstone not to expect to find a clause binding him as surety and co-principal debtor in the application form and therefore to sign it. Thus even if one accepts that Diners Club was *bona fide*, Livingstone's conduct in signing the form was not the cause of Diners Club's reliance that consensus had been reached. Diners Club was the author of its own misfortune and for this reason Livingstone was not bound.

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GEEN VERGOEDING VIR BEWUSTELOSE EISERES

Collins v Administrator, Cape 1995 4 SA 73 (K)

1 Feite en beslissing

As gevolg van nalatige optrede deur die personeel van die Tygerberg-hospitaal het Lee-Anne, 'n dogtertjie van 16 weke, onomkeerbare breinskade opgedoen. Haar tragiese toestand word soos volg deur die hof opgesom (76B):

> "Although her brainstem function is sufficient to maintain adequate ventilation and circulation she has no intellectual function. She has no awareness of environmental stimuli and no apparent awareness of herself. There is no hope of recovery and she will in all probability die within the next few years."

Die belangrikste vraag waaroor die hof moet beslis, is of die verweerder aanspreeklik is vir die betaling van die bedrag van R200 000 wat namens Lee-Anne geëis word as vergoeding vir pyn, lyding, skok, ongemak en verlies van lewensgenietinge. Na oorweging van die gesag kom regter Scott tot die gevolgtrekking dat hy 'n funksionele benadering moet toepas ingevolge waarvan die toekenning van vergoeding vir persoonlikheidsnadeel slegs geregverdig is vir sover die geldbedrag 'n "nuttige rol" kan speel (95C). Aangesien, volgens die hof, geen geldbedrag *in casu* so 'n rol kan vervul nie, hoef hy geen vergoeding toe te ken nie: "The claimant, by reason of her condition, is in truth incapable of being compensated by a monetary award" (95C).

Alhoewel 'n mens die hof gelyk moet gee dat die toekenning van R200 000 of enige groot bedrag geld nie geregverdig sou wees nie, wyk die hof af van die tot nou toe geldende posisie wat min of meer in ooreenstemming is met die oplossing in belangrike vergelykbare regstelsels waarvolgens vergoeding in analoë gevalle nie heeltemal geweier word nie. Die hof volg in effek die "oplossing" van Van der Merwe en Olivier (*Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 195) wat ook van mening is dat in sodanige geval daar geen ruimte vir enige vergoedingsbedrag is nie.

2 Basiese kritiek

Die uitspraak van die hof is om verskillende redes nie aanvaarbaar nie. Alhoewel 'n mens die hof gelyk kan gee oor 'n verskeidenheid kwessies (bv dat daar geldige besware teen aspekte van die Engelse reg in hierdie verband is; dat al die argumente in die twee gerapporteerde Suid-Afrikaanse uitsprake waarin vergoeding in derglike gevalle toegeken is, nl *Gerke NO v Parity Insurance Co Ltd* 1966 3 SA 484 (W) en *Reyneke v Mutual & Federal Insurance Co Ltd* 1991 3 SA 412 (W), nie korrek is nie; dat vergoeding vir verlies van lewensverwagting 'n anomalie is; en dat die funksie van 'n vergoedingsbedrag van belang is) getuig te veel van die hof se redenasies *in casu* van onvoldoende navorsing en besinning.

Ek het die hele problematiek van persoonlikheidsnadeel en vergoeding by bewustelose eisers al by verskeie geleenthede behandel en dit is dus onnodig om

hier opnuut na alle relevante kwessies te verwys (vgl in die algemeen Visser *Kompensasie en genoegdoening volgens die aksie weens pyn en leed* (LLD-proefskrif Unisa 1980) 72–90; Neethling, Potgieter en Visser *Deliktereg* (1996) 243–247; Visser en Potgieter *Skadevergoedingsreg* (1993) 97–99; Visser "Genoegdoening in die deliktereg" 1988 *THRHR* 480; "Die aard van persoonlikheidsnadeel by skending van die fisies-psigiese integriteit" 1981 *THRHR* 130–135; vgl ook Neethling, Potgieter en Visser *Neethling's Law of personality* (1996) 57–59).

'n Nuwe relevante faktor wat intussen bygekom het, is die verskansing van fundamentele menseregte in hoofstuk 3 van die Grondwet van die Republiek van Suid-Afrika Wet 200 van 1993 waarvolgens grondwetlike erkenning verleen word aan persoonlikheidsregte op onder meer menswaardigheid (a 10) en die vryheid en sekuriteit van die persoon (a 11). In die lig van die "gees en strekking" van hierdie bepalings (a 35(3)) wat aangewend moet word by die toepassing van die gemenereg, val dit vreemd op dat regter Scott nog kan argumenteer dat om selfs 'n geringe simboliese bedrag aan Lee-Anne toe te ken, dieselfde is as om geld aan 'n dooie persoon te betaal om hom te "kompenseer" vir die verlies van sy lewe (93H)! Lee-Anne was ten tyde van die verhoor beslis nog nie dood nie en 'n regstelsel wat haar in sekere opsigte soos 'n dooie behandel, is nie net onrealisties nie, maar minag haar menslike waardigheid op onverskoonbare wyse (sien ook Claassen R in *Reyneke v Mutual and Federal Ins Co Ltd supra* 425). Ingevolge die menseregte-bedeling wat tans in Suid-Afrika die toon aangee, word die lewens van die afskuwelikste moordenaars en verkragters gespaar (bv *S v Makwanyane* 1995 3 SA 391 (CC)) en moet die belastingbetaler die koste dra om hierdie tipes vir dekades op menswaardige en gerieflike wyse in gevangenisse te laat aanhou. Dit is daarom des te moeiliker om te glo dat die reg nie eers simboliese genoegdoening aan iemand soos Lee-Anne beskikbaar kan maak nie (sien par 6 hieronder).

3 Objektiewe en subjektiewe elemente van persoonlikheidsnadeel

Persoonlikheidsnadeel het sowel objektiewe as subjektiewe elemente (vgl Neethling, Potgieter en Visser *Deliktereg* 236–237 241). Hierdie stelling weerspieël bloot die werklikheid en berus nie op die een of ander dogmatiese beskouing of die kasuïstiek van die Engelse reg nie (sien oor lg die hof se opmerkings 94D). Trouens, die appèlafdeling het uitdruklik aanvaar dat persoonlikheidsnadeel uit meer as 'n subjektiewe gevoelskrenking kan bestaan en hierdie feit gebruik ter ondersteuning van die erkenning van persoonlikheidsregte by regspersone waar gevoelens geen rol kan speel nie (sien *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 2 SA 451 (A) 462; vgl verder Neethling en Potgieter "Die reg op privaatheid: regspersone, onregmatigheid en die openbare inligtingsbelang" 1993 *THRHR* 704; Visser 1981 *THRHR* 123; *Neethling's Law of personality* 78).

Sonder behoorlike inagneming van die objektiewe en subjektiewe elemente by persoonlikheidsnadeel as gevolg van 'n liggaamlike aantasting, is dit kwalik moontlik om 'n korrekte uitspraak te kan maak oor die *funksie* wat vergoeding vir sodanige nadeel moet vervul. Die indruk wat die hof *in casu* laat, is dat hy nie bloot die funksionele vergoedingsteorie gebruik nie maar 'n onvanpaste subjektivistiese siening van persoonlikheidsnadeel. Dit is daarom nie verbasend nie dat hy aanvegbare gevolgtrekkings oor die vergoeding van sodanige nadeel maak.

4 Die funksionele teorie by kompensasie

Die hof plaas heelwat klem op die sogenaamde funksionele benadering tot die vergoeding van persoonlikheidsnadeel waarvolgens 'n toekenning net geregverdig is in die mate waarin dit 'n "useful purpose" kan vervul (92I 93F 95C). In 'n bekende uitspraak oor hierdie kwessie (*Southern Insurance Association Ltd v Bailey NO* 1984 1 SA 98 (A); vgl ook *Hoffa v SA Mutual Fire and General Insurance* 1965 2 SA 944 (K) 954 oor die funksie van vergoeding) het die appèlafdeling slegs daarop gewys dat die funksie van 'n vergoedingsbedrag *saam met al die ander omstandighede van die geval* oorweeg behoort te word. Al was die jong eiseres se omstandighede in *Bailey* nie presies dieselfde as die van Lee-Anne in die huidige geval nie, kan die appèlafdeling se opmerkings oor die funksie van vergoeding kwalik as 'n onbelangrike *obiter dictum* geïgnoreer word. Die appèlafdeling se uitspraak maak dit duidelik dat die funksionele teorie by kompensasie nie ten koste van ander relevante oorwegings aangewend kan word nie. *In casu* volg regter Scott egter 'n benadering waarvolgens alle ander omstandighede deur die feit dat hy geen nuttige rol in enige vergoedingsbedrag kan bespeur nie, verdring word.

Daar is in ieder geval heelwat vrae ten aansien van die werking van die funksionele teorie. Hoe eienaardig hierdie benadering soms is, blyk uit 'n voorbeeld wat die hof self gee:

> "A conscious person who, by reason of his injuries, is incapable of deriving any advantage from a monetary award can *notionally* obtain some consolation from the receipt of money and from being able, if he pleases, to give it away. An unconscious person cannot even have this consolation" (92H; my beklemtoning).

Eerstens bewys die kwalifikasie deur die woord *notionally* (denkbeeldig, idieel, begriplik) van die vertroosting ("consolation") wat die ontvanger van die geld in die hof se voorbeeld verkry, dat dit nie noodwendig om *werklike* genot of vertroosting gaan nie (vgl ook die woorde "if he pleases"). Alles berus dus in effek maar op 'n tipe fiksie dat daar genot vir die aanvanklike ontvanger van die geld bereik kan word. Dit laat onmiddellik die vraag ontstaan waarom hierdie fiksie nie ook by 'n *bewustelose eiser* aangewend kan word nie: As Lee-Anne se verstandelike funksies nie deur die verweerder se nalatige optrede vernietig is nie, sou sy nie gelukkig gewees het deurdat haar ouers 'n bietjie geldelike voordeel uit haar beserings trek nie? (Dit is in elk geval nie die oplossing wat ek voorstaan nie – sien par 6 hieronder.)

Tweedens is regter Scott se voorbeeld ook kwalik te versoen met sy houding dat dit eintlik maar net Lee-Anne se ouers is wat benadeel word as daar nie vergoeding vir haar persoonlikheidsnadeel toegeken word nie (94G). As ernstig beseerde eisers vir wie geldelike vergoeding self niks meer positief kan doen nie, dit tog kan ontvang mits hulle nog die vermoë het om te besluit om dit aan iemand anders te gee, waarom dan nie maar die knoop deurhak en 'n bewustelose eiser deur 'n toekenning in staat stel om dit deur die werking van die *erfreg* aan sy erfgename te besorg nie?

Wat die funksionele teorie alles kan insluit, word ook aangetoon deur die volgende voorbeeld van regter Scott:

> "Where, as a result of his injury, a plaintiff is mentally retarded even to the extent that he may have no insight into his loss, provided only that he has awareness, an

> award of non-pecuniary damages can be utilised for his benefit even if the expenditure is frivolous and does no more than amuse him" (93H).

Hierdie voorbeeld beteken dat die aanwending van die geld nie noodwendig verband hoef te hou met die eiser se subjektiewe ervaring van die objektiewe aspek van sy persoonlikheidsnadeel nie. In so 'n (tragiese) geval gaan dit egter duidelik nie meer om kompensasie vir 'n bepaalde nadeel nie aangesien die eiser dit nie so ervaar nie. Hierdie voorbeeld toon dat regter Scott te veel van die bewussyn van die eiser maak.

Benewens die kwessies hierbo na verwys, maak die funksionele vergoedingsteorie soos deur regter Scott toegepas klaarblyklik diskriminasie moontlik tussen eisers wat weens vermoënskade, en eisers wat weens nie-vermoënskade (persoonlikheidsnadeel) eis. Terwyl dit duidelik is dat die reg nie belangstel in wat 'n eiser met sy vergoedingsbedrag as gevolg van *vermoënskade* doen nie (bv *Dhlamini v Government of the RSA* Corbett en Buchanan *The quantum of damages in bodily and fatal injury cases* III 583; Visser 1988 *THRHR* 485; Visser en Potgieter 159) – en ook waarskynlik nie by 'n toekenning op grond van *iniuria* nie – verwag die funksionele teorie dat die eiser die hof moet kan oortuig oor die aanwending van die vergoedingsbedrag by liggaamlike beserings. Oor hierdie (onbillike?) diskriminasie laat Stoll *Haftungsfolgen im bürgerlichen Recht* (1993) 358 hom soos volg uit:

> "Wohl aber wird die Festsetzung einer substantiellen Entschädigung als ausgeschlossen betrachtet, solange keine sinnvolle Verwendung der Entschädigung vorstellbar ist, auf welche sie ausgerichtet werden kann. Hierauf ist zu erwidern, daß bei Verletzung eines Vermögensgutes auch nicht danach gefragt wird, ob und auf welche Weise eine sinnvolle Verwendung der als Kompensation geleisteten Entschädigung möglich ist. Die Einführung zusätzlicher Kriterien für die Ersatzfähigkeit von Nichtvermögensschäden *läuft auf eine Diskriminierung dieser gerade für schwerste* Verletzungen typischen Schäden hinaus, was der verfassungsrechtlichen *Gewährleistung des Rechts auf körperliche Unversehrtheit zuwiderläuft*."

Hierdie standpunt kan waarskynlik ook geopper word in die lig van die Suid-Afrikaanse bepalings wat onbillike diskriminasie verbied (a 8 van die Grondwet).

Nog 'n geval waar die funksionele teorie klaarblyklik nie goed werk nie, is by die vergoeding aan regspersone vir skending van hulle persoonlikheidsregte (genoegdoening vir persoonlikheidsnadeel) (bv *Caxton Ltd v Reeva Forman (Pty) Ltd* 1990 3 SA 547 (A) 575). Hoe word die eiser – 'n abstrakte regspersoon – "gelukkig gemaak" deur die ontvangs van 'n bedrag genoegdoening? Of watter ander persoonlike voordeel van watter aard ook al is daar vir die eiser? Tot wie se voordeel is die toekenning werklik? Hierdie vrae is slegs bedoel om daarop te wys dat die besondere klem op die funksie van 'n vergoedingsbedrag klaarblyklik nie orals in ons deliktereg van belang is nie. (Selfs by vermoënskade kan die funksionele teorie nie altyd aangewend word nie. So kan 'n skadevergoedingsbedrag bv nie help om 'n unieke skildery of unieke juwele wat vernietig of gesteel is, te vervang nie. Dit bied hoogstens 'n tipe onvolmaakte geldelike ekwivalent.)

5 Straf en vergoeding

In casu wys die hof daarop dat daar nie ruimte vir straf in ons deliktereg is nie (94C; sien in die algemeen oor straf in deliktuele verband Visser "Genoegdoening met betrekking tot nie-vermoënskade" 1983 *TSAR* 68–73; 1988 *THRHR*

486–489; Stoll 55–78). Nietemin laat die hof na om te verwys na die gevalle ingevolge die *actio iniuriarum* waar daar 'n duidelike strafelement is (bv *Bruwer v Joubert* 1966 3 SA 334 (A) 338; *Buthelezi v Poorter* 1975 4 SA 608 (W) 617; *Pont v Geyser* 1968 2 SA 545 (A) 558; *South African Associated Newspapers v Yutar* 1969 2 SA 442 (A) 458). Straf is dus inderdaad deel van ons deliktereg – weliswaar by die *actio iniuriarum* waar genoegdoening 'n rol speel by skade wat gewoonlik nie-kompenseerbaar is (net soos by persoonlikheidsnadeel van permanent bewustelose eisers wat ook nie kompenseerbaar is nie). Nog 'n geval waar 'n verweerder in 'n sin gestraf word (waar hy dus meer betaal as die skade van die eiser), is waar 'n *ex gratia*-betaling aan 'n eiser nie as voordeel teen sy skadevergoedingsbedrag verreken word nie (bv *Santam Versekeringsmaatskappy Bpk v Byleveldt* 1973 2 SA 146 (A)).

Die hof gebruik die afwysing van straf in die deliktereg om die voorstel (deur Visser en Potgieter 99) te verwerp dat 'n klein bedrag "vergoeding" aan 'n permanent bewustelose eiseres soos Lee-Anne toegestaan word as 'n tipe simboliese herstel van die ernstige privaatregtelike onreg wat haar aangedoen is (94B). Nogtans verduidelik die hof nie hoe die toekenning van so 'n nominale bedrag as "straf" deur die verweerder ervaar sal word nie. In die geval van 'n kapitaalkragtige verweerder sou 'n veroordeling tot die betaling van 'n bedrag van byvoorbeeld R500 as simboliese en objektiewe genoegdoening kwalik 'n geldelike straf wees. Simboliese vergoeding is beslis nie "penal damages" waarin die hof so 'n afkeer openbaar nie. Word dit as nominale skadevergoeding gesien, kan dit aanvaarbaar wees aangesien ons reg waarskynlik steeds vir so-iets voorsiening maak (bv *Bhika v Minister of Justice* 1965 4 SA 399 (W); *Fraser v De Villiers* 1981 1 SA 378 (D); *Winterbach v The Master* 1989 1 SA 922 (OK)).

6 Evaluasie

In die saak onder bespreking moet die hof gelyk gegee word dat daar geen grond sou wees om die bedrag van R200 000 toe te staan wat namens Lee-Anne geëis is nie. Vir pyn en skok wat sy nie ervaar het nie, bied ons reg tereg nie vergoeding nie. Wat verlies aan lewensgenietinge betref (wat ook 'n objektiewe element het), kan tereg geargumenteer word dat 'n groot bedrag nie die doel kan dien om 'n teenwig vir haar ongelukkigheid te vorm of haar kan help om die terugslag te oorwin nie. Nogtans is die hof se gevolgtrekking dat ingevolge ons reg geen bedrag hoegenaamd vir die ernstigste persoonlikheidsnadeel denkbaar toegeken kan word nie, totaal onaanvaarbaar en stuur waarskynlik 'n verkeerde sein aan die gemeenskap. Óf die hof se beoordeling van ons deliktereg, óf ons deliktereg self is foutief. Dit wil lyk of eersgenoemde die geval is.

Dit staan vas dat 'n toekenning vir persoonlikheidsnadeel 'n geldige doel moet hê. Daardie doel hoef egter nie bloot die verwekking van subjektiewe geluksgevoelens as teenwig vir ongelukkigheid te wees nie (sien in die algemeen Visser "Kompensasie van nie-vermoënskade" 1983 *THRHR* 43). Die feit dat 'n eiser weens beserings deur die verweerder veroorsaak nie in staat gaan wees om die geld subjektief te geniet nie, beteken dus nie dat die deliktereg *functus officio* is nie. Vergoeding as genoegdoening (ook ingevolge die aksie weens pyn en leed – sien Visser en Potgieter 179–180) kan ook plaasvind. Genoegdoening (vgl in die algemeen hieroor Pecher 1971 *Archiv für die civilistische Praxis* 60 ev)

beteken nie bloot die verwekking van 'n psigiese gevoel van genoeë of bevrediging by die slagoffer van 'n onregsdaad nie. In die wydste sin beteken genoegdoening ook regshandhawing (1983 *TSAR* 55) en dit is by uitstek dié funksie wat relevant is indien werklike kompensasie in gevalle van ernstige liggaamlike beserings wat bewusteloosheid, kranksinnigheid of persoonlikheidsverandering tot gevolg het, nie meer bereikbaar is nie. Die toekenning van 'n simboliese bedrag – waarvan die kwantum uiteraard van geval tot geval kan wissel – moet dien tot herstel van die onreg. Dit geskied deurdat die verweerder veroordeel word om dit te betaal en sowel die familie en vriende van die eiser as die breë gemeenskap behae en tevredenheid daarin kan skep dat die skuldige verweerder nie skotvry afkom nie en dat die reg gepas reageer op die privaatregtelike onreg teenoor die ernstige beseerde eiser.

Hierdie tipe genoegdoening is nie altyd simboliese straf nie. 'n Voorbeeld waar die klem bloot val op die verwekking van tevredenheid by die gemeenskap, is waar 'n versekeraar namens die dader moet betaal en die dader dus nie eers self veroordeel word nie.

Die situasie wat regter Scott egter skep, is dat die eiser ten onregte soos 'n dooie behandel word. 'n Mens kan beswaarlik glo dat die fundamentele reg op menslike waardigheid (a 10 van die Grondwet) en die reg op sekuriteit van die persoon (a 11) so 'n resultaat kan veroorloof. Die (ironiese) uitdrukking, "it is cheaper to kill than to maim" (91G), waarna soms verwys word, beskryf die posisie nie korrek nie en kan nie relevant wees nie aangesien eisers soos Lee-Anne nie gedood is nie.

As 'n eiseres soos Lee-Anne nie eers 'n simboliese genoegdoeningsbedrag in 'n geval soos die onderhawige mag ontvang nie, vervul dit 'n mens met weersin in die regstelsel. Hopelik sal die appèlafdeling die regsposisie by die eersvolgende geleentheid opklaar.

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VADERLIKE OMGANGSREG, DIE BUITE-EGTELIKE KIND EN DIE WERKLIKHEIDSONDERBOU VAN GEREGTIGHEID

B v S 1995 3 SA 571 (A); BVerfG, Beschl v 7/3/1995, NJW 1995 2155; Keegan v Ireland EHRM 26 Mei 1994, CEDH, Series A vol 290, 1995 NJ 247

1 Inleiding

In hierdie drie belangwekkende sake, onderskeidelik van die Suid-Afrikaanse appèlhof, die Duitse konstitusionele hof (*Bundesverfassungsgericht; BVerfG*) en die Europese Hof vir die Regte van die Mens (EHRM), het die vraagstuk van die

omgangsreg – of ten minste die toekomstige moontlikheid daarvan – van die ongehude vader met sy buite-egtelike kind weer eens onder die vergrootglas gekom. Hierdie vraagstuk word, veral teen die agtergrond van die problematiek wat in dié sake aangespreek is, in hierdie bydrae onder die loep geneem.

Dit moet ten aanvang gestel word dat 'n groot getal buite-egtelike kinders hedendaags uit konkubinate, dit wil sê langtermyngerigte saamwoonverhoudings, gebore word. Die feitestel van 'n saak wat op 26 Mei 1977 (NJ 1978 417) voor die Nederlandse Hoge Raad gedien het, illustreer die onderhawige problematiek treffend. Uit die huwelik van A en B word C gebore. A en B skei intussen maar gaan voort om saam te woon. 'n Kind D word uit dié verhouding gebore. A het uit hoofde van die feit dat C binne huweliksverband gebore is 'n omgangsreg met hom of haar. Met D het hy nie sonder meer (in ons reg) so 'n reg nie (sien in die algemeen Labuschagne "Biogenetiese vaderskap: bewysregtelike en regpluralistiese problematiek" 1984 *De Jure* 58 332). Hierdie reëling is strydig met die sosiologiese beleweniswerklikheid van die betrokke partye, naamlik die ouers en kinders. Trouens, dit stel sinlose en mensverwyderde reg daar, indien dit hoegenaamd die begrip "reg" waardig is.

2 Terminologie

Met verwysing na slegs Engelsregtelike gesag kom appèlregter Howie in *B v S* 581–582 tot die volgende slotsom:

> "The *dicta* in these cases are clear and persuasive. They show that no parental right, privilege or claim as regard access will have substance or meaning if access will be inimical to the child's welfare. Only if access is in the child's best interests can access be granted. The child's welfare is thus the central, constant factor in every instance. On that, access is wholly dependent. It is thus the child's right to have access, or be spared access, that determines whether contact with the non-custodian parent will be granted. Essentially, therefore, if one is to speak of an inherent entitlement at all, it is that of the child, not the parent."

In Nederland is tot 1971 van 'n "bezoekrecht", in navolging van die Franse "droit de visite", gepraat. Sedertdien word die woord "omgangsrecht" gebruik (Doek "De 'definitieve' regeling van het omgangsrecht: een weerbarstige kwestie" 1992 *FJR* 26). In Duitsland word die woord "Umgangsrecht" gebruik. Die begrippe "toegangsreg" en "right of access" is misleidend. Die omgangsreg is wesenlik 'n interaksiereg wat in onderhawige verband (gelyktydig) 'n reg van beide vader en kind is en slegs kan wees (sien Labuschagne "Persoonlikheidsgoedere van 'n ander as regsobjek: opmerkinge oor die ongehude vader se persoonlikheids- en waardevormende reg ten aansien van sy buite-egtelike kind" 1993 *THRHR* 416 428–429). Appèlregter Howie se opmerkings is onvanpas en mis die wese van die vaderlike omgangsreg.

3 Menseregtelike dimensie

Artikel 8(1) van die Grondwet van die Republiek van Suid-Afrika 200 van 1993 bepaal tans dat elke persoon die reg op gelykheid voor die reg en op gelyke beskerming deur die reg het. In artikel 8(2) word daarop gewys dat nie teen 'n persoon op grond van sy sosiale herkoms gediskrimineer mag word nie. Blykens artikel 30(1)(b) het elke kind die reg op ouerlike sorg. Volgens artikel 30(3) word die beste belang van die kind in alle gevalle rakende hom of haar voorop

gestel. Die presiese veld wat hierdie bepalings dek, is nog nie deur ons howe vasgelê nie. Ek dink dat 'n mens, in die lig van die universele aard van menseregte, kan aanvaar dat dit op een lyn met internasionale en interregionale aktes van menseregte uitgelê sal word (sien Labuschagne "Doelorganiese regsnormvorming: opmerkinge oor die grondreëls by die uitleg van 'n akte van menseregte" 1993 *SA Publiekreg* 127).

Daar is aanvanklik oral teen buite-egtelike kinders en hulle ouers, veral ongehude vaders, gediskrimineer maar hulle posisie is voortdurend besig om te verbeter (sien Labuschagne 1993 *THRHR* 418–428; Salgo "Zur Stellung des Vaters bei der Adoption seines nichtehelichen Kindes durch die Mutter und deren Ehemann" 1995 *NJW* 2129; Doek 26–28).

In *B v S* 575 579 wys appèlregter Howie daarop dat die vaderlike omgangsreg uit ouerlike gesag ("parental authority") ontspring en dat die ongehude vader nie regtens in sodanige gesagsverhouding tot sy buite-egtelike kind staan nie. Volgens artikel 6(2)(1) van die Duitse *Grundgesetz (GG)* kom die reg en plig van die versorging en opvoeding van 'n kind die ouers toe. Die *BVerfG NJW* 1995 2156 beslis in navolging van vroeëre gewysdes dat die ongehude vader van 'n buite-egtelike kind wat met sy of haar moeder saamleef of saam met haar die opvoedingstaak waarneem 'n artikel 6(2)(1) *GG*-regshebbende is (sien ook Salgo 2130). Artikel 8 van die Europese Verdrag vir die Regte van die Mens (EVRM) bepaal soos volg:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, 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."

In *Keegan v Ireland* par 44–45 beslis die EHRM teen dié agtergrond soos volg:

> "The Court recalls that the notice of the 'family' in this provision is not confined solely to marriage-based relationships and may encompass other *de facto* 'family' ties where the parties are living together outside of marriage . . . A child born out of such a relationship is *ipso iure* part of that 'family' unit from the moment of his birth and by the very fact of it. There thus exists between the child and his parents a bond amounting to family life even if at the time of his or her birth the parents are no longer cohabiting or if their relationship has then ended . . . In the present case, the relationship between the applicant and the child's mother lasted for two years during one of which they co-habited. Moreover, the conception of their child was the result of a deliberate decision and they had also planned to get married. Their relationship at this time had thus the hallmark of family life for the purpose of Article 8. The fact that it subsequently broke down does not alter this conclusion any more than it would for a couple who were lawfully married and in a similar situation. It follows that from the moment of the child's birth there existed between the applicant and his daughter a bond amounting to family life."

Die Nederlandse howe stel die vraag of 'n ongehude vader 'n omgangsreg met sy buite-egtelike kind het onderworpe aan die vraag of 'n gesinslewe ("family life") tot stand gekom het of nie (Hoge Raad 1991-01-04, NJ 1991 253; Hoge Raad 1993-06-11, NJ 1993 560; Labuschagne "Aanvaarding van verantwoordelikhede as ontstaansbron van 'n omgangsreg vir 'n ongetroude vader met sy buite-egtelike kind" 1995 *TSAR* 162–164; Labuschagne "Vaderlike omgangsreg

en die toepassing van die vermoede *pater est quem nuptiae demonstrant* op 'n konkubinaat" 1994 *Obiter* 266–267). Die EHRM het in *Keegan v Ireland* par 56–58 beslis dat die Ierse regsreël dat 'n ongehude vader nie inspraak het in die aannemingsprosedure ten aansien van sy buite-egtelike kind nie, in stryd is met artikel 6(1) EVRM wat bepaal dat

> "[i]n the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing . . . by an independent and impartial tribunal . . ."

Trouens, die EHRM ken aan Keegan ook genoegdoening van IR £12 000 toe ter goedmaking van die trauma, ongerustheid en frustrasie wat hy in die regsprosesse moes deurmaak (par 65–71). Die *BVerfG NJW* 1995 2156–2157 bevind in dieselfde trant dat artikel 1747(2) *BGB* wat wegdoen met die ongehude vader se toestemming by 'n aannemingsprosedure van sy buite-egtelike kind onkonstitusioneel is as synde in stryd met artikel 6(2)(1) *GG* (sien ook Salgo 2132). Kragtens artikel 18(4)(d) van die Wet op Kindersorg 74 van 1983 is slegs die moeder se toestemming by die aanneming van 'n buite-egtelike kind in Suid-Afrika 'n vereiste (sien ook Labuschagne 1993 *THRHR* 422).

4 Konklusie

In Europese lande word die regte van die ongehude vader wat sy verantwoordelikhede teenoor sy buite-egtelike kind aanvaar in 'n toenemende mate met dié van die gehude vader gelykgestel. In *B v S* 584–585 verklaar appèlregter Howie soos volg:

> "In addition it seems to me to be necessary to lay down that where a parental couple's access (or custody) entitlement is being judicially determined for the first time – in other words where there is no existing Court order in place – there is no *onus* in the sense of an evidentiary burden, or so-called risk of non-persuasion, on either party. This litigation is not of the ordinary civil kind. It is not adversarial. Even where variation of an existing custody or access order is sought, and where it may well be appropriate to cast an *onus* on the applicant, the litigation really involves a judicial investigation and the Court can call evidence *mero motu* . . . *A fortiori* that is so in the 'first time' situation. And it matters not in this regard whether the child concerned is legitimate or illegitimate."

Wat presies hiermee bedoel word, is vir my onduidelik. Wat gebeur in geval van twyfel? Is dit nie juis dan wanneer 'n bewyslas ter sprake is nie? Die resultaat van dié beslissing van die appèlhof is dat beheptheid met regstegnikaliteite en reëlrasionalisasie 'n sinvolle en sosiologies werklikheidsgetroue benadering tot die onderhawige problematiek verdring het. Binne die feitestel van die Nederlandse saak waarmee die onderhawige problematiek hierbo ter inleiding verduidelik is, blyk derhalwe uit die bestaande Suid-Afrikaanse reg (nog steeds) dat A (*ipso jure*) 'n omgangsreg met C het, maar nie met D nie. Slegs indien "bewys" kan word dat dit nie in C se beste belang is nie, kan A sy omgangsreg *ontneem* word. In D se geval sal "bewys" moet word dat dit in sy of haar beste belang is voordat 'n omgangsreg *gevestig* word. Daar bestaan gevolglik 'n werklikheidsvreemde en sinlose dispariteit tussen die regsposisies van C en D in dié verband. Ons appèlhof het die geleentheid om dit reg te stel, laat verbygaan en die geregtigheidstrein verpas. Geregtigheid moet in die sosiale werklikheid geanker wees anders verloor dit sy funksionele waarde. Trouens, dan is daar nie werklik meer sprake van geregtigheid nie. Aan regsekerheid, soos veral beliggaam in die presedenteleer, mag nooit 'n hoër status as aan geregtigheidsekerheid en

regsinvolheid toegeken word nie (sien ook Labuschagne "Die opkoms van die teleologiese benadering tot die uitleg van wette in Suid-Afrika" 1990 *SALJ* 573). Of dit nou 'n *obiter dictum* of wat ook al was, regter Van Zyl was in *Van Erk v Holmer* 1992 2 SA 113 (T) aan die hoë waardes van regstaatlikheid getrou.

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Ek het 'n werklike probleem, dat indien ek sou beslis dat die Hof wel 'n inherente diskresie het om 'n persoon anders as 'n advokaat toe te laat om vir 'n persoon, soos die beskuldigde, te verskyn, daardie beslissing dalk 'n beslissing van substantiewe reg gaan wees. Die vraag is of ek nie daardeur afbreuk doen aan die regtens beskermde regte van advokate om in die Hooggeregshof te verskyn nie. Ek meen egter dat hierdie 'n kwessie van prosedure is en dat dit nie substantiewe reg is nie. Ek wil my die geval voorstel waar 'n persoon oor 'n lang tyd verteenwoordig word deur 'n advokaat, bygestaan deur 'n prokureur en waar die advokaat om een of ander rede nie verder beskikbaar is nie. Dit mag vir die ander party van belang wees om voort te gaan met die saak en ek sou my bedink dat dit in belang van die regspleging in die geheel sou wees en in belang van die litigante in besonder, in 'n saak soos daardie, vir die Hof om wel die prokureur wat bevoeg en in staat is om die saak voort te sit, toe te laat om dit te doen. Daardie prosedurele reëling word gemaak in belang van die regspleging. Dit beteken egter nie dat 'n Hof voor die voet prokureurs kan toelaat om in die Hooggeregshof te verskyn nie. Dit sal duidelik 'n groot inbreuk maak op die regte van advokate. Daar moet kennelik buitengewone omstandighede bestaan (per Hartzenberg R in *S v Lombard* 1994 3 SA 217 (T) 223–224).

BOEKE

LANDLORD AND TENANT
by WE COOPER
Juta Cape Town Wetton Johannesburg 1994, vii and 387 pp
Price R139,00 (soft cover)

It is commendable that lawyers outside academia find time to publish, thus sharing their expertise with students and fellow practitioners. It is even more impressive when they continue to pursue their academic interest by updating original publications even after their elevation to the bench. In this regard, the second edition of *Landlord and tenant* by the eminent jurist Judge Cooper must be welcomed. Two decades have passed since the publication of the first edition, which means that this edition has undergone significant changes.

The format and division of the work have remained largely the same. However, chapter 25, which dealt with the provisions of the Liquor Act 30 of 1928, and Part 9 of the first edition, which covered The Rents Act 43 of 1950 (which has been replaced by the Rent Control Act 80 of 1976) have been omitted from this edition. Part 9 is replaced by an invaluable chapter 24 titled "Practice", which deals with aspects of civil practice concerning ejectment proceedings and other related matters.

It is interesting to note that the recently revived concept of *bona fides* was applied to the contract of lease by Cooper as early as 1972 as a requirement which could prevent a defendant from making a mockery of an ejectment order. Cooper emphasises the self-evident need to temper the lessee's right to raise the existence of a dispute about the magistrate's court's jurisdiction with the requirement that the dispute must be *bona fide*.

Chapter 5, which deals with "Rent", has been expanded to reflect the position regarding certainty of rent after *Proud Investments v Lanchem Inter* 1991 3 SA 738 (A). Chapter 9, titled "Maintenance", rectifies the erroneous reference made in the first edition (96) to a seller's liability for damages. The new edition of Cooper (109) also correctly reflects the opinion that, in principle, a lessor should be liable for all damage sustained by a lessee, if such damage results from the breach of the lessor's obligation to maintain the let premises in proper condition. The author categorically rejects the view that the lessor's duty in this regard constitutes an implied warranty.

Although Cooper does not deal explicitly with the latest question on lease, that is, whether the "huur gaat voor koop" rule grants a lessee a right of election to

discontinue the lease on the sale of the premises, he very positively states the law surrounding the "huur gaat voor koop" rule as protecting the lessee's existing rights. From the attitude reflected in his work, one is inclined to deduce that Cooper would support the election theory propagated in *Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd* 1994 1 SA 106 (D).

This recently revised edition of the standard text on the letting and hiring of immovable property in South Africa has been written with such clarity that it is easy to use and persuasively authoritative. It is an essential addition to all law libraries and valuable to both students and legal practitioners.

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STUDENT CASE BOOK ON BUSINESS ENTITIES

deur JT PRETORIUS, PA DELPORT, M HAVENGA en M VERMAAS (reds)

Juta Kaapstad Wetton Johannesburg 1994; xvi en 235 bl

Prys R49,00 + BTW (sagteband)

In die voorwoord van *Student case book on business entities* word daarop gewys dat hierdie boek vir voorgraadse regstudente en nie-regstudente (handelstudente) bedoel is; en verder dat alhoewel die keuse van hofsake wat in so 'n bundel opgeneem word in 'n sekere mate van eie opinie afhang, die doelwit van die skrywers was om net sake wat vir onderrigdoeleindes bruikbaar is, op te neem. Dit word ook duidelik gestel dat die boek spesifiek saamgestel is om Cilliers *et al Entrepreneurial law* aan te vul.

Die werk bestaan uit 'n voorwoord, inhoudsopgawe, vier dele en alfabetiese vonnisregister.

Die eerste deel handel oor die vennootskapsreg (1–50); dit word gevolg deur die maatskappyereg (51–226). Die derde deel bevat een vonnis oor die beslote korporasiereg (227) en die vierde deel twee vonnisse oor die reg insake besigheidstrusts (228–229).

In sommige gevalle word bloot net die toepaslike aanhaling uit 'n hofsaak weergegee, terwyl by ander sake ook 'n kort maar handige opsomming van die feite verskaf word.

Artikels 9, 10, 11 en 12 van die Wet op Openbare Rekenmeesters en Ouditeurs 80 van 1991 word ook volledig weergegee (208–210). Dit word egter nie in die inhoudsopgawe aangedui nie maar slegs in die alfabetiese lys van sake agter in die boek.

Hoewel hierdie 'n handige en bruikbare boek is, veral vir die nie-regstudent, sou die praktiese nut daarvan verhoog geword het indien 'n wyer seleksie gemaak is ten opsigte van die beslote korporasiereg, veral in die lig van die

doelwit van die publikasie, naamlik dat dit saam met *Entrepreneurial law* gebruik moet word. Ook wat die handels- of besigheidstrust aanbetref, kon 'n beslissing soos *Goodricke and Sons (Pty) Ltd v Registrar of Deeds* 1974 1 SA 404 (N) die waarde van die werk verhoog het.

Die proefleesgehalte van die werk is goed en slegs enkele en uiters geringe foute kom voor, soos verkeerde lettertipes (vii). Die drukwerk en tegniese afwerking is bevredigend hoewel 'n beter kwaliteit papier gebruik kon gewees het. Die gebruik van die minder goeie kwaliteit papier kan nietemin verskoon word in die lig van die bekostigbaarheid van die boek.

Hierdie werk behoort as handige studiehulpmiddel algemeen onder die teikenmark byval te vind.

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PERSONEREG STUDENTEHANDLEIDING
deur T DAVEL en RA JORDAAN
Juta Kaapstad Wetton Johannesburg 1995; 200 bl
Prys R69.00

Die personereg het die afgelope paar jaar grootskaalse veranderinge ondergaan. Meeste van die bestaande handboeke oor die onderwerp is dus nie meer op datum nie. Voorts het die personereg ontwikkel tot 'n afsonderlike vakgebied – dit word aan vele universiteite nie meer saam met die familiereg as een kursus aangebied nie. Die skryf van 'n afsonderlike handboek wat slegs oor die personereg handel, word dus grootliks verwelkom.

Die inhoud van *Personereg studentehandleiding* is baie goed uiteengesit en volledig. Daar word telkens melding gemaak van spesifieke ontwikkelinge op elke gebied van die personereg. Moontlike toekomstige veranderinge word ook telkens uitgewys. Die volgorde van die bespreking van die inhoud wyk af van die gewone volgorde deurdat die totnietgaan van regsubjektiwiteit laaste bespreek word, na diverse faktore wat 'n persoon se status kan beïnvloed. Die rede hiervoor is seker dat 'n persoon te sterwe kom nadat al die statusbepalende faktore reeds plaasgevind het. Dood is immers die laaste statusbepalende faktor.

Personereg studentehandleiding is van 'n volledige bibliografie, vonnisregister, statuteregister, Regskommissieverslae en woordregister voorsien. Dit is verblydend om te verneem dat dié publikasie ook binnekort in Engels gaan verskyn.

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1994 SUPPLEMENT TO THE LAW OF SUCCESSION IN SOUTH AFRICA

by ELLISON KAHN

Juta Cape Town Wetton Johannesburg 1994, xxvi and 216 pp

Price R99,00 (soft cover)

The object of this opusculum, as Professor Ellison Kahn chose to call it, is to state the law of succession in South Africa as it stood at the end of April 1994. Since the publication of the 1985 Supplement, new legislation on wills and intestate succession and important decisions by the courts necessitated a supplementary update of the work. Kahn has very successfully heeded this call, providing in his inimitable style a brief and concise but comprehensive and authoritative exposition of developments in the law of succession over the fourteen years after the first publication (1980) of the main work (by Corbett, Hahlo, Hofmeyr and Kahn). He not only documents the legal position, but by referring to South African Law Commission Reports and working papers, presents a clearer perspective on the development of certain aspects of the law. For students and lawyers alike, the supplement is a timeous and valuable addition to the library of succession law in South Africa.

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LEADING CASES ON INSOLVENCY

deur LEONARD GERING

Butterworths Durban 1994

Prys R142,50 (sagteband)

Die outeur van die vonnisbundel het hom ten doel gestel om die doel en beleid van die insolvensiereg en ook die skema van die Insolvensiewet te illustreer deur gebruikmaking van hofsake. Daar word goed in hierdie doel geslaag.

Die boek volg 'n duidelike indeling en indien nagegaan wil word of 'n bepaalde onderwerp in die boek aangespreek word, is dit met 'n enkele blik op die inhoudsopgawe duidelik of daardie onderwerp in besonderhede behandel word of nie.

Die boek is in dertien onderafdelings verdeel, naamlik: die doel, beleid en skema van die Insolvensiewet; aansoek om sekwestrasie; die gevolge van sekwestrasie op die eiendom van die insolvent; die gevolge van sekwestrasie op die solvente gade; vernietigbare regshandelinge; vervreemding van roerende

bates; die invloed van sekwestrasie op 'n huurkontrak; onvoltooide kontrakte; versekerde eise en sessie *in securitatem debiti*; "subordination of debts"; akkoord; uitwysingsbevele by rehabilitasie; en jurisdiksie.

Die alfabetiese lys (en indeks) van beslissings, artikels van die wet, lys van wetgewing en ook 'n baie handige trefwoordindeks aan die einde van die boek, verhoog die toeganklikheid daarvan aansienlik. Hoewel slegs enkele sake in besonderheid bespreek word, word daar genoegsaam na ander relevante sake verwys (ook vervat in die indeks van sake). Gevolglik is daar voldoende verdere verwysings vir die praktisyn en student wat verder wil lees.

Elke uittreksel uit 'n saak word deur 'n inleidende gedeelte voorafgegaan wat die saak in konteks plaas. Die belangriker sake bevat ook 'n kort uiteensetting van die feite, die regsvraag en soms ook die beslissing. In hierdie verband is dit prysenswaardig dat die outeur in die weergee van die beslissing die moeite gedoen het om ook die betrokke bladsyverwysing in 'n voetnoot te vermeld. Die vooraf opmerkings word gevolg deur uittreksels uit die beslissing. Dit word weer gevolg deur 'n aanvullende nota waarin nuwe ontwikkelings soms aangespreek en na addisionele bronne verwys word.

Die verwysing na die addisionele bronne is kort en kragtig – miskien té kort aangesien die tydskrifartikels waarna verwys word, nie van titels voorsien is nie. Die outeur maak ook soms gebruik van afkortings soos *Tydskrif* sonder om in die lys van afkortings te vermeld of *Tydskrif* verwys na byvoorbeeld die *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* (*THRHR*) of die *Tydskrif vir die Suid-Afrikaanse Reg* (*TSAR*). Dit blyk wel later dat die outeur eersgenoemde in gedagte het. Vir die oningewyde student wat die verwysing vinnig wil opvolg, skep dit 'n onnodige oponthoud. Dit is egter wenslik om by die erkende afkortings van regstydskrifte te hou ten einde verwarring te voorkom.

Hierdie boek het besliste voordele vir die student van die insolvensiereg. Nie net word die student gehelp deur die uiteensetting van die feite en die weergee van die uitspraak nie; hy het ook die voordeel van die aanvullende nota wat hom na addisionele bronne en ander beslissings verwys waarin die betrokke saak aangehaal word. Op hierdie wyse word die student geleer dat 'n hofsaak verdere gevolge kan hê en deel van ons regsontwikkeling uitmaak. Die boek is egter meer omvattend en bevat verwysings na meer sake as wat normaalweg van voorgraadse LLB-studente in die insolvensiereg vereis word. Die prys van die boek, opgeweeg teen die beperkte gedeelte daarvan wat die meeste studente waarskynlik sal gebruik, sal seker meebring dat die meeste studente die boek nie sal aanskaf nie.

Dit is jammer dat die drukwerk op sommige bladsye deurslaan met die gevolg dat die maklike leesbaarheid van die werk benadeel word.

In die geheel gesien, vul hierdie vonnisbundel 'n leemte wat geruime tyd reeds bestaan het. Wat die inhoud betref, is dit 'n aanwins vir enige ernstige student van die insolvensiereg. Ook die insolvensieregspraktisyn kan veral die verdere verwysings in die addisionele nota aan die einde van elke saak van groot waarde vind.

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Professionele aanspreeklikheid teenoor derdes*

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SUMMARY

Professional liability to third parties

It can be accepted as a premise that a member of any profession is delictually liable for damages for patrimonial damage or injury to personality which he has caused in a professional capacity to a third party in a wrongful and negligent manner. In this article the focus falls on the delictual elements of wrongfulness, negligence and causation. The overall conclusion is that the general principles of delict can cater quite comfortably for professional liability to third parties. It is only with regard to wrongfulness and negligence that cognisance must be taken of the fact that the actor belongs to a certain profession which requires particular expertise, skill and knowledge and consequently creates expectations of professional conduct from the public. In connection with wrongfulness this fact plays an important role in determining whether there was a legal duty on the member of the profession concerned to prevent harm to third parties – this applies to liability for omissions in respect of damage to property or injury to personality, as well as to liability for pure economic loss and negligent misrepresentation (as a species of liability for pure economic loss); and with regard to negligence the well-known test of the reasonable expert (member of a profession) is applied. Be that as it may, to reiterate the general principles of the law of delict may successfully be applied *mutatis mutandis* to conduct from any professional sphere which causes damage to third parties.

1 INLEIDING

Na woordlui betrek professionele aanspreeklikheid die regsaanspreeklikheid van 'n lid van 'n professie uit hoofde van professionele optrede. Ten einde die onderhawige gebied nader te presiseer, is dit nodig om duidelikheid omtrent die begrip professie te verkry. Volgens die HAT beteken professie "beroep – veral gebruik vir werk van 'n intellektuele aard". Hierdie omskrywing is egter te wyd om regstegnies bruikbaar te wees aangesien dit uiteindelik enige werk of beroep kan omvat. Daarom is Pretorius[1] se benadering te verkies. Volgens hom is 'n professie 'n beroep met 'n verhoogde status wat 'n sekere mate van teoretiese en praktiese opleiding en bygevolg kennis en vaardigheid verg, lede aan 'n etiese gedragskode onderwerp, en onder beheer van 'n professionele liggaam staan. Die regsaanspreeklikheid van 'n lid van 'n professie moet in die lig van hierdie kenmerke – veral die verhoogde status en die daaruit voortvloeiende

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* Referaat gelewer by geleentheid van 'n seminaar oor *Professionele aanspreeklikheid*, aangebied deur die Departement Privaatreg, Unisa te Pretoria op 1996-03-15.

1 *Aanspreeklikheid van maatskappy-ouditeure teenoor derdes op grond van wanvoorstelling in die finansiële state* (1985) 14–16.

verwagtinge van die publiek – beoordeel word.[2] Professies sluit gevolglik onder andere regs- (soos advokate en prokureurs), mediese (soos geneeshere en tandartse), bou- (soos argitekte, ingenieurs en bourekenaars) en finansiële (soos ouditeurs en bankiers) beroepe in.

Ten aanvang moet gestel word dat die aanspreeklikheid van 'n lid van 'n professie teenoor 'n kliënt met wie hy in 'n kontraktuele verhouding staan, in die geval van nie-nakoming van die kontraktuele verpligtinge, afgesien van kontrakbreuk, in beginsel ook op delik gegrond kan word mits natuurlik aan die vereistes vir deliktuele aanspreeklikheid voldoen word. Dit blyk egter dat die howe – na aanleiding van *Lillicrap, Wassenaar and Partners v Pilkington Brothers (Pty) Ltd*[3] – anders as in die geval waar die kontrakbreuk tot saakbeskadiging of persoonlikheidskrenking lei, weens beleidsoorwegings nie maklik 'n deliksaksie naas 'n kontraksaksie sal erken in gevalle van *suiwer ekonomiese verlies*[4] nie. By die nalatige verskaffing van professionele dienste ingevolge 'n ooreenkoms sal die benadeelde in die reël dus net die kontraksaksie tot sy beskikking hê.

Hierdie huiwerigheid om 'n deliksaksie aan 'n kliënt by kontrakbreuk toe te staan, kom uit die aard van die saak nie by nie-kliënte of derdes voor nie – daar is bloot nie sprake van 'n kontrak wat in die weg staan nie.[5] As uitgangspunt kan daarom aanvaar word dat 'n lid van enige professie deliktueel aanspreeklik is vir vergoeding van vermoënskade of nie-vermoënskade wat hy in professionele hoedanigheid aan 'n derde op onregmatige en skuldige wyse veroorsaak het. Wat hierdie artikel betref, moet drie verdere punte vooraf uitgelig word: Eerstens word gekonsentreer op die algemene toepassing van deliksbeginsels in gevalle van professionele aanspreeklikheid teenoor derdes; eiesoortige probleme in verband met 'n besondere professie word dus sover moontlik vermy. Tweedens word die aandag meer toegespits op die hantering van die onregmatigheids-, nalatigheids- en kousaliteitselemente van die onregmatige daad in die huidige verband; die handelings- en skadevereistes lewer in die algemeen met betrekking tot professionele aanspreeklikheid nie unieke probleme nie. Derdens word in verband met onregmatigheid onderskei tussen deliktuele professionele optrede wat tot saakbeskadiging of persoonlikheidskrenking lei en sodanige optrede wat net suiwer ekonomiese verlies tot gevolg het; die toepassing van die algemene deliksbeginsels met betrekking tot suiwer ekonomiese verlies verg naamlik 'n ander benadering – en is minder goed ontwikkeld – as in die geval van saakbeskadiging of persoonlikheidskrenking.

2 ONREGMATIGHEID

2 1 Saakbeskadiging of persoonlikheidskrenking

Soos bekend, is onregmatigheid in ons reg – ook ten aansien van professionele optrede – basies geleë óf in die skending van 'n subjektiewe reg[6] óf in die

2 Vgl *idem* 16.
3 1985 1 SA 475 (A) 499–500.
4 Hierdie begrip word *infra* 195 omskryf.
5 Vgl nietemin Midgley *Lawyers' professional liability* (1992) 90–91 oor die moontlikheid van 'n *stipulatio alteri* tgv 'n derde.
6 Sien Neethling, Potgieter en Visser *Deliktereg* (1996) 44 47 ev 51–52; *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 4 SA 376 (T) 381–383 387; Van Heerden en Neethling *Unlawful competition* (1995) 79–81.

verbreking van 'n regsplig om nadeel vir 'n ander te vermy.[7] In die geval van saakbeskadiging of persoonlikheidskrenking word eersgenoemde benadering uit die aard van die saak in die reël gevolg, behalwe waar die inwerking op die saak of die persoon as gevolg van 'n late[8] teweeggebring is en die regspligbenadering dan toepassing vind.

Nou geld die algemene reël dat, in die afwesigheid van 'n regverdigingsgrond, enige saakbeskadiging of persoonlikheidskrenking in beginsel in stryd met die algemene onregmatigheidsnorm van ons reg, te wete die *boni mores*- of redelikheidsmaatstaf, en daarom onregmatig is – oftewel die betrokke saaklike of persoonlikheidsreg aantas. Anders gestel, sou 'n mens ook kon sê dat saakbeskadiging of persoonlikheidskrenking *prima facie* onregmatig is, welke onregmatigheid deur die aanwesigheid van 'n regverdigingsgrond opgehef word.[9] Hierdie benadering geld natuurlik ook waar 'n lid van 'n professie deur sy positiewe optrede 'n derde se saak beskadig of sy persoonlikheid krenk.

Voorbeelde van *prima facie* onregmatigheid is waar 'n geneesheer 'n operasie op 'n bewustelose persoon uitvoer;[10] waar 'n hotel wat nie meer in besit van die oorspronklike eienaar-bouer is nie, afbrand as gevolg van 'n defektief argiteksontwerpte kaggel;[11] waar 'n stutmuur wat verkeerd deur 'n ingenieur ontwerp is, begin oorhel en herboukoste vir die koper van die eiendom teweegbring;[12] en waar 'n prokureur 'n brief, wat hy namens 'n kliënt aan 'n derde geskryf en lasterlike bewerings aangaande die geadresseerde bevat het, aan ander instansies openbaar maak.[13]

Regverdigingsgronde wat hierdie *prima facie* onregmatigheid kan ophef, is byvoorbeeld noodtoestand in die geval van die geneesheer wat op die bewustelose persoon opereer,[14] en bevoorregte geleentheid of privilegie in die geval van die publikasie van die lasterlike brief.[15] So gesien, verg die onregmatigheidsvraag by professionele aanspreeklikheid in die onderhawige gevalle nie 'n eiesoortige hantering nie.

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7 Neethling, Potgieter en Visser *Deliktereg* 53 ev.

8 *Idem* 54 ev.

9 Sien in die algemeen *idem* 35 ev 43–44 51–52; vgl Neethling, Potgieter en Visser *Neethling's Law of personality* (1996) 90 ev 101 ev mbt liggaamsaantasting. Uitsonderings kom wel voor, bv by bepaalde persoonlikheidskrenkings, soos laster of eerskending, waar eers bepaal moet word of die laster of belediging *contra bonos mores* is (Neethling, Potgieter en Visser *Deliktereg* 43 vn 43; *Neethling's Law of personality* 144 ev 212 ev).

10 Vgl *Burger v Administrateur, Kaap* 1990 1 SA 483 (K) 489; *Neethling's Law of personality* 101 vn 124.

11 Vgl *Cathkin Park Hotel v JD Makesch Architects* 1993 2 SA 98 (W) (hier was die hotel egter steeds in besit van die eienaar-bouer wat die deliksaksie ingestel het).

12 *Tsimatakopoulos v Hemmingway, Isaacs & Coetzee CC* 1993 4 SA 428 (K); sien Van Aswegen "Concurrence of contractual and delictual claims and the determination of delictual wrongfulness" 1994 *THRHR* 147 ev. Alhoewel die hof *in casu* die skade weens die koste om die muur te herbou as suiwer ekonomiese verlies hanteer, hou dit myns insiens direk verband met "beskadiging" van die eiser se saak (onbruikbaarheid van die muur) en is daarom nie suiwer ekonomies van aard nie.

13 Vgl *Eksteen v Van Schalkwyk* 1991 2 SA 39 (T).

14 Vgl *Burger v Administrateur, Kaap* 1990 1 SA 483 (K) 489; *Neethling's Law of personality* 105 vn 162; Neethling, Potgieter en Visser *Deliktereg* 85 vn 275 276.

15 Sien hieroor *Neethling's Law of personality* 155 ev; Neethling, Potgieter en Visser *Deliktereg* 335.

Waar 'n late tot saakbeskadiging of persoonlikheidskrenking lei, word, soos aangedui,[16] ook met betrekking tot professionele aanspreeklikheid die regspligbenadering tot onregmatigheid in ons reg gevolg. Anders as by die *commissio*, is beskadiging of krenking deur 'n *omissio* nie *prima facie* onregmatig nie.[17] Dit is eers die geval as daar volgens die *boni mores* 'n regsplig was om op te tree ten einde bedoelde benadeling te vermy; en hier moet alle relevante faktore "in die totaal van omstandighede van 'n bepaalde geval" oorweeg word wat op die bestaan van 'n regsplig kan dui,[18] soos voorafgaande positiewe optrede, beheer oor 'n gevaarlike voorwerp, 'n regsvoorskrif,[19] die besondere verhouding tussen die partye, die bekleding van 'n bepaalde amp of beroep, 'n kontraktuele onderneming om die veiligheid van 'n derde te verseker en die verwekking van 'n skyn dat 'n ander beskerm sal word.[20] Hierbenewens speel die feit dat die dader *geweet* het dat sy late benadelend vir 'n ander kan wees, veelal by hierdie faktore 'n belangrike rol;[21] en in verband met professionele aanspreeklikheid kan die etiese riglyne of gedragskode wat vir lede van 'n bepaalde professie voorgeskryf word,[22] insgelyks aanduidend van 'n deliktuele regsplig wees.[23]

Toegepas op professionele aanspreeklikheid, kan die volgende gestel word: Die feit dat 'n persoon 'n bepaalde professie beoefen, is op sigself waarskynlik onvoldoende om 'n algemene regsplig te skep om benadeling (saakbeskadiging of persoonlikheidsnadeel) van derdes deur professionele optrede te voorkom; sodanige plig sou 'n te swaar las op lede van professies plaas. So gesien, mag 'n geneesheer se versuim om aan mediese hulpbehoewendes wat sy pad kruis bystand te verleen, morele verontwaardiging ontlok en selfs in stryd met sy etiese kode wees, maar dit is op sigself waarskynlik nie deliktueel onregmatig nie.[24] Lidmaatskap van 'n professie kan nietemin 'n faktor in die totaal van die

16 Sien weer Neethling, Potgieter en Visser *Deliktereg* 54 ev.

17 Sien ook Neethling en Potgieter "Deliktuele onregmatigheid by die nie-nakoming van 'n statutêre voorskrif" 1995 *THRHR* 529.

18 Sien *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 597.

19 Neethling, Potgieter en Visser *Deliktereg* 63–64. Hierdie faktor speel ook 'n rol by die bepaling van die regsplig om suiwer ekonomiese verlies te vermy of, in die geval van nalatige wanvoorstelling, die regsplig om die korrekte inligting te verskaf (*infra* 201 204). Eiesoortige vereistes het in die regspraak (*Da Silva v Coutinho* 1971 3 SA 123 (A) 140) rondom aanspreeklikheid weens "breach of a statutory duty" ontwikkel. Hulle is (volgens McKerron *The law of delict* (1971) 257 ev): "(1) the statute was intended to give a cause of action; (2) he [plaintiff] was one of the persons for whose benefit the duty was imposed; (3) the damage was of the kind contemplated by the statute; (4) the defendant's conduct constituted a breach of the duty; and (5) the breach caused or materially contributed to the damage." Sien ook Van Heerden en Neethling *Unlawful competition* 267–267; Burchell *Principles of delict* (1993) 46; Neethling, Potgieter en Visser *Deliktereg* 69–71; Neethling en Potgieter 1995 *THRHR* 532.

20 Sien in die algemeen Neethling, Potgieter en Visser *Deliktereg* 54–69.

21 Vgl *idem* 42 59–60 vn 119 61–62 vn 126 364 vn 110; Van Aswegen 1994 *THRHR* 153.

22 Sien bv Strauss *Doctor, patient and the law* (1991) 25–26 oor die rol van medies-etiese riglyne (sien 449–457 oor die gedragskode van die SA Geneeskundige en Tandheelkundige Raad (SAGTR)).

23 Vgl Van Wyk "VIGS, *boni mores* en vertroulikheid" 1992 *THRHR* 120–123; Van Wyk "VIGS, vertroulikheid en 'n plig om in te lig?" 1994 *THRHR* 143 144–147.

24 Vgl Strauss *Doctor, patient and the law* 23 ev.

omstandighede wees wat op 'n regsplig dui.[25] 'n Paar voorbeelde, hoofsaaklik uit die mediese professie, kan ter illustrasie dien: Waar 'n geneesheer vasstel dat sy pasiënt VIGS het, sal sy professionele kennis van die ernstige gevare wat die siekte vir derdes inhou, die wete dat die pasiënt getroud is of 'n seksuele verhouding met 'n identifiseerbare persoon of persone het en dat hulle dus kan aansteek, en die feit dat hierdie persone relatief maklik[26] bereikbaar is, waarskynlik 'n regsplig op die geneesheer plaas om diesulkes in te lig;[27] of waar 'n geneesheer vasstel dat 'n pasiënt 'n statutêr aanmeldbare siektetoestand het[28] – welke aanmelding juis ten doel het om die samelewing te beskerm – sal die geneesheer se professionele kennis van die siekte en die gevare wat dit vir andere inhou, tesame met die statutêre voorskriftelikheid van aanmelding,[29] hom waarskynlik deliktueel verplig om toe te sien dat die betrokke gesondheidsowerhede ingelig word;[30] of waar 'n geneesheer 'n medisyne voorraadkamer langs sy spreekkamer het, en sodoende beheer oor 'n gevaarlike voorwerp uitoefen,[31] rus daar 'n regsplig op hom om te voorkom dat ongemagtigde persone, soos kinders, toegang kan verkry en hulleself benadeel deur byvoorbeeld skadelike pille te drink; of waar 'n geneesheer telefonies teenoor 'n ouer onderneem om na sy dodelike siek kind te kom kyk, is hierdie onderneming sterk aanduidend van 'n deliktuele regsplig om mediese bystand aan die kind te verleen;[32] of waar 'n argitek, nadat 'n gebou voltooi is, bewus word van 'n defek in die ontwerp daarvan wat 'n gevaar van benadeling vir derdes inhou, sal hierdie wete, asook die feit dat hy deur sy ontwerp 'n potensieel gevaarlike toestand geskep het (*omissio per commissionem*),[33] aanduidend wees van 'n regsplig om stappe te doen om die gevaar af te weer.

2 2 Suiwer ekonomiese verlies

Skadevergoeding weens suiwer ekonomiese verlies is in beginsel *ex lege Aquilia* verhaalbaar,[34] ook in gevalle van professionele aanspreeklikheid teenoor derdes.

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25 Strauss *idem* 25 wys bv op die volgende faktore wat die vraag na die redelikheid al dan nie van die geneesheer se late kan beïnvloed: "(1) The doctor's actual knowledge of the patient's condition; (2) the seriousness of the patient's condition; (3) the professional ability of the doctor to do what is asked of him; (4) the physical state of the doctor himself . . .; (5) the availability of other doctors, or even of nurses and paramedics; (6) the interests of other patients; (7) whether attending the patient would expose the doctor to danger; (8) whether the patient is desirous or not to be treated; (9) professional ethical considerations."

26 Vgl *Regal v African Superslate (Pty) Ltd* 1963 1 SA 102 (A) 111.

27 Vgl Van Wyk 1992 *THRHR* 123 vn 7; Van Wyk 1994 *THRHR* 147. Daar bestaan egter nie 'n plig om kollegas (tandarts en geneesheer) in te lig waar die kanse skraal is dat hulle die pasiënt in die toekoms sal behandel nie (*Jansen van Vuuren v Kruger* 1993 4 SA 842 (A)).

28 Ingevolge a 45 van die Wet op Gesondheid 63 van 1977.

29 Vgl Strauss *Doctor, patient and the law* 24; Neethling, Potgieter en Visser *Deliktereg* 63–64.

30 Vgl Van Wyk 1992 *THRHR* 123 vn 7.

31 Vgl Neethling, Potgieter en Visser *Deliktereg* 60–63; Strauss *Doctor, patient and the law* 24.

32 Vgl Neethling, Potgieter en Visser *Deliktereg* 66–67; Strauss *Doctor, patient and the law* 24.

33 Vgl Neethling, Potgieter en Visser *Deliktereg* 55–59.

34 Sien *idem* 12–13 286 ev.

Ter wille van begripshelderheid is dit noodsaaklik om vooraf duidelikheid omtrent die begrip "*suiwer* ekonomiese verlies" te verkry. Suiwer ekonomiese verlies omvat enersyds vermoënsverlies wat hoegenaamd nie die gevolg van saakbeskadiging of persoonlikheidskrenking is nie,[35] byvoorbeeld waar 'n maatskappy-ouditeur ekonomiese verlies vir derdes veroorsaak as gevolg van wanvoorstellings in die finansiële state van die maatskappy;[36] of die geval in *Arthur E Abrahams and Gross v Cohen*,[37] waar 'n prokureursfirma, wat namens die eksekuteurs van 'n bestorwe boedel die bereddering daarvan behartig het, versuim het om die nodige stappe te doen om die opbrengs van sekere polisse binne 'n redelike tyd aan die begunstigdes te laat uitbetaal – *in casu* het die uitbetaling eers vyf jaar na die testateur se dood geskied – en hulle dientengevolge finansiële verliese gely het. Andersyds het suiwer ekonomiese verlies te make met vermoënsverlies wat wel uit saakbeskadiging of persoonlikheidskrenking resulteer, maar sodanige beskadiging of krenking nie ten aansien van die *eiser* se saak of persoonlikheid geskied het nie (soos afhanklikes se eis vir verlies van onderhoud teen 'n narkotiseur wat die broodwinner se dood tydens 'n operasie op 'n nalatige wyse veroorsaak het);[38] of waar dit wel die geval is, die *verweerder* nie die saakbeskadiging of persoonlikheidskrenking veroorsaak het nie. (Byvoorbeeld: A word as gevolg van B se nalatigheid in 'n motorongeluk so ernstig beseer dat hy permanent bewusteloos is. A se vrou gee opdrag aan 'n prokureur om 'n eis vir skadevergoeding weens mediese onkoste en pyn en lyding in te stel maar hy laat die eis teen die MMF verjaar weens sy versuim om dit betyds in te dien en A ly dientengevolge ekonomiese verlies.)[39]

Die onregmatigheid van 'n handeling by die veroorsaking van suiwer ekonomiese verlies is vir die regspraak feitlik deurgaans geleë in die nienakoming van 'n regsplig om dié verlies te vermy.[40] In *Arthur E Abrahams and Gross v Cohen*[41] stel regter Marais hierdie benadering ten aansien van die prokureursprofessie soos volg:

> "Setting the boundaries of liability *ex delicto* for causing what has come to be styled as pure economic loss not flowing from physical damage has been a major concern of Western Courts in recent times. The problems involved in so doing are reasonably well known and I do not intend to review them generally yet again . . . As I see the position it comes to this. A defendant may be held liable *ex delicto* for causing pure economic loss unassociated with physical injury but before he is held liable it will have to be established that the possibility of loss of that kind was reasonably foreseeable by him and that in all the circumstances of the case he was under a legal duty to prevent such loss occurring . . . It is not possible or desirable to attempt to define exhaustively the factors which would give rise to such a duty

35 Sien *idem* 286 vn 102.
36 Sien Pretorius *Wanvoorstelling passim*.
37 1991 2 SA 301 (K).
38 Sien Neethling, Potgieter en Visser *Deliktereg* 287 vn 103.
39 Sien *idem* 287 vn 104.
40 Sien bv *Barlow Rand Ltd t/a Barlow Noordelike Masjinerie Mpy v Lebos* 1985 4 SA 341 (T) 346–347 348 (regsplig van prokureur teenoor sy opponent); *Leite GFM v Leandy and Partners* 1989 2 PH F18 (D) (regsplig van prokureur teenoor onverteenwoordigde teenparty – Midgley 111); *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 1 SA 783 (A) 797–798 (regsplig van invorderingsbankier teenoor die ware eienaar van 'n verlore tjek); *Fedgen Insurance Ltd v Bankorp Ltd* 1994 2 SA 399 (W) 404 ev; Neethling, Potgieter en Visser *Deliktereg* 288 vn 109 vir verdere gesag.
41 1991 2 SA 301 (K) 307 309.

> because new situations not previously encountered are bound to arise and societal attitudes are not immutable. However, that does not mean that capriciousness in the adjudication of claims of this kind is permissible. If liability is to be imposed, a court must satisfy itself that there are adequate grounds for doing so and be able to say what they are."

Hierdie benadering is aanvaarbaar, mits maar in gedagte gehou word dat waar daar wel 'n subjektiewe reg in gedrang kom, onregmatigheid ewe goed in die skending van dié reg – as keersy van die regsplig – geleë kan wees. Skending van 'n subjektiewe reg kom op die onderhawige gebied nogal dikwels voor – ook ten aansien van die optrede van lede van professies teenoor derdes – soos in die geval van onregmatige mededinging waar die reg op die werfkrag in gedrang kom, of die bemoeiing met die kontraktuele verhouding van 'n ander waar 'n vorderingsreg meestal op die spel is. Voorbeelde van hierdie tipe "onprofessionele" gedrag – wat streng gesproke egter nie optrede is wat uit hoofde van professionele kennis en vaardigheid onderneem word en daarom nie tot professionele aanspreeklikheid lei nie – is waar 'n geneesheer onware neerhalende bewerings aangaande 'n mededingende mediese praktyk maak ten einde pasiënte af te skrik en hulle sodoende vir sy eie praktyk te wen;[42] of waar prokureur A 'n boikot teen sy mededinger prokureur B aanstig;[43] of waar 'n argitek hom in advertensies van sy praktyk beter gekwalifiseerd voordoen as wat hy werklik is;[44] of waar 'n ingenieur 'n kliënt van 'n mededinger afrokkel deur hom tot kontrakbreuk aan te spoor.[45]

Nou moet egter goed voor oë gehou word dat, net soos met betrekking tot aanspreeklikheid weens 'n late, daar nie 'n algemene regsplig bestaan om suiwer ekonomiese benadeling van andere te voorkom nie;[46] anders gestel, die feitelike veroorsaking van suiwer ekonomiese verlies is nie *prima facie* onregmatig nie.[47] Dit geld ook met betrekking tot professionele aanspreeklikheid. Daarom moet in elke geval volgens die redelikheids- of *boni mores*-onregmatigheidskriterium vasgestel word of bedoelde regsplig bestaan het. Soos bekend, vereis dié kriterium dat die hof "a value judgment embracing all relevant facts and involving considerations of policy" moet uitspreek. Dit word gewoonlik beskryf as die "policy-based aspect of the 'duty of care' concept, by means of which the scope of delictual liability is judicially controlled", en hier volg die howe in die algemeen 'n konserwatiewe benadering.[48] Die *boni mores*-kriterium behels basies 'n noukeurige afweging van die belange van die betrokke partye met inagneming van die gemeenskapsbelang.[49] Die volgende faktore, wat nie 'n *numerus clausus* is nie, kan volgens die regspraak hier 'n rol speel:

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42 Vgl Van Heerden en Neethling *Unlawful competition* 283 ev.
43 *Idem* 307 ev.
44 *Idem* 149 ev.
45 *Idem* 257 ev; Neethling, Potgieter en Visser *Deliktereg* 306 ev.
46 Sien Neethling, Potgieter en Visser *Deliktereg* 53–54.
47 Sien *Knop v Johannesburg City Council* 1995 2 SA 1 (A) 26; Neethling en Potgieter 1995 *THRHR* 530–531; Van Aswegen *Die sameloop van eise om skadevergoeding uit kontrakbreuk en delik* (1991) 117 ev 146.
48 Sien Neethling, Potgieter en Visser *Deliktereg* 13 vn 66.
49 Sien bv *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 1 SA 783 (A) 797; *Fedgen Insurance Ltd v Bankorp Ltd* 1994 2 SA 399 (W) 406–409; *Trope v South African Reserve Bank* 1992 3 SA 208 (T) 214; sien verder die gesag aangehaal in Neethling, Potgieter en Visser *Deliktereg* 289 vn 114 115. Sien in die algemeen *idem* 288 ev; Midgley 94 ev mbt die regsprofessie.

(a) Eerstens, en uiteraard vir doeleindes van die huidige bespreking onontbeerlik, die feit dat die verweerder 'n bepaalde beroep of professie beoefen wat besondere vaardigheid, bekwaamheid en kennis veronderstel. Dit beteken dat waar die verweerder professionele dienste verskaf, dit aanduidend van 'n plig is om nie suiwer finansiële verlies aan andere te veroorsaak nie. Hierdie standpunt is veral bevestig met betrekking tot invorderingsbanke. Daar rus naamlik 'n regsplig op die invorderingsbankier om finansiële verlies vir die eienaar van 'n gesteelde of verlore tjek te vermy deur die tjek nie aan 'n onregmatige besitter uit te betaal nie.[50] Hierdie faktor is waarskynlik op sigself egter nie deurslaggewend vir die bepaling van 'n regsplig teenoor derdes nie[51] aangesien dit professionele aanspreeklikheid te wyd sal laat uitkring.

(b) Daarom speel die feit dat die verweerder inderdaad *geweet* of *subjektief voorsien* het dat nalatige optrede aan sy kant die eiser gaan benadeel, 'n baie belangrike – straks deurslaggewende – rol by die bepaling van die regsplig.[52] In *Arthur E Abrahams and Gross v Cohen*[53] word die rol van die wete of kennis van die verweerder-prokureur soos volg uitgelig:

> "It may well be that usually the person issuing the policy will be the person upon whom it would be appropriate to impose such a duty [dws om die begunstigdes van hulle aanspraak op die polis te verwittig], but an executor who is in possession of the policy, who *knows* of the beneficiary's entitlement, who *knows* that the insurer has not informed the beneficiary of it and that the insurer is acting on the assumption that the executor has done so or will do so, and who has received from the insurer, and not returned to it, appropriate discharge forms sent for completion by the beneficiaries is, so it seems to me, no less appropriate a person upon whom to impose such a duty. An attorney who has undertaken to do an executor's work for him cannot expect to be regarded any differently."

Die onregmatigheid van die verweerder se optrede word sodoende beperk tot derdes wat hy op die oomblik van sy gewraakte optrede geweet het benadeel gaan word, dit wil sê tot eisers wie se identiteit op daardie oomblik reeds vir

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50 Sien bv *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 1 SA 783 (A); *Fedgen Insurance Ltd v Bankorp Ltd* 1994 2 SA 399 (W) 406–409; *Kwamashu Bakery Ltd v Standard Bank of South Africa Ltd* 1995 1 SA 377 (D); *Holscher v ABSA Bank* 1994 2 SA 667 (T); sien verder die gesag aangehaal in Neethling, Potgieter en Visser *Deliktereg* 291 vn 126.

51 Sien Pretorius *Wanvoorstelling* 293–294; Burchell "The birth of a legal principle – negligent misstatement causing pure economic loss" 1980 *SALJ* 5–6.

52 Sien bv *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 1 SA 783 (A) 799 (invorderingsbankier); vgl *Tsimatakopoulos v Hemmingway, Isaacs & Coetzee CC* 1993 4 SA 429 (K) 435 (ingenieur – Van Aswegen 1994 *THRHR* 153); sien ook die ander regspraak aangehaal in Neethling, Potgieter en Visser *Deliktereg* 290 vn 118; sien in die algemeen *idem* 289–290; Midgley 98–99. Subjektiewe wete of voorsienbaarheid van vermoënsnadeel moet egter nie met redelike (objektiewe) voorsienbaarheid gelykgestel word nie. Lg het as prognose trouens geen rol te speel by die vasstelling van die regsplig by onregmatigheid (diagnose) nie (sien Neethling, Potgieter en Visser *Deliktereg* 148 290 vn 122; die *Indac*-saak *supra* 787; vgl *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A) 833–834). So gesien, kom die vraag na redelike voorsienbaarheid van skade slegs by nalatigheid en juridiese kousaliteit ter sprake (*contra Arthur E Abrahams and Gross v Cohen* 1991 2 SA 301 (K) 309 (aangehaal hierbo); vgl ook *Bedford v Suid-Kaapse Voogdy Bpk* 1968 1 SA 226 (K) 231; Midgley 97).

53 1991 2 SA 301 (K) 311 (sien hierbo vir die feite); vgl Midgley 113–114.

hom vasgestaan het. Spekulasie oor die identiteit van ander moontlike eisers en bygevolg onbegrenste aanspreeklikheid word dus uitgesluit.[54]

(c) 'n Faktor wat nou verband hou met die vorige, is die feit dat die situasie tot onbepaalbare (onbeperkte) aanspreeklikheid kan lei, of "one fraught with an overwhelming potential liability" is. Dit is byvoorbeeld die geval waar die gewraakte optrede waarskynlik 'n "multiplicity of actions" wat "socially calamitous" kan wees, tot gevolg gaan hê. In sodanige omstandighede word dan te kenne gegee dat die verweerder nie 'n regsplig gehad het om benadeling te vermy nie.[55] In *Arthur E Abrahams and Gross v Cohen*[56] laat die hof hom soos volg met betrekking tot die regsplig van die prokureur uit:

> "This is not a case in which the recognition of a legal duty to inform the beneficiaries and the imposition of liability for loss arising from the failure to do so may have the undesirable consequences about which Courts have expressed concern in the cases dealing with liability for pure economic loss unassociated with physical injury. The persons to whom the duty is owed are not members of a large and indeterminate class. They are few in number and immediately identifiable. The nature of the loss which they may suffer is not indeterminable. On the contrary, it is obvious what it will be. The time when such loss may be suffered is similarly not indeterminate; it is also known. The relative ease with which the duty may be discharged and liability avoided is also a factor which predisposes me towards recognising that such a duty exists. I can certainly think of no public policy to which the recognition of such a legal duty would be inimical. Indeed, I believe that society at large would regard it as entirely reasonable and recognise a legal duty of this kind and to impose liability for loss suffered as a consequence of its negligent breach."[57]

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54 Sien *Arthur E Abrahams and Gross v Cohen* 1991 2 SA 301 (K) 312; vgl *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D) 386–387; *Greenfields Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 4 SA 910 (N) 916–917: "Looking at the facts involved in the plaintiff's . . . claim it is important that the extent of the potential loss is finite. Nor is it necessary in such a situation for a defendant to speculate as to the identity of the possible claimant. It is further a case of a single loss occurring but once and hardly likely to bring in train a multiplicity of actions. The loss, moreover, is a direct and not an indirect economic consequence of the defendant's negligence. If I may borrow from the language of an American decision (*Rozny v Mornul* (1969) 43 Ill 2d at 54, 250 NE 2d at 656): 'The situation is not one fraught with an overwhelming potential liability'. Trying to balance the individual interests of the claimant against the broader ones of the community I am unable to perceive that the imposition of liability in a case such as this is likely to prove socially calamitous."

55 Vgl *Greenfields Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 4 SA 910 (N) 916–917 (*supra* vn 54); sien ook Pretorius *Wanvoorstelling* 268 ev; Midgley 113–114; *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 1 SA 783 (A) 798; *Tsimatakopoulos v Hemmingway, Isaacs & Coetzee CC* 1993 4 SA 428 (K) 433–434 (Van Aswegen 1994 *THRHR* 153); die ander sake aangehaal in Neethling, Potgieter en Visser *Deliktereg* 292 vn 129.

56 1991 2 SA 301 (K) 312.

57 In *Tsimatakopoulos v Hemmingway, Isaacs & Coetzee CC* 1993 4 SA 428 (K) 433–434 (Van Aswegen 1994 *THRHR* 153) het die hof insgelyks nie die omvang van die skade as onbeperk hanteer nie. Foxcroft R stel dit soos volg (434): "Mr *Griessel* submitted that to allow a claim to a person in the position of the present plaintiff [nuwe eienaar van erf eis van ingenieur herboukoste van 'n defek-ontwerpte stutmuur] would render every building contractor and subcontractor, architect, engineer, plumber, electrician, etc liable not only *ex contractu* to his immediate co-contracting party (with whom he may have agreed on the limitation or exclusion of his own liability) but *ex delicto* to all their successors in

vervolg op volgende bladsy

Indien 'n mens nou aanvaar dat "an overwhelming potential liability" genoegsame rede verskaf om die dader vry te laat uitgaan, behoort sodanige vryspraak slegs te geskied waar die dader inderdaad 'n te wye professionele aanspreeklikheid sal oploop (waarmee bedoel word dat byvoorbeeld in die geval van 'n "multiplicity of actions" elkeen van die eise beslis sal slaag omdat die dader se optrede ten aansien van elk aan al die vereistes van die Aquiliese aksie – ook dié van subjektiewe kennis van benadeling in bogenoemde betekenis – voldoen). Wanneer dit die geval sal wees, sal van die omstandighede afhang. Waar byvoorbeeld slegs 'n enkele eis (of benadeling) subjektief voorsienbaar is terwyl daar 'n element van spekulasie bestaan oor die identiteit van ander moontlike eisers (hulle behoort met ander woorde tot "an unascertained class of potential victims"), behoort die eerste eis nie weens hierdie beleidsoorweging te faal nie. Aanspreeklikheid met betrekking tot die ander moontlike eisers word in so 'n geval uitgesluit bloot weens ontbreking van subjektiewe kennis en bygevolg die afwesigheid van 'n regsplig om ten aansien van hulle benadeling te vermy.[58]

(d) Voorts word gekyk na die praktiese stappe wat die verweerder (betrokke lid van 'n professie) kon doen om die ekonomiese verlies te voorkom. Die volgende oorwegings word ook hier in ag geneem: die waarskynlike sukses van sodanige stappe, die redelikheid al dan nie van die koste verbonde aan die stappe in verhouding tot die skade wat die eiser gely het, en die relatiewe gemak waarmee die stappe gedoen kon word.[59]

(e) Ander faktore wat ook deur die howe in ag geneem word, is onder andere dat die verweerder 'n etiese professionele gedragsreël oortree het;[60] dat 'n

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title . . . In answer to this proposition Mr *Rosenthal* submitted that where the facts are such as in the present case, the wall which was about to fall over can only fall over once as a result of the admitted negligence of the structural engineer, namely defendant. That event has occurred, and will not happen again. Therefore the spectre of an unlimited class of possible plaintiffs cannot haunt on the present facts. The offending wall has been rebuilt, and the claim is for the economic loss sustained by the cost of the rebuilding of the wall."

58 Sien Neethling, Potgieter en Visser *Deliktereg* 292. Van Aswegen ("Policy considerations in the law of delict" 1993 *THRHR* 192–193; *Sameloop van eise* 178) toon oortuigend aan dat die onderhawige faktor nie relevant mbt onregmatigheid is nie, maar eerder benut moet word mbt juridiese kousaliteit wat die vraag na die omvang van aanspreeklikheid direk betrek. Hoe dit ook al sy, die vraag ontstaan ten slotte of die oorweging van "an overwhelming potential liability" werklik vir 'n sinvolle en rasionele *toepassing* deur die howe vatbaar is. Myns insiens is die antwoord hierop negatief en wel om die voor die hand liggende rede dat dit in die reël uiters moeilik – trouens onmoontlik – gaan wees om te besluit of die omvang van die dader se aanspreeklikheid te wyd of "overwhelming" is. Dit is waarskynlik ook om hierdie rede dat die onderhawige beleidsoorweging nog nooit 'n rol by die vasstelling van aanspreeklikheid weens *saakbeskadiging* gespeel het nie. Daarom behoort die toepassing daarvan ook op die terrein van suiwer ekonomiese verlies laat vaar te word.

59 Sien bv *Arthur E Abrahams and Gross v Cohen* 1991 2 SA 301 (K) 312 (aangehaal hierbo); *Kwamashu Bakery Ltd v Standard Bank of South Africa Ltd* 1995 1 SA 377 (D); sien ook die ander gesag in Neethling, Potgieter en Visser *Deliktereg* 291 vn 125; Midgley 101–102.

60 Verbreking van die professionele gedragskode lei uiteraard tot dissiplinêre optrede teen die betrokkene; sodanige verbreking kan egter ook aanduidend van die nie-nakoming van 'n regsplig wees waar dit nie net professionele morele verontwaardiging ontlok nie, maar ook strydig met die regsoortuigings van die gemeenskap is. Vgl oor die regsprofessie Midgley 103–105 111 vn 186; *Leite GFM v Leandy and Partners* 1989 2 PH F18 (D).

statutêre bepaling uitdruklik of by implikasie voorskryf dat die verweerder die (ekonomiese) benadeling moet voorkom;[61] die graad of omvang van die risiko van ekonomiese verlies wat die eiser in die gesig staar;[62] dat die eiser nie in staat is om homself teen die betrokke ekonomiese verlies te beskerm nie; dat die verweerder hom voldoende kan beskerm deur versekering uit te neem;[63] en die omvang van die plig wat op ander persone geplaas word wat hulle in dieselfde posisie as die verweerder bevind.[64]

2 3 Nalatige wanvoorstelling

Wanvoorstelling as verskyningsvorm van *damnum iniuria datum* bestaan daarin dat die dader (ook 'n professionele persoon) op 'n onregmatige en skuldige wyse 'n verkeerde of misleidende voorstelling maak – wat natuurlik ook as 'n late in die vorm van die nie-openbaarmaking van inligting kan bestaan[65] – aan 'n ander persoon wat op grond daarvan tot sy nadeel handel. Hier moet voor oë gehou word dat die eiser self die persoon moet wees wat op grond van die wanvoorstelling tot sy nadeel gehandel het.[66] Indien slegs *derdes* tot nadeel van die eiser op die wanvoorstelling gereageer het, het die eiser nie 'n deliksaksie weens nalatige wanvoorstelling teen die wanvoorsteller nie. Dit beteken natuurlik nie dat die eiser hom nie op 'n ander deliktuele skuldoorsaak kan beroep nie, soos wanvoorstelling (misleiding) ten aansien van die eie prestasie (byvoorbeeld waar 'n argitek die publiek oor sy kwalifikasies en ervaring mislei) of wanvoorstelling ten aansien van die eiser se prestasie (byvoorbeeld onware neerhalende bewerings oor 'n mededingende prokureurspraktyk) as verskyningsvorme van onregmatige mededinging.[67]

By professionele aanspreeklikheid weens 'n wanvoorstelling wat saakbeskadiging of persoonlikheidsnadeel tot gevolg het, geld die posisie soos hierbo ten aansien van saakbeskadiging of persoonlikheidskrenking uiteengesit is. 'n Voorbeeld is waar 'n ingenieur na 'n vloed 'n brug vir veiligheid inspekteer en nalatig 'n verklaring uitreik dat die brug veilig vir verkeer is. Die brug stort in duie toe 'n groot vragmotor daaroor beweeg; die bestuurder word ernstig beseer en die vragmotor afgeskryf.[68]

Hierdie bespreking word daarom beperk tot professionele wanvoorstellings wat *suiwer ekonomiese verlies* teweegbring; in der waarheid kan hierdie skuldoorsaak as 'n *specie* van die *genus* aanspreeklikheid weens suiwer ekonomiese verlies beskou word wat aparte behandeling verg omdat eiesoortige reëls in die

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61 Vgl *The Cape of Good Hope Bank v Fischer* (1886) 4 SC 386 (ekonomiese verlies weens versuim om verbandakte volgens wetsvoorskrif te registreer); *Knop v Johannesburg City Council* 1995 2 SA 1 (A) 31 33; vgl ook Neethling, Potgieter en Visser *Deliktereg* 293 vn 132.

62 Sien bv *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 1 SA 783 (A) 798–799; *Fedgen Insurance Ltd v Bankorp Ltd* 1994 2 SA 399 (W) 407; *Kwamashu Bakery Ltd v Standard Bank of South Africa Ltd* 1995 1 SA 377 (D) 393 – invorderingsbankier.

63 *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 1 SA 783 (A) 799; Midgley 101–102.

64 Vgl *McLelland v Hulett* 1992 1 SA 456 (D) 465.

65 Vgl *McCann v Goodall Group Operations (Pty) Ltd* 1995 2 SA 718 (K) 721 726; Neethling, Potgieter en Visser *Deliktereg* 295.

66 *Alliance Building Society v Deretitch* 1941 TPD 203 216–217.

67 Vgl Van Heerden en Neethling *Unlawful competition* 62 149 ev 283 ev 290–291.

68 Vgl ook Neethling, Potgieter en Visser *Deliktereg* 293 vn 136.

regspraak daaromtrent ontwikkel het. Die volgende voorbeelde kan ter toeligting dien: waar 'n maatskappy-ouditeur wanvoorstellings teenoor derdes aangaande die finansiële state van die maatskappy maak;[69] of waar A (verweerder-bankier) op navraag van B (eiser-bankier) op 'n nalatige wyse foutiewe inligting aangaande die kredietwaardigheid van 'n kliënt van A aan B verskaf. As gevolg van die verkeerde bankverslag verdiskonteer B 'n wissel getrek op bedoelde kliënt van A. B ly skade toe die wissel gedishonoreer word en die volle bedrag daarvan nie van die kliënt verhaal kan word nie;[70] of waar A, 'n geswore waardeerder, op nalatige wyse 'n te hoë waardasie van B se grond maak. Op sterkte hiervan leen C (eiser) geld aan B en verkry as sekuriteit 'n verband oor die grond. B kom nie sy kontraktuele verpligtinge na nie en C laat die grond in eksekusie verkoop. Hy ly skade aangesien die grond veel minder werd is as wat A beraam het. Dit blyk dat indien dit nie vir die verkeerde waardasie was nie, C nooit 'n verband oor die grond sou geneem het nie;[71] of waar 'n transportbesorger (prokureur) wanvoorstellings in verband met die oordrag van eiendom aan die eiser maak – onder andere dat die eiendom vry van verbandbeswaring aan die eiser oorgedra is terwyl die teendeel waar is – en die eiser dientengevolge skade ly.[72]

Soos by ander gevalle van suiwer ekonomiese verlies, is die onregmatigheidselement van besondere betekenis by die bepaling van aanspreeklikheid weens nalatige wanvoorstelling. Nou is dit so dat waar 'n wanvoorstelling suiwer ekonomiese verlies teweegbring, 'n identifiseerbare subjektiewe reg gewoonlik ontbreek. Daarom word onregmatigheid ook hier bepaal, soos alreeds gevestigde praktyk in die regspraak is, aan die hand van die vraag na regspligskending. Die kernvraag by nalatige wanvoorstelling is dus of daar in die besondere omstandighede 'n *regsplig* op die dader (ouditeur, prokureur, bankier) gerus het om die korrekte inligting te verskaf (oftewel of die verweerder die reg gehad het op die korrekte inligting of om nie mislei te word nie) en sodoende vermoënsnadeel vir die verweerder te vermy. Om vas te stel of sodanige regsplig bestaan, moet soos in alle gevalle by die onregmatigheidsvraag die redelikheids- of *boni mores*-maatstaf aangewend word.[73] 'n Aantal riglyne of faktore (wat nie as 'n *numerus clausus* beskou moet word nie) betreffende die bestaan al dan nie van 'n regsplig om die korrekte inligting te verskaf, kan reeds uit die regspraak of andersins afgelei word:

(a) Eerstens bestaan daar in beginsel geen regsplig om die korrekte inligting te verskaf waar inligting bloot *informeel* gegee word nie. In 'n Engelse saak[74] word gesê dat

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69 Sien Pretorius *Wanvoorstelling passim.*

70 Sien *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A).

71 Sien *Perlman v Zoutendyk* 1934 CPD 151 328; vgl ook Neethling, Potgieter en Visser *Deliktereg* 294 vn 138.

72 Sien *Suid-Afrikaanse Bantoetrust v Ross en Jacobs* 1977 3 SA 185 (T); Midgley 109–110.

73 Sien bv *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A) 769–770; *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 2 SA 888 (A) 913–914; *Suid-Afrikaanse Bantoetrust v Ross en Jacobs* 1977 3 SA 185 (T) 187; Pretorius *Wanvoorstelling* 229 ev 250–254; sien in die algemeen Neethling, Potgieter en Visser *Deliktereg* 295–296.

74 *Mutual Life and Citizens' Assurance Co Ltd v Evatt* [1971] 1 All ER 150 162, aangehaal in *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A) 834.

> "it would be quite unreasonable for the enquirer to expect more in such circumstances and quite unreasonable to impose any greater duty on the adviser. The law must keep in step with the habits of the reasonable man and consider whether ordinary people would think they had some obligation beyond merely giving an honest answer".

Hierdie riglyn geld na alle waarskynlikheid ook vir professionele persone aangesien dit 'n buitengewone swaar las op diesulkes sou plaas om in alle omstandighede – ook bloot sosiaal – die korrekte inligting te verskaf. Daarom ontbreek 'n regsplig in beginsel by 'n advokaat of bankier om nie sy buurman in 'n informeel-vriendskaplike gesprek oor die muur oor regs- of finansiële sake te mislei nie. Desnietemin kan ander faktore 'n teenoorgestelde gevolgtrekking genoodsaak, soos waar die sosiale advies van die bankier met 'n *onbehoorlike of kwaadwillige motief* (soos om sy buurman 'n finansiële knou toe te dien) gepaard gegaan het.[75]

(b) As teenpool tot die regmatigheid van informele verskaffing van inligting, staan die verskaffing van inligting uit hoofde van 'n amp, beroep of professie. Daar kan sonder vrees vir teëspraak gekonstateer word dat daar in beginsel 'n regsplig bestaan om in professionele hoedanigheid die korrekte inligting te verskaf. Dit blyk onomwonde uit die volgende riglyne wat reeds in die regspraak uitgekristalliseer het: Daar bestaan naamlik 'n regsplig

• waar 'n persoon wat uit hoofde van 'n bepaalde beroep aanspraak maak op professionele kennis en vaardigheid, in professionele hoedanigheid inligting verskaf.[76] Pretorius[77] is trouens van mening dat "[p]rofessionele kennis en vaardigheid ... 'n deurslaggewende oorweging [kan] wees wat op die bestaan van 'n regsplig om misleiding te voorkom, dui veral waar die regsverkeer 'n besondere belang het in en waarde heg aan die inligting wat die verweerder wat oor professionele kennis en vaardigheid beskik, verskaf";

• waar 'n persoon, uit hoofde van 'n bepaalde openbare amp wat hy beklee (soos 'n notaris, geswore waardeerder en ouditeur) "a kind of patent of credibility and efficiency conferred upon [him] by *public authority*" het, in amptelike hoedanigheid inligting verskaf. Die rede hiervoor is dat "[m]embers of the public are invited and entitled to repose confidence and trust in the acts of such persons performed in their respective capacities";[78] en

• waar 'n persoon uit hoofde van 'n bepaalde beroep uitsluitlik oor bepaalde inligting beskik en dié inligting dus op geen ander wyse as van daardie persoon (of 'n beroepsgenoot) bekom kan word nie – 'n toedrag van sake wat by uitstek ook op professionele kennis, weens die besondere wetenskaplike en teoretiese onderbou daarvan, van toepassing is.[79]

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75 Vgl oor die rol van 'n onbehoorlike motief by die vraag na onregmatigheid, Neethling, Potgieter en Visser *Deliktereg* 42 112–113.

76 Sien Pretorius *Wanvoorstelling* 289–294; *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A) 770; *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 2 SA 888 (A) 913; sien in die algemeen Neethling, Potgieter en Visser *Deliktereg* 297.

77 *Wanvoorstelling* 294.

78 Vgl *Herschel v Mrupe* 1954 3 SA 464 (A) 488; *Perlman v Zoutendyk* 1934 CPD 151 328; Midgley 111–112.

79 Bv *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A) 770 ("particular knowledge" van bankier); sien verder Neethling, Potgieter en Visser *Deliktereg* 297 vn 161.

(c) Die verpligting om in professionele verband korrekte inligting te verskaf, word versterk waar 'n statutêre voorskrif hierdie plig rugsteun,[80] waar die professionele etiese gedragskode dit ook voorskryf,[81] of waar daar 'n kontraktuele onderneming gegee is om korrekte inligting te verstrek. Sodanige kontraktuele verpligting kom ook tot stand waar die korrektheid van die inligting, uitdruklik of stilswyend, gewaarborg is. Vir huidige doeleindes is van belang dat die kontraktuele verpligting waarskynlik aanduidend van die bestaan van 'n regsplig *ex delicto* teenoor derdes kan wees.[82]

(d) Die feit dat aanwesigheid van een of meer van al hierdie faktore op die bestaan van 'n regsplig om die korrekte inligting te verskaf in die algemeen dui, beteken nog nie dat by verbreking daarvan onregmatig teenoor 'n *bepaalde persoon* (derde) opgetree is nie. Om sodanige gevolg te hê, moet dit vasstaan dat die regsplig inderdaad teenoor daardie (geïdentifiseerde of identifiseerbare) persoon bestaan het; en dit is volgens die howe die geval, soos reeds met betrekking tot suiwer ekonomiese verlies aangedui is, indien die dader (wanvoorsteller) op die oomblik van die verskaffing van die inligting *geweet of subjektief voorsien* het wie die persoon(e) is wat daarop gaan reageer of staatmaak.[83] Die dader se regsplig en bygevolg aanspreeklikheid word sodoende beperk tot eisers wie se identiteit op bedoelde oomblik reeds vir hom vasgestaan het.[84]

Die volgende voorbeeld kan ter toeligting dien: 'n Ma bekom namens haar dogter professionele regsadvies van 'n advokaat oor die dogter se dreigende egskeiding. Die advokaat verskaf op nalatige wyse 'n foutiewe regsmening. Die ma deel die inligting mee aan sowel haar dogter as haar vriendin wat ook op egskeiding staan. Albei reageer tot hulle nadeel daarop. Omdat die advokaat net van die dogter bewus was, en daarom nie geweet het dat die vriendin ook op die advies gaan staatmaak nie, het sy regsplig om korrekte inligting te verstrek net teenoor die dogter bestaan.

In hierdie verband moet daarop gelet word dat die deliktuele aanspreeklikheid van ouditeurs en openbare rekenmeesters teenoor derdes vir nalatige wanvoorstelling sedert 1982 deur wetgewing gereël word. Volgens die statutêre reëling rus daar op sodanige persoon 'n regsplig om misleiding te voorkom indien hy geweet het of daar redelikerwys van hom verwag kon gewees het om te weet dat 'n persoon op die inligting wat hy verskaf het, gaan reageer. Hierdie statutêre regsplig is klaarblyklik wyer as die regspraak se voorskrif van subjektiewe kennis aangesien bloot redelike voorsienbaarheid ook aanvaar word as 'n faktor wat op die bestaan van die regsplig kan dui.[85]

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80 Sien Pretorius *Wanvoorstelling* 297 358 ev mbt ouditeurs; vgl *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A) 694; vgl ook hierbo tav 'n late en suiwer ekonomiese verlies.

81 Vgl *supra* 200 vn 60 .

82 Sien in die algemeen Neethling, Potgieter en Visser *Deliktereg* 296.

83 Sien ook Midgley 98–99 100 109–111 oor die regsprofessie; Pretorius *Wanvoorstelling* 297; *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A) 770; sien verder Neethling, Potgieter en Visser *Deliktereg* 297–298.

84 Vgl *Greenfields Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 4 SA 910 (N) 916–917, aangehaal *supra* vn 54.

85 Die Wet op Openbare Rekenmeesters en Ouditeure 80 van 1991, a 20(9); sien Neethling, Potgieter en Visser *Deliktereg* 300–301; vgl in die algemeen Pretorius *Wanvoorstelling* 535 ev oor die vorige wet.

(e) Laastens is dit in verband met onregmatigheid – weer eens net soos by aanspreeklikheid weens suiwer ekonomiese verlies – belangrik om in gedagte te hou dat die hof, ten spyte van die aanwesigheid van bovermelde faktore, om (ander) regspolitieke oorwegings steeds kan weier om 'n regsplig te konstrueer om die korrekte inligting aan derdes te verskaf, soos waar "a spectre of limitless liability" moontlik is of aanspreeklikheid tot 'n "multiplicity of actions" kan lei wat "socially calamitous" kan wees.[86]

Let ten slotte daarop dat die regspraak tradisioneel afkeurend gestaan het teenoor die verlening van 'n deliktuele aksie om skadevergoeding vir suiwer ekonomiese verlies wat spruit uit 'n *nalatige wanvoorstelling wat kontraksluiting tot gevolg gehad het*. 'n Welkome kentering in die houding van die howe het egter ingetree wat deur die appèlhof in *Bayer South Africa (Pty) Ltd v Frost*[87] bekragtig is. Hoofregter Corbett bevind dat daar in beginsel geen goeie rede bestaan waarom by die erkenning van 'n deliksaksie op grond van nalatige wanvoorstelling, 'n onderskeid gemaak moet word tussen 'n wanvoorstelling wat tot kontraksluiting lei en een wat buite die kontraktuele sfeer gemaak is nie. 'n Nalatige wanvoorstelling kan dus, afhangende van die omstandighede en met dien verstande dat al die vereistes vir deliktuele aanspreeklikheid aanwesig is, aanleiding gee tot 'n delikseis vir skadevergoeding selfs al het die wanvoorstelling die eiser oorreed om 'n kontrak met die wanvoorsteller aan te gaan.[88] Dit geld natuurlik ook met betrekking tot professionele aanspreeklikheid.

3 NALATIGHEID[89]

Soos bekend, word die redelike man-toets vir nalatigheid[90] in die geval van deskundiges vervang deur die redelike deskundige-toets.[91] Die kernvraag is dus of die redelike deskundige skade aan 'n ander sou voorsien het, en of hy stappe sou gedoen het om die skade te voorkom.[92] Dit geld ook vir deskundiges uit die professies: daarom, of die redelike geneesheer,[93] argitek,[94] prokureur,

86 Sien bv *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A) 770–771; *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 2 SA 888 (A) 914; Pretorius *Wanvoorstelling* 268 ev; sien in die algemeen Neethling, Potgieter en Visser *Deliktereg* 298.

87 1991 4 SA 559 (A) 568 570.

88 Sien Neethling, Potgieter en Visser *Deliktereg* 301.

89 Die vraag na opset of *animus iniuriandi* by benadeling van 'n derde deur 'n lid van 'n professie word net soos opsetlike benadeling buite professionele verband hanteer en verg daarom nie 'n afsonderlike behandeling nie.

90 *Kruger v Coetzee* 1966 2 SA 428 (A) 430; sien in die algemeen Neethling, Potgieter en Visser *Deliktereg* 126 ev; Scott "Die reël imperitia culpae adnumeratur as grondslag vir die nalatigheidstoets vir deskundiges in die deliktereg" *Petere Fontes LC Steyn-Gedenkbundel* 124–125; Midgley 120–122.

91 Sien Neethling, Potgieter en Visser *Deliktereg* 133–134; Burchell *Delict* 87–89.

92 Sien Scott *LC Steyn-Gedenkbundel* 126 ev; Midgley 122 ev.

93 Sien Strauss *Doctor, patient and the law* 40 95 267 290; *Richter v Estate Hamman* 1976 3 SA 226 (K) 232; *Lymbery v Jeffries* 1925 AD 236; *St Augustine's Hospital (Pty) Ltd v Le Breton* 1975 2 SA 530 (D) 536–538 ("professional competence" van verpleegsters); *S v Kramer* 1987 1 SA 887 (W) 893–894; *Pringle v Administrator, Transvaal* 1990 2 SA 379 (W) 384–385; *Castell v De Greef* 1993 3 SA 501 (K) 509 517; 1994 4 SA 408 (K) 416 423.

94 *Dodd v Estate Cloete* 1971 1 SA 376 (OK) 379.

advokaat,[95] ouditeur,[96] ingenieur,[97] bankier[98] ensovoorts skade aan derdes sou voorsien en voorkom het. In *Kwamashu Bakery Ltd v Standard Bank of South Africa Ltd*[99] word die nalatigheid van byvoorbeeld die invorderingsbankier bepaal met verwysing na

> "what reasonable, practical and affordable measures would the reasonable, prudent collecting banker have taken in order to have prevented the harm which resulted to the plaintiff".

Die redelike deskundige is in alle opsigte soos die redelike man maar dan aangevul deur 'n redelike mate van toepaslike deskundigheid. Die standaard van deskundigheid word as redelik beskryf omdat daar nie gewerk word met die hoogste mate van deskundigheid nie maar met die algemene en gemiddelde vlak van deskundigheid wat daar heers.[100] So word daar in *Van Wyk v Lewis*[101] in hierdie verband verwys na "the general level of skill and diligence possessed and exercised at the time by members of the branch of the profession to which the practitioner belongs". In hierdie saak is dan ook beslis dat wat die mediese professie betref,[102] nie dieselfde deskundigheid van 'n algemene praktisyn as van 'n spesialis verwag kan word nie.[103]

Uiteraard sal die omstandighede van elke geval die nalatigheidsbeoordeling beïnvloed. Die volgende faktore kan nietemin uitgelig word. Die standaard van redelike deskundigheid maak nie voorsiening vir beginners, oftewel persone wat aan die begin van hulle professionele loopbaan staan nie – die ervare of onervare ingenieur, geneesheer of advokaat word dus oor dieselfde kam van redelike deskundigheid geskeer.[104] Insgelyks behoort die plek waar die professionele persoon praktiseer, in beginsel geen invloed op die redelike deskundige-toets te

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95 Sien Midgley 122 ev; Scott *LC Steyn-Gedenkbundel* 146–147; *Van der Spuy v Pillans* (1875) 5 Buch 133 135; *Broderick Properties (Pty) Ltd v Rood* 1964 2 SA 310 (T) 314–315; *Honey & Blanckenberg v Law* 1966 2 SA 43 (R) 46; *Mouton v Die Mynwerkersunie* 1977 1 SA 119 (A) 142; *Bezuidenhout v AA Mutual Insurance Association* 1978 1 SA 703 (A); *Rampal (Pty) Ltd v Brett, Wills and Partners* 1981 4 SA 360 (D) 365; *Mosala v Santam Insurance Co Ltd* 1986 1 SA 808 (O); *Guardian National Insurance Co Ltd v Weyers* 1988 1 SA 255 (A) 263; *President Insurance Co Ltd v Retsos* 1988 1 SA 276 (A).

96 Sien Pretorius *Wanvoorstelling* 400 ev 425; *Tonkwane Sawmill Co Ltd v Filmalter* 1975 2 SA 453 (W) 455; Scott *LC Steyn-Gedenkbundel* 156.

97 *Randaree v Dixon* 1983 2 SA 1 (A) 4; *Tsimatakopoulos v Hemmingway, Isaacs & Coetzee CC* 1993 4 SA 428 (K) 435; vgl in die algemeen Loots *Construction law and related issues* (1995) 280 ev.

98 *Bonus argentarius* (*Fedgen Insurance Ltd v Bankorp Ltd* 1994 2 SA 399 (W) 411); "bank manager, *diligens et peritus*" (*Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 2 SA 888 (A) 912).

99 1995 1 SA 377 (D) 395.

100 Burchell *Delict* 87.

101 1924 AD 438 444; vgl ook *Pringle v Administrator, Transvaal* 1990 2 SA 379 (W) 384–385.

102 Sien ook Midgley 124–125 mbt die regsprofessie. Let daarop dat die prokureurs en advokate twee verskillende professies verteenwoordig, elk met sy eie standaard van kundigheid en bekwaamheid.

103 Sien ook Scott *LC Steyn-Gedenkbundel* 148–151.

104 Vgl Midgley 126–127; Scott *LC Steyn-Gedenkbundel* 151; Van der Walt *Delict: principles and cases* (1979) 71–72; Burchell *Delict* 89–90; Pretorius *Wanvoorstelling* 415; *S v Mkwetshana* 1965 2 SA 493 (N); *Clark v Welsh* 1976 3 SA 484 (A) 486; *African Flying Services (Pty) Ltd v Gildenhuys* 1941 AD 230 245.

hê nie.[105] Wat wel in ag geneem word, is dat die dader volgens algemene praktyk of alledaagse gebruike in sy professie opgetree het. Sodanige optrede is egter hoogstens *prima facie* bewys van redelike professionele optrede; daar kan dus steeds aangetoon word dat die algemene praktyk in stryd met die standaard van redelike deskundigheid is.[106] Ook kan die feit dat die dader 'n statutêre voorskrif oortree het, *prima facie* aanduidend van nalatige professionele optrede wees.[107]

4 KOUSALITEIT

Afgesien van onregmatigheid en skuld, speel kousaliteit ook 'n rol om professionele aanspreeklikheid binne redelike perke te hou. Sowel feitelike as juridiese kousaliteit is in hierdie opsig van wesenlike belang: By eersgenoemde gaan dit om die vraag of die betrokke professionele optrede die ingetrede nadelige gevolg(e) vir die derde(s) feitelik veroorsaak het; by laasgenoemde vir welke van die gevolge wat die dader feitelik veroorsaak het, hy professioneel aanspreeklik gehou moet word.[108]

4 1 Feitelike kousaliteit

Die howe hang in hierdie verband die *conditio sine qua non*- of "but for"-toets aan.[109] Soos elders gestel,[110] behoort hierdie "toets" weens grondige oorwegings egter nie nagevolg te word nie. Die toets is in werklikheid geen kousaliteitstoets nie maar hoogstens 'n *ex post facto* wyse om 'n voorafbepaalde kousale verband uit te druk.[111] Die korrekte wyse om 'n feitelike kousale verband te bepaal, is om aan die hand van die feite van 'n bepaalde geval (oftewel die getuienis daaromtrent) vas te stel of *een feit uit 'n ander gevolg het*. Wat professionele aanspreeklikheid in die algemeen betref, moet dit dus vasstaan dat die derde se skade uit die professionele optrede gevolg het oftewel daardeur veroorsaak is. Waar 'n vader byvoorbeeld regsadvies inwin oor 'n ooreenkoms wat sy seun wil aangaan, welke advies swak is, en die seun wel wetende dat die advies nie nagevolg behoort te word nie nogtans die transaksie sluit, sal 'n kousale verband ontbreek as die seun dientengevolge skade ly.[112] In die geval van nalatige wanvoorstelling in die besonder moet daar 'n feitelike kousale verband tussen die wanvoorstelling, die misleiding en die skade bestaan. Dit beteken eerstens dat die derde

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105 Pretorius *Wanvoorstelling* 404; Van der Walt *Delict* 71; vgl nietemin Midgley 127–128.

106 Sien Pretorius *Wanvoorstelling* 414 ev; Midgley 129; vgl Van der Walt *Delict* 82; Neethling, Potgieter en Visser *Deliktereg* 143–144; *Colman v Durbar* 1933 AD 141 157.

107 Vgl Van der Walt *Delict* 83–84; Neethling, Potgieter en Visser *Deliktereg* 144.

108 Sien in die algemeen Neethling, Potgieter en Visser *Deliktereg* 165 ev.

109 Sien bv *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A) 764; *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 2 SA 888 (A) 907–908 914–918; *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A) 700; *Minister of Police v Skosana* 1977 1 SA 31 (A) 34; *S v Mokgethi* 1990 1 SA 32 (A); vgl Pretorius *Wanvoorstelling* 437 ev; Midgley 153 ev; sien in die algemeen Neethling, Potgieter en Visser *Deliktereg* 166 ev 299 (mbt nalatige wanvoorstelling). Let daarop dat in die geval van 'n late (wanvoorstelling inbegrepe) die *conditio sine qua non*-toets anders as by positiewe optrede toegepas word (Neethling, Potgieter en Visser *Deliktereg* 172–173; Pretorius *Wanvoorstelling* 447 ev).

110 Neethling, Potgieter en Visser *Deliktereg* 168–172.

111 Sien ook Neethling en Potgieter "Juridiese kousaliteit bereik volle wasdom" 1995 *THRHR* 347 mbt *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A) 764.

112 Vgl *Van der Merwe v Rathbone* 1934 SWA 62, bespreek deur Midgley 154.

deur die verkeerde voorstelling mislei moet gewees het; dat hy met ander woorde inderdaad geglo het dat die wanvoorstelling waar is. Tweedens beteken dit dat die derde op grond van die wanvoorstelling tot sy nadeel moet gehandel het. Indien ander oorwegings as die professionele optrede dus die misleiding en nadeel veroorsaak het, is daar nie feitelike kousaliteit nie.[113]

4 2 Juridiese kousaliteit

Sedert 1990 volg die appèlhof 'n soepele benadering met betrekking tot juridiese kousaliteit.[114] Hiervolgens deug vir die bepaling van juridiese kousaliteit nie een van die bestaande juridiese kousaliteitsmaatstawwe (soos adekwate veroorsaking en redelike voorsienbaarheid) vir alle gevalle nie. Daarom moet 'n "elastiese maatstaf" gebruik word. Die kernvraag is of daar 'n genoegsame noue verband tussen die dader se handeling en die gevolg bestaan dat die gevolg die dader met inagneming van "beleidsoorwegings" op grond van "redelikheid, billikheid en regverdigheid" toegereken kan word. Die bestaande juridiese kousaliteitstoetse kan wel 'n subsidiêre rol speel by die bepaling van juridiese kousaliteit aan die hand van die soepel maatstaf. In *Standard Chartered Bank of Canada v Nedperm Bank Ltd*[115] waar dit oor die nalatige wanvoorstelling van 'n bankier gegaan het, verklaar hoofregter Corbett:

> "[T]he test to be applied is a flexible one in which factors such as reasonable foreseeability, directness, the absence or presence of a *novus actus interveniens*, legal policy, reasonability, fairness and justice all play their part."

In casu het veral redelike voorsienbaarheid 'n rol gespeel by die bevinding dat daar wel 'n juridies kousale verband tussen die wanvoorstelling en die skade bestaan het, met ander woorde dat die skade nie "too remote" was nie.

5 SLOTSOM

Uit die bespreking hierbo blyk dat die deliktuele aanspreeklikheid van professionele persone teenoor derdes relatief gemaklik deur die algemene beginsels van die deliktereg hanteer kan word. Trouens, soos gesien hoef daar net met betrekking tot die onregmatigheids- en nalatigheidselemente direk kennis geneem te word van die feit dat die dader lid van 'n professie is wat besondere kennis en vaardigheid verg en daarom verwagtinge van professionele optrede by die publiek skep. Hoe ook al, hierdie algemene beginsels behoort met groot vrug *mutatis mutandis* toegepas te kan word op optrede vanuit enige professionele sfeer wat nadeel aan derdes veroorsaak.

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113 Sien Neethling, Potgieter en Visser *Deliktereg* 299 vn 175 176; vgl ook Pretorius *Wanvoorstelling* 443 ev.

114 Sien *S v Mokgethi* 1990 1 SA 32 (A), bevestig in *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 4 SA 747 (A) 764–765; *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A) 701; *Smit v Abrahams* 1994 4 SA 1 (A) 16 ev; sien ook Neethling en Potgieter 1995 *THRHR* 343 ev; Neethling, Potgieter en Visser *Deliktereg* 175 ev 300 (mbt nalatige wanvoorstelling); Midgley 160–161.

115 1994 4 SA 747 (A) 765.

The "fault principle" and *justus error* in mistake in contract

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OPSOMMING

Die skuldvereiste en *justus error* by dwaling ten opsigte van kontraksluiting

Die skuldvereiste, spesifiek nalatigheid, is al dikwels genoem of oënskynlik gestel in beslissings oor dwaling by kontraksluiting. Die onderhawige ondersoek handel oor nalatigheid in vermelde verband in ons gemenereg, die Engelse reg en in verskeie Suid-Afrikaanse beslissings. Die gevolgtrekking is dat die toets waaraan die kommunikasie van die wilsuitinge en die verstaan daarvan deur die onderskeie kontrakspartye gemeet word, nie die toets vir nalatigheid in die deliktereg is nie (soos in die toonaangewende *Kruger v Coetzee* 1966 2 SA 428 (A) 430 vasgelê is), maar dat 'n reël van interpretasie toegepas word om te bepaal wat die bedoeling van die partye was; dit wil sê, of daar wel wilsooreenstemming bestaan het en wat die inhoud daarvan was. Volgens hierdie reël word die kommunikasie van die wilsuitinge en die verstaan daarvan deur beide partye tot die beweerde ooreenkoms getoets aan die redelikheidsnorm, naamlik of die partye alles gedoen het wat redelikerwys nodig was om hulle bedoelinge oor te dra, en of die redelike ontvanger van die kommunikasie dit ook sou of kon verstaan het soos die betrokke party dit verstaan het.

1 INTRODUCTION

1 1 General remarks

In the solution and discussion of cases on mistake in contract, our courts and authors have fairly often referred to the role of fault – either on the part of the mistaken party, and/or on the part of the other party to the contract.[1] The question, however, is whether (in view of the historical background, and our law as

1 *Maritz v Pratley* 1894 SC 345 347; *Patel v Le Clus (Pty) Ltd* 1946 1 TPD 30 34; *Dickinson Motors (Pty) Ltd v Oberholzer* 1952 1 SA 443 (A) 450; *Papadopoulos v Trans-State Properties and Investments Ltd* 1979 1 SA 682 (W) 689; *Saambou-Nasionale Bouvereniging v Friedman* 1979 3 SA 978 (A) 1003F with regard to estoppel; *Mondorp Eiendomsagentskap (Edms) Bpk v Kemp en De Beer* 1979 4 SA 74 (A) 79B–D; *Horty Investments (Pty) Ltd v Interior Acoustics (Pty) Ltd* 1984 3 SA 537 (W) 539F–G; *Osman v Standard Bank National Credit Corporation Ltd* 1985 2 SA 378 (C) 387G–H; *Standard Bank Credit Corporation Ltd v Naicker* 1987 2 SA 49 (N) 53I–J. In the recent case of *Sonap Petroleum (SA) (Pty) Ltd v Papadogianis* 1992 3 SA 234 (A) 240E–H, though, the court stated that the application of the "fault principle" in instances of mistake seems unnecessary: also see Lewis 1992 *Annual Survey* 51; Van der Merwe and Van Huyssteen 1993 *TSAR* 496.

applied in these cases) negligence[2] has a determining role to play in respect of the effect of a mistake in the conclusion of a contract, and if not, which test is to be applied, or is in fact applied in such cases.

1 2 Historical background

Owing to the significance of Roman, Roman-Dutch and English law in the formation of South African law on this topic, it is necessary briefly to look at the role of fault with regard to the effect of mistake in contract in each of these legal systems.

1 2 1 Roman and Roman-Dutch law

Nowhere in the most important texts dealing with mistake in contract in Roman law is there a reference to the role of negligence in the effect of such a mistake.[3]

In *D* 45 1 22, which deals with a mistake in a *stipulatio*, the reference is to the *actio doli* which could be instituted if the *clausula doli mali* formed part of the *stipulatio* and there had been fraud on the part of the promisor. This instance therefore obviously envisages liability based on fraudulent misrepresentation; consequently it does not contribute towards a solution of the present problem, namely negligence in relation to the effect of a mistake upon a contract.

Even the reference in *D* 18 1 41 1 to the imprudence or indiscretion (or does imprudence merely refer to the seller's lack of knowledge?)[4] of the seller who was ignorant that the solid silver table he had sold me had only a veneer of silver, is not relevant to the effect of negligence in cases of mistake in the conclusion of an agreement.[5] It is well-known that a contract could not be challenged on account of negligent misrepresentation[6] unless such representation

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2 Obviously where an allegedly mistaken party is aware of his own mistake, he is not mistaken. The position where the other party is aware of the mistake, in fact or by inference from the facts, does also, it is submitted, not cause problems. The focus will therefore be mainly on negligence.

3 Cf *D* 45 1 22; *D* 45 1 83 1; *D* 45 1 137 1; *D* 50 17 116 2; *Inst Iust* 3 19 23; *Inst Iust* 4 13 *pr* and 1; *D* 45 1 32; *D* 12 1 32; *D* 44 7 57; *D* 19 2 52; *D* 18 1 9 *pr* – 2; *D* 12 1 18 *pr* – *1*; D 18 1 10; *D* 18 1 11 *pr* – 1; *D* 18 1 14; *D* 18 1 34 *pr*; *D* 18 1 41 1; *D* 19 1 21 2; *D* 19 1 34 and *D* 19 2 60 8; Thomas *Textbook of Roman law* (1981) 228–232; Van Oven *Leerboek van Romeinsch privaatrecht* (1945) 324–329; Van Warmelo *An introduction to the principles of Roman civil law* (1976) 265–267; Van Zyl *History and principles of Roman private law* (1983) 257–259. *Contra*, however, De Wet *Dwaling en bedrog by die kontraksluiting* (1943) 8: *D* 22 6 9 2, which is relied upon, is as the author himself admits, very general. Moreover, this text does not deal with mistake in contract. *D* 4 1 2, cited by the author, states that the praetor may grant *restitutio in integrum* in a case of *iustus error*, *inter alia*, if justice/fairness (*iustitia*) demands it upon examination of the facts of the case. There is no reference to fault and moreover the remedy of *restitutio in integrum* was not the appropriate remedy for mistake in contract; cf all the texts cited on mistake in contract above. The other texts cited by the author likewise do not deal with mistake in contract. Therefore, I do not agree with the court in *Horty Investments (Pty) Ltd v Interior Acoustics (Pty) Ltd* 1984 3 SA 537 (W) 541E–F, that fault was the basis of the *iustus error* doctrine in Roman law (see Février-Breed *A critical analysis of mistake in South African law of contract* (LLD thesis UP 1991) 18–73).

4 Van Oven 327.

5 Liability for *dolus* and *culpa* in the *negotia bonae fidei*, of which sale was the most common, was *ex contractu* – here the sale is *nulla*; therefore no such liability arose *ex contractu*.

6 Joubert *General principles of the law of contract* (1987) 97; Van Oven 320–330; Van Warmelo 260–267.

could be brought within the ambit of the *actiones aediles*.[7] It is moreover doubtful whether negligence in this regard could have been relevant in the time of Julian,[8] to whom this text is ascribed.

Roman-Dutch law on this topic follows Roman law:[9] there is no authority on the role of negligence.[10] De Groot[11] requires blameworthiness in causing the mistake as a prerequisite for holding the party in question liable for ensuing damage. Again, this is irrelevant to the legal effect of the mistake upon the agreement or the effect of negligence in this regard.

There is accordingly no authority in our common law heritage for requiring the absence of negligence on the part of the mistaken party or the presence of negligence on the side of the other party, for mistake to nullify the alleged *consensus*.

1 2 2 English law

In the English law on mistake in contract, however, fault is relevant to the legal effect of the mistake upon the contract:

- In *McRae v Commonwealth Disposals Commission*[12] there is a *dictum* suggesting that a party who entertains an erroneous belief without reasonable grounds (negligence, carelessness, or unreasonableness?) and who induces this mistake in the other party, will be estopped from relying on this mistake.
- Lack of real coincidence between offer and acceptance will also not affect (the existence or contents) of a contract if one of the parties has negligently caused the other party to believe that there was a contract, or a contract of certain content, between them.[13]
- A mistake in a declaration of intent/promise, known to the other party, will render the agreement void.[14]
- A mistake as to the identity of the other party will in certain circumstances render an agreement void, *inter alia* if the identity is material to the agreement and if the other party was, in addition, aware of the mistake.[15]

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7 Ie the *actiones redhibitoria* and *quanti minoris* which were available in certain circumstances in case of incorrect *dicta promissave* by a seller.

8 He lived around the beginning of the second century AD; Thomas 36 (iii); Van Warmelo *Die oorsprong en betekenis van die Romeinse reg* (1978) 73 (c).

9 De Wet and Van Wyk *De Wet and Yeats: Die Suid-Afrikaanse kontraktereg en handelsreg* (De Wet and Yeats) (1978) 15–16.

10 Huber *ZU Huber Heedendaegse rechts-geleertheyt (soo elders, als in Frieslandt gebruikelijk)* (1726) 3 2 13; cf Van Apeldoorn *De Groot: Inleiding tot de Hollandsche rechts-geleerdheid met aantekeningen van Fockema Andreae* (1939) 3 1 19, 3 2 4, 3 14 4; Van Bijnkershoek *Observationes juris Romani* (1752) 4 14; Vinnius *In iv libros institutionum imperialium commentarius* (1709) 3 20 22; Voet *Commentarius ad pandectas* (1716) 18 1 5, 45 1 6. See Février-Breed 85–95 on mistake in contract in Roman-Dutch law.

11 *De jure belli ac pacis* (1625) 2 11 6 3.

12 [1950] 84 CLR 377; Chitty on *Contracts. General principles* vol 1 (1983) 197 *et seq* § 349–351; Février-Breed 110.

13 Cheshire, Fifoot and Furmston *Law of contract* (1986) 236; Chitty § 330 186; Corbin on *Contracts* vol 3 (1960) § 593 596 599; Février-Breed 111 *et seq*.

14 *Hartog v Colin Shields* [1939] 3 All ER 566; Chitty § 332 188–189; *The digest annotated British, Commonwealth and European cases* 34 (1983) 439 no 3579; Halsbury's *Laws of England* vol 32 (1980) § 21 14; Février-Breed 114.

15 *Cundy v Lindsay* [1878] 3 App Cas 459; Cheshire *et al* 14; Chitty § 334–339 189–193; Corbin § 601 602 608 618–620; Février-Breed 115 *et seq*.

- A party who would otherwise be entitled to rely on the plea of *non est factum* (that is, that he was not liable in terms of a document which he has signed), will be successful only if there was, in addition, no negligence or carelessness on his part.[16] Even a party who has been deceived about the character of a written agreement, but who has negligently/carelessly signed the agreement, will be estopped from pleading *non est factum* as against a third party.[17]
- In equity, a mistaken party may under certain circumstances rely on his mistake as a defence against a claim for specific performance, unless his mistake is due to his own carelessness.[18]

It is therefore clear that in English law, otherwise than in our common law, negligence on the part of the parties to a contract is taken into account in determining the effect of a mistake upon an agreement.

2 FAULT IN THE SOUTH AFRICAN LAW OF MISTAKE IN CONTRACT

Although fault has often been mentioned in this regard,[19] it nevertheless merits examination to determine whether fault in its ordinary sense is intended.[20] Towards this end the authorities cited for the application of the "fault principle" have to be scrutinised:

In *Horty Investments (Pty) Ltd v Interior Acoustics (Pty) Ltd*[21] the fault requirement was perhaps more explicitly emphasised. The court relied on a passage from *George v Fairmead*.[22] However, it is incorrect to conclude that this

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16 *Saunders v Anglia Building Society* [1971] AC 1004; Chitty § 345 195.

17 Guest *Anson's Law of contract* (Anson) (1969) 290; Halsbury vol 11 (1955) § 10 8; Corbin § 606 654, 607 666; Février-Breed 120 *et seq*.

18 Chitty § 349 197; Corbin § 612 700 *et seq*; Février-Breed 125 *et seq*.

19 See fn 1 above. However, in a greater number of (important) decisions it has not been done, and, with respect, correctly so: eg *Logan v Beit* (1890) 7 SC 197; *I Pieters & Co v Salomon* 1911 AD 121; *Van Rhyn Wine and Spirit Co v Chandos Bar* 1928 TPD 417; *Hodgson Bros v South African Railways* 1928 CPD 257; *Collen v Rietfontein Engineering Works* 1948 1 SA 413 (A); *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 2 SA 473 (A); *George v Fairmead* 1958 2 SA 465 (A); *Allen v Sixteen Sterling Investments (Pty) Ltd* 1974 4 SA 164 (D); *Micor Shipping (Pty) Ltd v Treger Golf & Sports (Pty) Ltd* 1977 2 SA 709 (W); *Usher v AWS Louw Elektriese Kontrakteurs* 1979 2 SA 1059 (O); *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd* 1983 1 SA 978 (A). Note the sense in which the word "skuld" was used by the judge in *Du Toit v Atkinson's Motors Bpk* 1985 2 SA 893 (A) 904J–905C; *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 1 SA 303 (A) 317A; esp the *Sonap Petroleum* case cited *supra* fn 1; also Christie *The law of contract in South Africa* (1991) 25–26 and Février-Breed 160–297.

20 Because negligence could indicate unreasonableness on the part of the negligent party. Care should be taken, though, not to equate the unreasonableness of a mistake with negligence, which in our law requires the application of the test for negligence as set out in *Kruger v Coetzee* 1966 2 SA 428 (A) 430.

21 1984 3 SA 537 (W).

22 1958 2 SA 465 (A) 539G–I: "Has the first party – the one who is trying to resile – been to blame in the sense that by his conduct he had led the other party, as a reasonable man, to believe that he was binding himself? ... If his mistake is due to a misrepresentation whether innocent or fraudulent, by the other party, then, of course, it is the second party who is to blame and the first party is not bound."

passage endorses the application of the "fault principle".[23] The judge in the *George* case explained that he was using "to blame" in the sense that the first party has by his conduct led the other party reasonably to believe that he was binding himself.[24] Conduct and words forming part of the alleged declarations of intent are interpreted in accordance with the understanding of a reasonable man in the circumstances – this is not the test for negligence, but a rule of interpretation.[25] With regard to the second portion of this passage dealing with the second party who might be "to blame" because he has caused the first party's mistake, it must be borne in mind that it is inherent in the nature of a misrepresentation that it would mislead a reasonable person in the same circumstances;[26] the conduct/understanding of both parties is therefore appraised as against the understanding/belief/interpretation of the reasonable man in those circumstances – which is a rule of interpretation. The innocent misrepresentation referred to in the relevant passage is not restricted to negligent misrepresentation – it includes negligent as well as blameless misrepresentation.[27] This is confirmed by the judge's reference to Christie[28] where the author *inter alia* mentions mere causation (that is, entirely blameless conduct) of the mistaken party's mistake, as a factor that would render the mistake *justus*.[29]

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23 Also see Sharrock 1985 *SALJ* 1 *et seq*; Christie 25–26, according to whom the "fault principle" apparently refers to conduct which induced an erroneous belief; cf fn 29 below.

24 *Janowski v Fourie* 1978 3 SA 16 (O) 19: "'[S]kuld' kan in hierdie verband juis tot stand kom deur die maak van 'n voorafgaande wanvoorstelling." The "wanvoorstelling" is not qualified in respect of its blameworthiness at all.

25 Newman and McQuoid-Mason *Lee and Honoré: The South African law of obligations* (Lee and Honoré) (1978) § 3 78 27: "A person's intention is taken to be that which his words and/or conduct are *reasonably understood* to express. But a person is not bound by an expression of intention which to the knowledge of the person to whom it was made did not express the real intention of the person making it" (my italics); cf for comparative purposes the authority cited on English law in fn 43.

26 Joubert 84 and footnotes: Roberts *Wessels' Law of contract in South Africa* vol 1 (Wessels) 2nd ed § 1119 343 and Donellus *Opera omnia* 10 col 1312 cap 4 6 cited there: this factor is, upon closer examination, present in the very notion of misrepresentation: ie whether the representation is likely to mislead (whether a reasonable person would be misled thereby into entering into the agreement) (Coaker and Zeffertt *Wille and Millin's Mercantile law of South Africa* (Wille and Millin) 18th ed 95) with regard to the materiality of the misrepresentation, ie whether a reasonable man in that position would have been induced to contract (cf Christie 337). This further entails that the reasonable man would not be induced to contract if the incorrectness of the representation, or the possibility that it may be incorrect, was evident from the facts known to the innocent party. This is a finding of knowledge (by inference from the facts) of the incorrectness of the representation; on the other hand, the following qualification may be added, viz that the misrepresenter will not escape liability on this basis if he knew, actually or by inference, that the misrepresentee might or did in fact believe the representation. This would prevent the misrepresenter from exploiting the "ignorance, stupidity or trustfulness of the other [innocent] party" (cf Wessels § 1120 344 and authority cited there; *contra* Christie 338 and *Otto v Heymans* 1971 4 SA 148 (T) cited there).

27 Wille and Millin 95–96.

28 (1st ed 314 or 383 2nd ed) 540C.

29 I nevertheless disagree, but for different reasons: the mere causation (of the mistake) cannot suffice – the facts must be such that the causation would have resulted in a reasonable person being misled thereby. Cf, *inter alia*, *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd* 1983 1 SA 978 (A) 985, where an invoice was held not to be a declaration of intent (an offer) even though it had *caused* the mistake of the appel-

continued on next page

The judge also relied on both JC de Wet and Christie[30] for the argument that "fault . . . underlies the iustus error doctrine". De Wet in this instance starts off by citing *Maritz v Pratley*.[31] It is conceded that the use of the words "gross negligence" would seem to indicate fault; this is unfortunate, since it is clear from the examination by the court of Pratley's conduct that the court was concerned with Pratley's understanding of the circumstances, that is, whether his understanding was reasonable.[32] It is submitted that the statement (criticised by De Wet) that the court would be "loth to find that there was a mistake" if there had been "gross negligence" on the part of the mistaken party, further supports this interpretation – only if the mistake, or the possibility thereof, would have been evident to the reasonable person upon the facts and in those circumstances, or if there was actual knowledge on the part of the mistaken party, will there be no mistake.[33] A party who is actually or constructively aware of his (possible) "mistake", is not mistaken and the court will consequently not find that there was a mistake. It is submitted, therefore, that the "gross negligence" referred to is not ordinary negligence, but the reasonableness rule of interpretation.

With regard to *I Pieters & Co v Salomon*[34] De Wet concludes that the real reason for holding the mistaken party bound to the contract, although the judge did not say so, was the mistaken party's own negligence. Note, though, that the words of the judge *inter alia* cited by the author, clearly indicate the application of the rules of interpretation, and not the test for negligence.[35] The same applies to the decisions in *Logan v Beit*,[36] *Van Rensburg v Rice*[37] and *Hodgson Bros v South African*

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lant bank, because the reasonable man would not have been misled into thinking that it was. See also *Boerne v Harris* 1949 1 SA 793 (A) 810: "The offeror is not entitled to claim to be embarrassed by defects in lucidity which would certainly not embarrass a reasonable man"; fn 26 above in respect of the role of reasonableness in misrepresentation inducing a contract.

30 540C; *Dwaling en bedrog by die kontraksluiting* 4–5 and *Contract* 1st ed 314 respectively; to the same effect, but not cited, is De Wet and Yeats.

31 1894 SC 345 347.

32 The judge said in this respect (347): "[It is] no unusual thing to sell a mirror or pier-glass together with the mantelpiece on which it stands . . ."

33 As De Wet 15 correctly states, a mistake does not cease being a mistake because it was negligently committed, but it is my submission that it is different if the party was aware or can be taken to have been aware of his own misapprehension.

34 1911 AD 121.

35 "When a man makes an offer in plain and unambiguous language, which is understood in its ordinary sense by the person to whom it is addressed, and accepted by him bona fide in that sense, then there is a concluded contract . . . The promisor is bound to perform what his language justified the promisee in expecting" (137).

36 7 SC 197 (cited by De Wet 14). In this case the dispute concerned the interpretation of a certain phrase, namely "cum rights"; the judges found that the term was not ambiguous, that the seller did not cause the mistake of the buyer by false representations (217), or by any means (216) and that the seller also did not know, or have reason to know, of the buyer's mistake (215). This reference to knowledge, or reason to have knowledge, means (the absence of) actual, or constructive knowledge (ie knowledge by inference from the facts), or that the reasonable person in the same circumstances would not have been aware of the error.

37 1914 EDL 217 (cited by De Wet 15). This decision was decided on the basis of the interpretation of the written agreement – the agreement was found to be ambiguous in the surrounding circumstances and the "mistaken" party was found not to have been wilfully ignorant; his mistake was therefore reasonable.

Railways.[38] The author further relies on *Van Ryn Wine and Spirit Co v Chandos Bar*,[39] where the judge stated that the mistaken party may be estopped from setting up his mistake, because he "has rendered himself liable by his unreasonable conduct".[40] Admittedly, the use of "estopped" superficially justifies the conclusion that "unreasonable conduct" refers to negligent conduct, since negligence has generally been accepted as a requirement for a successful reliance on estoppel. However, in view of the fact that the famous passage from the English case *Smith v Hughes*[41] was cited by the court, and that the test for negligence[42] was not applied, it may at this early stage be opined that it is dangerous to infer from the use of this terminology that unreasonableness is to be equated with negligence and that negligence is therefore the basis of the mistaken party's contractual liability in these instances of mistake. Whilst negligence is arguably always unreasonable, unreasonableness is the wider concept of the two and the test is different from that for negligence.

The *dictum* from *Smith v Hughes* stated the rule of interpretation to be applied to the words and conduct of a party/parties in the negotiation of an alleged contract, in order to determine their respective intentions.[43] This is further supported by the quotation from Glück[44] who clearly refers to the rule of interpretation applied to determine the intention of the parties to an (alleged)

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38 1928 CPD 257 (cited by De Wet 16), in which it was said that the "principle" to be applied is the one contained in the *dictum* from *Smith v Hughes* (cited fn 41 *infra*) which is discussed below. As is explained later, the relevant passage stated the rule of interpretation to be applied in such instances. The defendant had written a certain letter to plaintiffs in which an offer was made to purchase a certain lorry (together with certain parts) from the plaintiffs at £500, which the plaintiffs accepted. The defendant was held bound by this agreement and was not permitted to rely on a hidden intention to offer only £300.

39 1928 TPD 417.

40 422.

41 LR 6 QB 597 607: "If whatever a man's real intention may be, he so conducts himself that a *reasonable man would believe* that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms" (my italics).

42 As stated in *Kruger v Coetzee* 1966 2 SA 428 (A) 430.

43 Cheshire *et al* 236 *et seq*; Anson 273: "For it is a rule of our law that the intention of the parties must be inferred from their words and conduct *as interpreted by a reasonable man*" (my italics); the author then (274 fn 1) proceeds to cite this passage from *Smith v Hughes*; cf Mulligan 1959 *SALJ* 277–279; Lee and Honore *loc cit*; *Kalell (Pty) Ltd v Gundelfinger & Son (Pty) Ltd* 1961 1 SA 537 (T) 540H. On the other hand, this entails the application of estoppel: cf Halsbury vol 32 § 13 19 and Lee and Honoré 26 (73) relying on the authority of Halsbury; however, Lee and Honore 27 § 3 78 make the statement with regard to the interpretation quoted in fn 25 above.

44 *Commentary on the Pandects* 11 14 290: "[O]ne deduces a person's meaning and his intention *in accordance with commonsense*. If therefore one cannot *reasonably* infer anything else from a person's conduct in a particular case than that he conducted himself in a certain manner because he accepted and agreed to what had happened, then one is entitled to accept such conduct as a tacit declaration of his consent. Nobody can escape the result of such an interpretation of his conduct being given against him. Because should he desire this, then he really must claim to be judged according to different principles than those upon which all *reasonable beings* act, and he cannot do so as long as he is a unit of human society" (my italics). The court (*ibid*) also referred to MacKeldy *Lehrbuch des römischen Rechts* 163.

agreement, or an agreement of (alleged) different content, namely the understanding/belief of the reasonable person in the circumstances.

In *Patel v Le Clus*[45] the court again relied *inter alia* upon the relevant passage from *Smith v Hughes*. The court's decision, however, rested upon two different bases:[46] first, that the defendant was bound by the agreement by reason of his failure to discharge the onus of proof that the agreement alleged by him differed from the written agreement before the court; and secondly that the mistaken defendant was bound by the agreement as alleged (and proven) by the plaintiff, owing to the defendant's "carelessness or inattention" in signing the agreement.[47] It is submitted that if the defendant had not succeeded in discharging the onus as stated, he would have been liable on the contract as proved by the other party; it was also unnecessary and incorrect to base his liability on the contract upon his "carelessness or inattention" in signing the agreement.

The decision in *Dickinson Motors (Pty) Ltd v Oberholzer*[48] did not take the matter any further; neither did the decision in *Papadopoulos v Trans-State Properties and Investments Ltd.*[49] In *Saambou-Nasionale Bouvereniging v Friedman*[50] the court enquired into blameworthiness as a requirement for a reliance upon estoppel; it is consequently not relevant here. *Mondorp Eiendomsagentskap (Edms) Bpk v Kemp en De Beer*[51] provides authority at first glance for the requirement of fault.[52] The judge cited Corbin on *Contracts* on the question whether the second party/appellant "knew or had reason to know" of the mistaken interpretation by the other party/respondent of the letter in question. It was found that a reasonable man would have known/understood that his letter could

45 1946 1 TPD 30.

46 34.

47 Wessels § 895 (who in turn relies on *D* 22 6 9 2 – cf fn 3 above) is cited here; the example given here by Wessels is of a person who, having misread one of the terms of an agreement, signs the agreement which he would not have signed but for the misapprehension. The author further states: "[A]s the mistake is due to his own carelessness or inattention, the law will take no notice of the mistake." In other words, this person's having "misread" a term means that he did not ascribe the "ordinary sense"/"common sense" meaning to the term, ie that the reasonable person would not have misread, or misunderstood the relevant term in those circumstances and that his understanding/interpretation/mistake was therefore not reasonable (as was the case in *Logan v Beit loc cit*) and, if the reader was unreasonable in misreading a term, it is irrelevant whether he was careless or inattentive or not.

48 1952 1 SA 443 (A) 450. It is again clear that negligence was equated with the unreasonableness of the mistake, because the judge stated that "no question arises here of neglect on the plaintiff's part giving rise to the mistake" and the mistake was called "reasonable and common" (450F).

49 1979 1 SA 682 (W). While unreasonableness was apparently equated with negligence in certain *dicta* of the court (689) with a reference to *National & Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 2 SA 473 (A), *George v Fairmead (Pty) Ltd loc cit* and *Diedericks v Minister of Lands* 1964 1 SA 49 (N), this matter was referred to trial on the following issues: whether the applicant had agreed to take transfer of the relevant erf with residential rights only, and whether the applicant also shared the mistake of the respondent in thinking that the erf had residential rights only, while in actual fact it had business rights as well.

50 1979 3 SA 978 (A).

51 1979 4 SA 74 (A).

52 Per Jansen JA 79A–B.

be interpreted by the respondent as an undertaking, that is, that the mistake was reasonably possible. This, again, is not the test for negligence.

It is submitted that the expression "ought (reasonably) to have known of the mistake" is in many instances confused with the test for negligence:[53] this is a facet of the rule of interpretation applied in such circumstances, where the facts are such that the reasonable person would in those circumstances have been aware (of the mistake, or the possibility of a mistake). In other words, this is a case of an inference of awareness from the facts,[54] or so-called constructive knowledge – it is simply said that the party in question "ought [reasonably] to have been aware".

Osman v Standard Bank National Credit Corporation[55] and *Standard Credit Corporation Ltd v Naicker*[56] contained no new authority on the requirement of fault which has not been discussed above.

The reasonableness or reasonable person test is no stranger to the law of contract; it is encountered in various areas.[57] It is my submission that reasonableness or the reasonable person is confused with the reasonable man test for negligence:[58] In these instances of mistake in contract, the test applied to the conduct of the respective parties in order to determine the intentions conveyed to each other, is that of the understanding or belief of the reasonable person in the same circumstances (on the evidence), while the well-known test for negligence[59] has not found application in these cases. This rule of interpretation is applied so naturally and inconspicuously that it is often confused with negligence.

An example may further illustrate that reasonableness as opposed to negligence is the decisive factor in determining the effect of a mistake upon a contract: In a dispute about a mistake between two contracting parties, it appears that X, the mistaken party, was negligently mistaken, while the other party, Y, was unreasonable in that in those circumstances a reasonable person would have been aware of X's mistake (constructive knowledge).[60] X's mistake, although

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53 Cf eg *Horty Investments supra* 540I; *Mondorp Eiendomsagentskap v Kemp en De Beer supra* 79A–C with a reference to Corbin.

54 Cf Christie 94 *et seq* on tacit contracts, or declarations of intent by inference from the facts.

55 1985 2 SA 378 (C).

56 1987 2 SA 49 (N).

57 *Inter alia* in determining whether a breach of contract is material (and whether the innocent party is consequently entitled to cancel) (Joubert 238 and authority cited by the author in fn 120), whether an aggrieved party is entitled to the *actio redhibitoria* on the ground of a latent defect in an object purchased (Wille and Millin 232) and, in the rule of interpretation mentioned, which is applied to determine the intention(s) of parties to an (alleged) agreement (Lee and Honoré fn 25 above).

58 Analogous to what happened in some instances in the law of delict in respect of the reasonableness yardstick in the requirement of unlawfulness and the reasonableness (reasonable man) in the test for negligence, where two different independent requirements for delictual liability were in danger of being confused. Cf Van der Merwe and Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 131; Neethling, Potgieter and Visser *Deliktereg* (1996) 148 and authority cited by these authors.

59 See fn 42 above.

60 In the words of the judge in *Boerne v Harris supra* 810 quoted above in fn 29, the same may be said with regard to the party(ies) in a dispute about mistake; cf McLennan 1987 *SALJ* 385–386 in respect of a similar instance in *Nasionale Behuisingskommissie v Greyling* 1986 4 SA 917 (T).

negligent, will be effective/*justus* either with regard to the very existence of *consensus* or in respect of the contents of the *consensus*. Turning this example the other way round will likewise demonstrate that negligence has no role to play here: should X be unreasonable in his misapprehension (that is, he is either aware of his own (mis)apprehension or the reasonable person would have been aware of it), then he is not mistaken (or his mistake is unreasonable/*injustus* in legal phraseology). This illustration may be taken even further: Y has negligently caused X's alleged mistake, but the circumstances are such that the reasonable person would not have been misled, that is, the reasonable person would in those circumstances have been aware of the correct situation, or he would have been aware that an incorrect impression was being conveyed to him. It will not avail X to rely on his so-called mistake.[61]

3 CONCLUSION

In view of what has been said above, it is submitted that authority for the application of the "fault principle" is entirely absent in Roman and Roman-Dutch law; and despite the use of this terminology in some instances in our law, fault (negligence) is not necessary and was not intended to be the decisive factor in determining the effect of an alleged mistake in contract. The test applied in practice to the communication of the declarations of intent and to the respective understandings of the aforesaid communication, is the reasonableness test encountered in interpretation – not the accepted and well-known reasonable man test for negligence. It is therefore to be welcomed that the Appellate Division in the recent *Sonap Petroleum* case[62] regarded the application of the fault principle as unnecessary in cases of mistake.

> *'Though trade warfare may be waged ruthlessly to the bitter end, there are certain rules of combat which must be observed. "The trader has not a free lance. Fight he may, but as a soldier, not as a guerilla." In the interests of the public and the competitors themselves, boundaries have been set by the law, and numerous practices have been marked out as "unfair" competition . . .'*
>
> *The second respondent, Weir-Smith and Zeelie may be described as not fighting as soldiers but as guerillas or, as mentioned above, as pirates* (per Kirk-Cohen J in *Interflora African Areas Ltd v Sandton Florist* 1995 4 SA 841 (T) 849).

61 Eg in *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd* 1983 1 SA 978 (A) – although the appellant bank was allegedly mistaken in thinking that an invoice was an offer by the respondent to sell to it (it was therefore allegedly misled by the invoice), the court found that "[o]n the evidence, no *reasonable man* would have regarded the invoice as an offer to sell and accordingly the appellant was not entitled to conclude that it was such" (985H; my italics). Also see previous note.

62 *Loc cit.*

Die beslegtingsproblematiek in geval van mediese wanpraktyksgeskille

(*vervolg*)*

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5 ALTERNATIEWE GESKILBESLEGTINGSMETODES

Alternatiewe geskilbeslegtingsmetodes verwys na prosesse waarin'n onpartydige derde party gebruik word om die skikking van 'n dispuut te bewerkstellig sonder die gebruikmaking van formele hofprosedures.[71] Trollip[72] verkies die term *gepaste* eerder as alternatiewe geskilbeslegtingsmetodes ("appropriate dispute resolutions"):

> "The fact is that the judicial institution, with its inherent sovereign quality, cannot be confronted by any alternative mechanism."

Voorstanders van alternatiewe geskilbeslegtingsmetodes verwys dikwels na die patologie van gedingvoering: hiermee bedoel hulle dat dit onhanteerbaar word; onvoldoende is; nie in die beste belang van die partye is nie; nie bekostig kan word nie; ongunstige publisiteit uitlok; besigheidsverhoudings skaad; en die kragte van die partye dreineer.[73]

Die regsverteenwoordiger bevind hom soms in 'n dilemma deurdat 'n ongelukkige kliënt ten alle koste sy saak wil wen; indien hy die moontlikheid van 'n skikking of 'n alternatiewe geskilbeslegtingsmetode voor litigasie opper, word dit soms deur sy kliënt as 'n swakheid beskou. Dit is belangrik dat, uit hoofde van die vertrouensverhouding tussen prokureur en kliënt en uit hoofde van sy professionalisme, 'n regsverteenwoordiger onverskrokke sy kliënt se saak moet stel en beveg, maar ook objektief en eerlik die kliënt moet adviseer oor wat in sy beste belang is. Die keuse van alternatiewe geskilbeslegtingsmetodes bo volskaalse gedingvoering verteenwoordig nie noodwendig vrees of swakheid nie.

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* Sien 1996 *THRHR* 22–23

71 Trollip *Alternative dispute resolution in a contemporary South African context* (1991) 7.

72 *Ibid.* Die gedagte onderliggend aan alternatiewe metodes van beslegting is nie 'n aanval op die soewereiniteit van die regsprekende gesag nie. Inteendeel, alternatiewe geskilbeslegtingsmetodes impliseer beter werkverrigting in die kader van die regsprekende gesag en 'n groter toeganklikheid vir die publiek tot geskilbeslegting. Alternatiewe metodes is nie 'n vereenvoudigde vorm van litigasie nie maar 'n metode ter vermyding van litigasie.

73 *Idem* 12–14.

5 1 Ombudspersoon

Een alternatief is dié van 'n mediese ombudsman of -persoon. Die mediese ombudspersoon word toegewys aan 'n betrokke streek waarbinne hy as mediese ondersoeker jurisdiksie het.[74] Afhangende van die hoeveelheid werk kan die amp op 'n voltydse of deeltydse basis beklee word. 'n Ervare geneesheer met 'n omvangryke algemene kennis van die mediese wetenskap en praktyk is die aangewese persoon vir hierdie amp. Die gemeenskap moet oortuig wees van sy professionalisme, kundigheid en integriteit – iemand uit die gemeenskap vir die gemeenskap.

Die mediese ombudspersoon sal ten doel hê om mediese wanpraktykeise te evalueer en reeds in 'n vroeë stadium kwelsieke, onbenullige en ongegronde eise van *prima facie* eise te skei. Hoewel so 'n keuringsproses 'n ideale voorloper tot 'n moontlike geding is,[75] staan die pasiënt onder geen verpligting hoegenaamd om van hierdie ondersoeker of keurder gebruik te maak nie en hy kan direk 'n dagvaarding in 'n geregshof uitreik. Die pasiënt kan sy klagte of eis indien by die ombudspersoon, wat te midde van die informele en *in camera*-verrigtinge die houdbaarheid van die eis oorweeg. Selfs die pasiënt wie se eis afgewys word omdat daar nie 'n *prima facie* saak uitgemaak kan word nie, is nie sonder 'n regsmiddel nie en kan nog steeds 'n aksie teen die mediese praktisyn instel. Sou die ombudspersoon van oordeel wees dat die pasiënt 'n grondige eis of klagte het, kan hy die pasiënt medies ondersoek of, na gelang van omstandighede (byvoorbeeld 'n ingewikkelde gespesialiseerde gebied), aan kundiges die versoek rig om die pasiënt en die klagte te ondersoek. Dit sou vir die ombudspersoon aangewese wees om 'n paneel van mediese deskundiges saam te stel en op dieselfde basis as 'n medies-deskundige getuie die pasiënt vir 'n mediese ondersoek en ondervraging na 'n lid van die paneel te stuur.[76] Die beskuldigde of verweerder moet volledig ingelig word insake die eis of klagte ten einde hom in staat te stel om 'n verduideliking aan die ombudspersoon te gee.

Die ombudspersoon sal in samewerking met sy assistente (waaronder sy personeellede en/of paneellede) 'n skriftelike bevinding maak wat aan beide die klaer of eiser en die beskuldigde of verweerder beskikbaar gestel word.[77] Dit sal te verwelkom wees indien die ombudspersoon waar nodig van regsadvies gebruik maak en dat, hoewel hy op enige mediese of regsaspek kommentaar kan

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74 Strauss *Doctor, patient and the law* 287 ev.

75 Nie alleen is hierdie 'n siftingsproses nie, maar dit moedig medici aan om wel voor so 'n ombudspersoon getuienis af te lê sonder die vrese van vyandige kruisondervraging of dat een mediese praktisyn teen 'n ander afgespeel gaan word.

76 *Idem* 288. Die mediese ombudspersoon is in die ideale posisie om die hulp en bystand van mediese deskundiges te bekom. Hoewel die mediese deskundiges vrywillig op die paneel dien, behoort dieselfde reëling tov hulle te geld as by die medies-deskundige getuie, wat onder 'n regsverpligting staan om medies-deskundige getuienis af te lê en eweneens in aanmerking kom vir voldoende redelike vergoeding. Waar die wetgewer vir 'n mediese ombudspersoon voorsiening behoort te maak en aldus sy werksaamhede te reël, behoort die aangeleentheid van 'n mediese paneel met vrywillige aanvaarding van lidmaatskap, statutêr gereël te word. Indien nodig, moet paneellede in reaksie op getuie-dagvaardings, medies-deskundige getuienis in 'n hof gaan aflê. Paneellede behoort 'n groter vrymoedigheid te hê om uit hoofde van hulle amp as paneellede en deskundiges wat die nodige ondervraging en mediese ondersoeke gedoen het, die mediese getuienis in 'n hof af te lê.

77 *Idem* 288 ev.

lewer, hy hom daarvan weerhou om hom ten opsigte van die *quantum* van skadevergoeding uit te spreek.[78]

Sou die pasiënt die geneesheer dagvaar, verskaf die verslag van die ombudspersoon *prima facie* getuienis van die feite daarin aan die hof. Die verweerder (geneesheer) is geregtig om die houdbaarheid van die verslag aan te val deur kruisondervraging van die ombudspersoon of die aanbied van deskundige getuienis. Sou die verweerder nie die verslaginhoud betwis nie, word dit as deel van die getuienis beskou en is dit in die hof se diskresie om die feite te aanvaar of te verwerp. Die voorsittende beampte kan die verweerder (geneesheer), hoewel hy nie geregtig is om paneellede te kruisondervra nie, wel toelaat om hulle te ondervra.[79]

Partye tot die ondersoek deur 'n ombudspersoon sal op regsverteenwoordiging geregtig wees. Hoewel die proses vrywillig, privaat en informeel en die verslag van die ombudspersoon nie bindend sal wees nie, kan partye wel ooreenkom dat die verslag bindend, finaal en nie appelleerbaar nie, is.

5 2 Keuringspanele

Keuringspanele ("screening panels") het as 'n voorverhoormeganisme ontstaan in reaksie op mediese wanpraktykskrisisse. In die vroeë sestigerjare het die staat Virginië deur die samewerking van die balieraad en die mediese vereniging, mediese wanpraktykkeuringspanele ingestel,[80] gevolg deur 27 ander state regoor Amerika, om deur middel van die panele kwelsieke mediese wanpraktykseise te ontmoedig en 'n vroeë skikking te bewerkstellig. In die state Pennsylvanië en Florida is keuringspanele deur wetgewing in die lewe geroep.[81] Kort nadat die wetgewing gepromulgeer is, is die Pennsylvaniese hooggeregshof genader om uitspraak te lewer oor die vraag of die keuringspanele konstitusioneel toelaatbaar is.[82] In *Carter v Sparkman*[83] is die geldigheid van die Florida Medical Malpractice Reform Act ook konstitusioneel bevraagteken. In beide gevalle is beslis dat die remediërende bepalings wel konstitusioneel toelaatbaar is.

Alvorens met die vernaamste besware in die onderskeie gewysdes gehandel word, behoort kortliks gelet te word op die samestelling en doel van keuringspanele. Ingevolge die Health Care Services Malpractice Act (in kort HCSMA) is die doelstelling daarvan die volgende:

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78 *Ibid.*

79 *Idem* 288 290 vn 41. Strauss wys heeltemal tereg daarop dat om kruisondervraging van paneellede sonder 'n bevel van die regter te doen, 'n situasie gaan skep van aanhoudende kruisondervraging. Ipv om die paneel te beman en die ombudspersoon behulpsaam te wees, word die getuiebank beman en laat dit die ombudspersoon sonder hulp. Om gemelde rede is ek van opinie dat die reg op kruisondervraging, 'n basiese prosessuele reg, nie goedsmoeds deur die hof toegelaat gaan word om aangetas te word nie, maar dat gemelde redes om duplisering te vermy tog aanvaarbaar is.

80 *Idem* 283 289 bronne in vn 10; Shepperd 1964 *Washington and Lee LR* 212 231–232.

81 The Health Care Services Malpractice Act 40 Pa Cons Stat Ann § 1301.101–1006 (Purdon Supp 1980) en Florida Malpractice Reform Act Fl Stat Ann § 168.44 (West Supp 1981).

82 *Parker v Childrens' Hospital* 483 Pa 106, 394 A 2d 932 (1978); Boyle "Medical malpractice screening panels: A judicial evaluation of their practical effect" 1981 *Univ of Pittsburgh LR* 939–960.

83 335 So 2d 802 (1976).

> "To make available professional liability insurance at a reasonable cost . . . [and to] establish a system through which a person who has sustained injury or death as a result of tort or breach of contract by a health care provider can obtain a prompt determination and adjudication of his claim and the determination of fair and reasonable compensation."[84]

Aangesien keuringspanele oorspronklike, uitsluitlike jurisdiksie oor alle skadevergoedingseise voortspruitende uit nalatige mediese dienste het, word hulle as't ware as spesiale howe met beperkte jurisdiksie beskou.[85] Die beslissing deur die keuringspaneel het die uitwerking van 'n vonnis tensy die saak op hersiening gaan,[86] in welke geval 'n verhoor *de novo* gehou word. Die paneel se feitebevindinge is as getuienis toelaatbaar tydens die verhoor maar is nie afdoende nie.[87] Geen skadevergoedingsbedrag deur die paneel toegestaan, is egter as getuienis toelaatbaar nie.[88] Sommige keuringspanele het slegs 'n voorverhoorfunksie ten einde geskilpunte uit te lig en te verminder sonder dat daar 'n vasstelling plaasvind. Ander keuringspanele se bevinding het die uitwerking van 'n vonnis wat appelleerbaar is.[89]

Keuringspanele verskil wat betref samestelling en die prosedure wat hulle volg. Die Pennsylvanië-plan maak voorsiening dat indien 'n pasiënt na bewering deur die verskaffer van gesondheidsorg benadeel word, die pasiënt, as verbruiker, sy klag of eis aanhangig maak by die keuringspaneel bestaande uit drie lede, waarna 'n formele sitting plaasvind. Die samestelling van die paneel bestaan uit een gesondheidsorgverskaffer, 'n lid van die publiek en 'n prokureur wat as voorsitter optree en die regsvrae beslis.[90] Die gesondheidsverbruiker wil deurgaans die versekering hê dat daar geen botsing van belange tussen die paneellede is nie en dat die bevinding van die keuringspaneel bevredigend is. Paneellede word byvoorbeeld in Pennsylvanië deur 'n administrateur vir arbitrasiepanele gekies uit 'n lys wat vir doeleindes van elke eis saamgestel word.[91] Die vergoeding van paneellede is 'n redelike vergoeding ten einde te verseker dat voornemende lede hulle dienste wel aan die keuringspaneel beskikbaar sal stel.

Ernstige besware teen die keuringspaneel se houdbaarheid op konstitusionele gronde het nie uitgebly nie. In *Parker v Childrens Hospital of Philadelphia*[92] is onder andere beweer dat die keuringspaneelprosedure die leerstuk van skeiding van magte verbreek. Die hof bevind dat die delegasie van mag in die keuringspaneelprosedure toelaatbaar was, mits daar vir hersiening voorsiening gemaak word.[93]

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84 40 Pa Cons Stat Ann § 1301.102 (Purdon Supp 1980).

85 Die interpretasie wat soms daaraan geheg word, is dat die wetgewer bedoel het om 'n enkele forum daar te stel om mediese wanpraktykseise op te los tot uitsluiting van vrywillige arbitrasie-ooreenkomste (Boyle 1981 *Univ of Pittsburgh LR* 48).

86 40 Pa Cons Stat Ann § 1301.508–511 (Purdon Supp 1980).

87 Die verhoorhof kan alleen daarby baat om wel die paneel se beslissing of vasstelling tydens die verhoor toe te laat.

88 40 Pa Cons Stat Ann § 1301.510 (Purdon Supp 1980).

89 Boyle 1981 *Univ of Pittsburgh LR* 948 vn 59.

90 *Idem* 949.

91 40 Pa Cons Stat Ann § 1301.308 (Purdon Supp 1980).

92 *Supra*.

93 Boyle 1981 *Univ of Pittsburgh LR* 953.

'n Tweede beswaar in die *Parker*-saak,[94] wat bykans ooreenstem met die besware in die *Carter*-saak,[95] is dat die keuringspaneelprosedure inbreuk maak op die reg op 'n jurieverhoor. Sedert die inwerkingtreding van die Grondwet in 1790 is 'n persoon geregtig op 'n verhoor deur 'n jurie in alle aangeleenthede waarin die reg op 'n jurieverhoor erken is ten tyde van die inwerkingtreding van die Grondwet.[96] Die vraag of die deliksaksie weens mediese wanpraktyk in 1790 erken is, het nie voor die hof gedien nie en dit het ongehinderd voortgegaan om te oorweeg of die keuringspaneel inbreuk gemaak het op die reg op 'n jurieverhoor. Die hof verwys na *Emerick v Harris*[97] en 'n *Smit*-saak[98] en wys daarop dat die hof nie die konstitusionele bepalings so uitlê dat dit 'n volkome vrye of ongebonde reg op 'n jurieverhoor daarstel nie. Die hof verwys voorts na die toelaatbaarheid van "some inconvenience to the exercise of the right"[99] en dui daarop dat die doel van die konstitusionele bepalings juis is om die reg op 'n jurieverhoor te verseker voordat daar 'n finale beslissing ten opsigte van persoonlikheids- of eiendomsregte gemaak word.[100] Die *Parker*-hof kom tot die gevolgtrekking dat aangesien die paneel se bevindinge nie bindend is nie en daar 'n reg op jurieverhoor bestaan, die prosedure nie dié reg aantas nie maar hoogstens uitstel.[101] 'n Verdere argument in die *Parker*-saak wat namens die eisers gevoer is, kom daarop neer dat die reg op 'n jurieverhoor aangetas word omdat die keuringspaneelprosedure as voorwaarde vir 'n jurieverhoor gestel word. Die hof kom na oorweging van die doel van die betrokke wetgewing tot die gevolgtrekking dat enige teoretiese las op die reg van 'n pasiënt op 'n jurieverhoor reggestel word deur die wesenlike voordele wat die pasiënt ingevolge die wetgewing het en dat dit hoegenaamd nie as 'n beletsel beskou moet word nie. Die wetgewing bevorder juis die spoedige afhandeling van eise, bevredigende uitsprake en laer regskoste.[102]

Hoewel die eisers in die *Parker*-saak boonop oortuigende statistiek voor die hof gelê het om aan te toon dat die keuringspanele nie in hul doel slaag nie, het die hof by bestaande praktyk gehou en 'n redelike tyd toegestaan alvorens uitspraak gegee word ten opsigte van die geslaagdheid van wetgewing.[103] In *Carter v Sparkman*[104] is die grondwetlikheid van die Florida Medical Malpractice

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94 *Supra.*
95 *Supra.*
96 *Parker v Childrens' Hospital* 483 Pa 106 118; 394 A 2d 932 938 (1978).
97 1 Binn 416 (PA 1808).
98 381 Pa 223; 112 A 2d 625 (1955).
99 Boyle 1981 *Univ of Pittsburgh LR* 954.
100 *Ibid.*
101 *Ibid.*
102 483 Pa 106 120; 394 A 2d 932 939 (1978).
103 438 Pa 106 121; 394 A 2d 932 940 (1978). In *Mattos v Thompson* Pa 421 A 2d 190 195 (1980) beslis die hof in Pennsylvanië tog dat die keuringspaneelprosedure 'n ongrondwetlike las op die reg op 'n jurieverhoor plaas. In dié saak is ook ander laerhofsake aangehaal waarin die burokratiese aard van die prosedure uitgelig is, wat daarop dui dat die wetgewing ondoeltreffend is. Statistiese gegewens het aan die lig gebring dat 2 909 eise in 'n drie-en-'n-halfjaar periode sedert die inisiëring van die keuringspaneelprosedure ingestel is. Slegs 14 het inderdaad voor die keuringspaneel gedien en ses daarvan het in appèl gegaan. Van die 48 eise wat in 1976 aanhangig gemaak is, was ses onafgehandel in 'n stadium in 1980. Boyle 1981 *Univ of Pittsburg LR* 957–958 verwys na die uitspraak in *Mattos v Thompson.*
104 *Supra.*

Reform Act aangeval.[105] Die eiser in die *Carter*-saak het aangevoer dat die prosedure van die keuringspaneel die reg op toegang tot die howe ondermyn, aangesien partye hulle moet onderwerp aan 'n duur en lang proses van geskilbeslegting voordat daar 'n daadwerklike geregtelike bepaling plaasvind. Die hof het hierop geantwoord dat

> "[a]lthough courts are generally opposed to any burden being placed on the rights of aggrieved persons to enter the courts because of the constitutional guarantee of access, there may be reasonable restrictions prescribed by law".[106]

Die hof het voorts bevind dat die prosedure konstitusioneel is en volstaan met die opmerking dat

> "even though the prelitigation burden cast upon the claimant reaches the outer limits of constitutional tolerance, we do not deem it sufficient to void the medical malpractice law".[107]

Versekeringsmaatskappye se kennisname van die ongewildheid van keuringspanele word weerspieël in die styging van versekeringspremies wat in 'n bose kringloop uiteindelik deur middel van verhoogde mediese koste van die pasiënt verhaal word. Sekere doemprofete beskou die keuringspaneelprosedure as 'n middel om druk uit te oefen ten einde 'n skikking te bereik; ander beskou dit weer as 'n dobbelspel waarin die teenkant toegelaat word om, sou die prosedure voor die keuringspaneel misluk, 'n "fishing expedition" vir verhoordoeleindes te onderneem. Die doemprofete meen voorts dat indien die prosedure misluk, die verhoor vertraag en kosbare tyd en geld in die proses verspil word.

5 3 Spesiale tribunale

Daar is al dikwels gevra of mediese wanpraktyksgeskille nie uit die kader van die gewone siviele howe geneem en deur 'n spesiale tribunaal verhoor moet word nie. Die mediese tribunaal word beman deur regs- en mediese deskundiges wat gebruik maak van 'n meer inkwisitoriese proses as die adversatiewe stelsel wat tans heers. Soos Strauss tereg daarop wys,[108] gaan die waarskuwingsligte ten opsigte van spesiale howe op en hou juriste in Suid-Afrika aan die adversatiewe stelsel vas.

5 4 Arbitrasie

Arbitrasie van wanpraktyksgeskille is 'n geskilbeslegtingsmoontlikheid wat oorweeg kan word. Arbitrasie is vrywillig in die sin dat partye die keuse het of hulle 'n dispuut vir arbitrasie wil verwys; en bindend in die sin dat die beslissing van die arbiter finaal is. 'n Arbitrasie-ooreenkoms kan aangegaan word tussen

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105 Fla Stat Ann § 168.44 (West Supp 1981).

106 335 So 2d 802 805 (Fla 1976).

107 335 So 2d 802 806. Die Florida hooggeregshof het in *Aldana v Holub* 381 So 2d 231 238 (Fla 1980) weer die geleentheid gekry om oor die kwessie van reg op toegang tot die howe te beslis. *In casu* is bevind dat die reg op toegang teoreties beswaar kan word deur die keuringspaneelprosedure, maar dat die werking van die wet sodanig is dat dit as arbitrêr beskou word en in meer as 50% van die gevalle 'n litigant van sy konstitusionele regte beroof – Boyle 1981 *Univ of Pittsburgh LR* 956. In *Kelly v Ruben* 78-15303 (Dade County Ct Fla Ct Oct 12, 1979) is daar op die teenproduktiwiteit van keuringspanele gewys en was dié saak een van 72 laerhowe in Florida wat die haalbaarheid van die keuringspaneelprosedure bevraagteken het – Boyle *supra* 957.

108 Strauss *Doctor, patient and the law* 286.

byvoorbeeld 'n pasiënt en sy of haar geneesheer of tussen 'n pasiënt en 'n hospitaal (privaatkliniek, ensovoorts).[109] Arbitrasie is 'n verwysing van 'n geskil na 'n onafhanklike onpartydige derde party vir beslissing deur hom na aanhoor analoog aan 'n regsproses van beide die partye.[110]

Die beslissing van 'n arbiter kan regtens afgedwing word en is nie vatbaar vir appèl nie. 'n Arbitrasiebevel kan deur 'n geregshof tersyde gestel word[111] indien 'n party kan aantoon dat die arbiter hom met betrekking tot sy pligte aan wangedrag skuldig gemaak het.[112] 'n Verdere grond vir die tersydestelling van 'n arbitrasiebevel is growwe onreëlmatigheid in die arbiter se hantering van die verrigtinge, die feit dat die toekenning van die arbiter nie op 'n behoorlike manier bekom is nie en dat die arbiter sy magte oorskry het.[113]

'n Aansoek om hersiening skort nie outomaties die nakoming van die bevel deur die arbiter op nie en die party wat die hersiening verlang, moet pertinent aansoek doen om opskorting tot tyd en wyl die hersieningsverrigtinge afgehandel is. Indien 'n arbiter gefouteer het ten opsigte van 'n feite- of regsbevinding en bereid is om sy oorspronklike beslissing te hersien, kan die hof die aangeleentheid na die arbiter terugverwys.

'n Swak toekenning is dus hersienbaar en nie appelleerbaar nie. Dit sal meebring dat 'n *bona fide* fout wat gemaak is net hersienbaar en nie appelleerbaar is nie. Vir doeleindes van hersiening is partye geregtig om buite om die rekord ekstrinsieke getuienis aan te voer om 'n onreëlmatigheid aan te dui waar 'n party in geval van appèl absoluut gebonde is aan die rekord.[114]

5 4 1 Voordele

Die voordele van arbitrasie bo litigasie is onder andere die volgende:

(a) *Deskundigheid en tydsfaktor* Bekwame deskundiges op 'n spesifieke gebied van die geneeskunde kan as arbiters optree. Op sterkte van sy persoonlike kennis kan die arbiter tot 'n beslissing kom sonder om van deskundige getuies gebruik

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109 Sodra partye 'n arbitrasie-ooreenkoms skriftelik aangegaan het, vind die bepalings van die Wet op Arbitrasie 42 van 1965 toepassing. Die doel van die wet is die skikking van dispute dmv arbitrasie ingevolge die arbitrasie-ooreenkoms en die afdwinging van die toekennings of bevele deur die arbiter. Ingevolge a 1 is 'n arbitrasie-ooreenkoms 'n skriftelike ooreenkoms ingevolge waarvan enige bestaande of toekomstige dispuut tov 'n aangeleentheid in die ooreenkoms gespesifiseer, vir arbitrasie verwys word, of 'n arbiter benoem is al dan nie.

110 Trollip *Alternative dispute resolution* 21 23. *Re Carus-Wilson and Greene* [1887] 18 QB 7 (CA) 9: "If it appears, from the terms of the agreement by which a matter is submitted to a person's decision, that the intention of the parties was that he should hold an enquiry in the nature of a judicial enquiry, and hear the respective cases of the parties, and decide upon evidence laid before him, that case is one of arbitration. The intention in such cases is that there shall be a judicial enquiry worked out in a judicial manner."

111 *Benjamin v SOBAC South African Building & Construction (Pty) Ltd* 1989 4 SA 940 (K) en a 33 Wet op Arbitrasie 42 van 1965.

112 Bv, 'n arbiter kom nie die terme van die ooreenkoms na nie; verontagsaam die *audi alteram partem*-reël; het 'n belang by die dispuut; tree nie onpartydig op nie; stel 'n buitengewone hoë fooi vir sy dienste, ens.

113 Murphy "Voluntary arbitration: an alternative means of resolving medical malpractice disputes" 1987 *Medical Trial Technique Q* 410.

114 Trollip *Alternative dispute resolution* 26.

te maak.[115] Benewens die deskundigheid van die arbiter wat 'n baie groot pluspunt is, kom ook die besparing van tyd hier ter sprake. Tydens die litigasieproses neem dit tyd in beslag om aan die regsprekende beampte, wat 'n kenner van die reg maar 'n leek op die gebied van die geneeskunde is, mediese aspekte in besonderhede te verduidelik.[116]

(b) *Private forum – vertroulikheid* Die arbitrasieproses vind nie in 'n ope hof plaas nie. Die dokter se gedrag word geëvalueer in 'n private forum vry van die "martelkamer"-milieu, soos wat die hof in die oë van die medici bekend staan. Die pers het geen toegang tot arbitrasieverrigtinge nie en die rekord van die verrigtinge bly ook vertroulik.[117]

(c) *Informele prosedure* Die informele prosedure by arbitrasieverrigtinge maak dit vir die partye moontlik om baie nader aan 'n skikking te kom.[118] Geneeshere is baie gevoelig vir die formele en wat hulle soms as vreemde en "vyandige" optrede in die litigasieproses beskou.[119] Medici beskou potensiële regsgedinge as 'n hindernis in die vertrouensverhouding met 'n pasiënt, welke hindernis die gunstige herstel van 'n pasiënt kan skaad.[120]

(d) *Finaliteit van die beslissing* Daar bestaan nie 'n reg op appèl teen 'n arbiter se toekenning nie, hoewel die partye tog op so 'n reg kan ooreenkom.[121]

(e) *Billikheid* Die arbiter sal 'n billike toekenning maak eerder as 'n toekenning wat absoluut verkneg is aan die letter van die wet en dus 'n skikking ontmoedig.[122]

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115 'n Deskundige is nie verplig om aan die partye uit te wys hoe sy deskundigheidskennis tov 'n aspek toegepas word nie. Indien dit nie hiervoor was nie, sou die arbiter hom in die snaakse posisie begewe het dat hy 'n getuie in die verrigtinge sou word (*idem* 24; *Rhodesia Electricity Supply Commission v Joelson Brothers and Bardone (Pty) Ltd* 1977 4 SA 639 (R)).

116 Trollip *Alternative dispute resolution* 25 wys tereg daarop dat, hoewel hierdie deskundige arbiter genoegsame kennis van die (mediese) wetenskap het, hy nie genoegsame ondervinding in die siftingsproses van getuienis het en om 'n beoordeling te maak oor aangeleenthede rakende die geloofwaardigheid van getuies nie. Die medies-deskundige arbiter het 'n gebrek aan regskennis en -opleiding en dit kan moontlik aanleiding gee tot onbillikhede of ongeregtighede. Die probleem kan mi ondervang word deur 'n tweede arbiter, 'n regsgeleerde, aan te stel wat ook as voorsitter van die arbitrasiepaneel kan optree.

117 *Idem* 24. Die vertroulike verrigtinge word nie oral in openbare geledere verwelkom nie. Die publiek wil sake rakende gesondheidsorg en die verskaffers daarvan in die reine, in die openbaar gestel hê, in plaas daarvan om beweerde nalatige optrede en die finale uitslag van die saak dig te hou.

118 Partye kan ooreenkom oor die wyse waarop arbitrasie sal plaasvind, die aangeleenthede wat ter sprake mag kom, die aard en omvang van die moontlike toekennings en kan die effek en toepassing van sekere bepalings van die Wet op Arbitrasie beperk.

119 "After some exposure to the courtroom, either as expert witnesses or as defendants in malpractice claims, many physicians come to regard it as an alien environment" – Polsky "The malpractice dilemma: a cure for frustration" 1957 *Temple LQ* 362, soos aangehaal in Sharp "Issues in medical law in Canada" 1981 *McGill LJ* 671–1047 1036.

120 Stetler "Medical legal relations – the brighter side" 1957 *Villa Nova LR* 390, soos aangehaal deur Sharp 1036.

121 Trollip *Alternative dispute resolution* 25 wys tereg daarop dat die doeleindes wat nagestreef word deur arbitrasie deur sodanige ooreenkoms verydel word aangesien 'n appèl op 'n beslissing 'n oponthoud in die proses gaan veroorsaak. Waar 'n litigant op beide 'n regs- en feitebeslissing mag appelleer, mag hersiening, soos reeds aangedui, net op sekere gronde plaasvind.

122 *Ibid.*

(f) *Keusevryheid* Die partye kan die tyd en plek van die arbitrasieverrigtinge kies.[123]

(g) *Spoedige afhandeling* Inaggenome die vol hofrolle en die feit dat dit etlike jare kan neem om 'n geding af te handel, is die spoedige afhandeling van 'n arbitrasieproses te verkies bo gedingvoering. Partye moet egter daarteen waak om nie 'n arbitrasieproses onnodig uit te rek deur ondeurdagte administratiewe reëlings nie. 'n Spoedige arbitrasieproses voorkom dat 'n skuldenaar sy verpligtinge ontduik. Ook gesien vanuit die benadeelde se oogpunt, is dit om geldelike redes (depresiasie, inflasie, ensovoorts) voordeliger om van arbitrasie gebruik te maak.

(h) *Verminderde koste* Dit is belangrik dat die arbitrasiepartye die verrigtinge so kort as moontlik hou. Die vergoeding van die arbiters en die koste verbonde aan 'n geskikte plek vir die arbitrasieverrigtinge – koste wat normaalweg in die litigasieproses deur die staat gedra word – kan dalk op die lang duur veroorsaak dat arbitrasiekoste nie noodwendig minder as litigasiekoste is nie.[124]

5 4 2 Nadele

Nadele[125] verbonde aan arbitrasie is onder andere: beuselagtige eise; meer kompromieë eerder as duidelike beslissings op feite en regsvrae; die gevaar verbonde aan nie-regskundiges wat as arbiters optree en beslis oor skadevergoeding en die geheimhouding van identiteit; en optrede van beweerde deliksplegers wat vir die gemeenskap onaanvaarbaar is. Dit is te verkies dat partye vooraf by wyse van ooreenkoms die reëls van 'n geregshof en die basiese reëls van die bewysreg in die verrigtinge sal navolg.

In Amerika het kritiek teen arbitrasie-ooreenkomste nie uitgebly nie. Die vernaamste besware is die volgende:

Vanweë die feit dat die geneesheer by ondertekening van die ooreenkoms in 'n magsposisie oor die pasiënt is, word die ooreenkoms as vernietigbaar aangemerk omrede:

(a) die pasiënt geen ander keuse gehad het as om die arbitrasie-ooreenkoms met die dokter te sluit nie; en/of

(b) die pasiënt sy konstitusionele reg op 'n jurieverhoor laat vaar het met die ondertekening van die ooreenkoms.[126]

Voordat arbitrasie by wyse van wetgewing in Amerika gereël is, het die gemenereg gegeld en het die howe arbitrasie-ooreenkomste beskou as 'n ongeldige metode om die regbank van sy jurisdiksie te ontneem. Gevolglik was howe traag om arbitrasie-ooreenkomste af te dwing.[127]

Die arbitrasie-ooreenkoms sluit 'n verhoor *de novo* uit en die toekenning is afdwingbaar asof dit 'n hofuitspraak is. Tien van die dertien state waarin wetgewing mediese wanpraktykarbitrasie reël, maak voorsiening vir ooreenkomste voordat 'n eis ontstaan, welke ooreenkomste gesluit word tussen die gesondheidsorgverskaffer en die pasiënt voor behandeling en waarvoor toestemming tot die

123 *Ibid.*
124 *Idem* 24 25.
125 Murphy 1987 *Medical Trial Technique Q* 411.
126 *Ibid.*
127 *Idem* 412.

ooreenkoms nie 'n voorwaarde vir behandeling is nie.[128] Van die wetgewers het veiligheidsmaatreëls in die wetgewing ingebou om te verseker dat die pasiënt bewus is van die feit dat die arbitrasie-ooreenkoms bestaan en wat die effek daarvan is. Die pasiënt kry 'n geleentheid om her te besin oor sy besluit om voort te gaan met arbitrasie nadat die druk van mediese behandeling en die verkryging daarvan afgeloop het.[129] Die wetgewing bepaal die tydperk waarbinne herroeping van die arbitrasie-ooreenkoms mag plaasvind.[130]

Ten einde te verseker dat pasiënte vrywillig en met volle wete toestem tot 'n arbitrasie-ooreenkoms, word in die ooreenkoms self vir kursivering voorsiening gemaak. Daar word onder pasiënte se aandag gebring dat aanname van die ooreenkoms nie 'n voorvereiste vir behandeling is nie; dat daar nie 'n verhoor *de novo* naas arbitrasie is nie (dit wil sê afstanddoening van die jurieverhoor); en gewys op die moontlike herroepingsopsie wat hy kan uitoefen.[131] In die state Main en Michigan word selfs sover gegaan as om aan die pasiënt 'n inligtingsbrosjure te gee vir bestudering voor ondertekening van die arbitrasie-ooreenkoms.[132]

Die besware hou verder in dat die pasiënt in die stadium waarop hy mediese sorg benodig, nie nog kan rondsoek ("shop around") na 'n ander gesondheidsorgverskaffer nie.

> "In essence, the fundamental argument against medical malpractice arbitration agreements is that there can be no meeting of the minds in this context which would be sufficient to create an enforceable contract."[133]

In die toonaangewende *Doyle v Giuliucci*[134] beslis die Kaliforniese hooggeregshof in 1965 eenparig dat vrywillige kontraktuele arbitrasie grondwetlik houdbaar en geldig is. Die hof bevind voorts dat arbitrasie 'n redelike beperking op die reg op 'n jurieverhoor is, en nie substantiewe veranderinge meebring nie – dit stel slegs 'n spesifieke forum daar vir die afhandeling van dispute. In *Brown v Siang*[135] beslis die Michigan appèlhof dat 'n arbitrasie-ooreenkoms nie 'n voorvereiste vir die behandeling van 'n pasiënt is nie, selfs al bemoeilik die pasiënt se omstandighede en die opset van die gesondheidsorgverskaffer dit vir die pasiënt om die ooreenkoms te weier.[136] In die *Brown*-saak stel die hof dit baie duidelik met verwysing na *Wheeler v St Joseph Hospital*:[137]

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128 *Idem* 413.

129 Kalifornië en Illinois laat die pasiënt of gesondheidsverskaffer toe om die kontrak te herroep en in Alaska, Louisiana, Main, Ohio en Virginia is die ooreenkoms slegs herroepbaar deur die pasiënt: *idem* 413 vn 11 12; Cal Civ Proc Code § 1295 (c) (1981); Ill Rev Stat c 10 209(c) (1982); Alaska Stat § 09.55.535 (c) (Supp 1981); La Rev Stat Ann § 9:4235 (1982); Me Rev Stat Ann tit 24 § 2702 (1) (C) (Supp 1982); Ohio Rev Code Ann § 2711.26 (b) (1981); Va Code § 8.01–581.12(A) (1977 & Supp 1982).

130 In Michigan word 60 dae toegelaat óf na uitvoering van die behandeling óf na ontslag uit 'n hospitaal. Murphy 1987 *Medical Trial Technique Q* 413 vn 14; MSA § 27 A 5041 Subd (3) MCL § 600.5041 subd (3) (Supp 1982). In Suid-Dakota is daar geen tydsbeperking waarbinne 'n arbitrasie-ooreenkoms herroep mag word nie.

131 Murphy 1987 *Medical Trial Technique Q* 414.

132 *Ibid* en die statute genoem *idem* 428 vn 18.

133 *Idem* 416 429 vn 27.

134 62 Cal 2d 606; 43 Cal Rptr 697 401 P 2d 1 (1965).

135 107 Mich App 91 (1981).

136 Murphy 1987 *Medical Trial Technique Q* 418.

137 63 Cal App 3d 345; 133 Cal Rptr 775 (1976).

> "The form clearly states that the agreement to arbitrate is not a prerequisite to care. Furthermore, the patient is given sixty days after execution in which to revoke the agreement, thereby alleviating the possibility of coerciveness in the admission room found in Wheeler. The patient has a realistic and fully informed choice based upon the form and the booklet presented."[138]

Die vrese vir moontlike partydigheid by geneeshere wat lid is van die arbitrasiepaneel is onder andere besweer deur die feit dat hulle 'n geldelike belang het in die uiteindelike uitslag van die mediese wanpraktyksaak, aangesien dit die koste en beskikbaarheid van wanpraktykversekering nadelig kan beïnvloed.[139] Die appèlhof het met verwysing na die grondwetlikheid van die Michigan Arbitration Act die volgende vier faktore uitgelig:[140]

(a) Die geneesheer is een van drie lede op die paneel – hy kan nie alleen die beslissing maak nie;

(b) in die wet self word daar voorsiening gemaak vir die tersydestelling van 'n bevel indien 'n arbiter bevooroordeeld is;

(c) in die betrokke saak is geen getuienis aangevoer om 'n bevinding te steun dat geneeshere geldelike belang in die uitslag of 'n antagonistiese houding jeens hierdie tipe sake het nie; en

(d) daar is 'n behoefte aan 'n mediese deskundige op die paneel vanweë die hoogs tegniese aard van die verrigtinge.

Ten opsigte van die groot beswaar dat ondertekening van 'n arbitrasie-ooreenkoms 'n ongrondwetlike afstanddoening van die reg op 'n jurieverhoor is, het die Michigan appèlhof in *Moore v Fragatos*[141] beslis dat die toets vir die geldigheid van 'n arbitrasie-ooreenkoms is om vas te stel of daar voldoende getuienis is wat daarop dui dat die pasiënt bewustelik en vrywillig gekies het om afstand te doen van bedoelde konstitusionele reg.[142] Hoewel 'n jurieverhoor fundamenteel tot die Amerikaanse regstelsel is, ontmoedig die howe nie 'n arbitrasie-ooreenkoms nie en word arbitrasie nie as 'n minderwaardige beslegtingsproses beskou nie maar as 'n alternatiewe forum met 'n baie goeie rekord.[143]

Te oordeel aan die Heintz-studie en die Rubsammen-navorsing, blyk die arbitrasieproses in ten minste Michigan en Kalifornië 'n sukses te wees.[144] Vanaf Januarie 1976 tot einde 1981 is 24,7% van die 150 eise teruggetrek, 53,3% geskik en 22% het die arbitrasieproses deurloop. Skikkings het 'n gemiddeld van $20 000 bereik en toekennings was gemiddeld $9 200. Administratiewe koste en uitgawes in die arbitrasieproses het 'n gemiddeld van $1 470 beloop. Vanaf die stadium dat 'n eis aanhangig gemaak is tot by afhandeling daarvan het 'n gemiddeld van twee dae verloop. Ingevolge die Michiganplan neem dit ongeveer 'n jaar vir 'n gemiddelde bedrag van $9 000 om by wyse van arbitrasie verhaal te word.

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138 107 Mich App 91 108 (1981).
139 Murphy 1987 *Medical Trial Technique Q* 421.
140 107 Mich App 91 (1981).
141 321 NW 2d 781 (Mich App 1982).
142 Murphy 1987 *Medical Trial Technique Q* 419.
143 *Idem* 420 424.
144 *Idem* 423–426.

5 5 Bemiddeling

By bemiddeling as alternatiewe geskilbeslegtingsmetode word konflikoplossing hanteer deur 'n derde party, met vrywillige deelname deur die partye tot die geskil[145] en met die hoofdoel om partye te beweeg om self 'n oplossing te vind.

Bemiddeling is in die Suid-Afrikaanse reg nie 'n vreemde verskynsel nie. Niks verhoed partye tot 'n mediese wanpraktyksgeskil om die geskil vir bemiddeling voor te hou nie. Op die gebied van die arbeidsreg het organisasies soos die Independent Mediation Service of South Africa (IMSSA), die South African Association for Conflict Intervention en die South African Association for Mediation die bemiddelingsproblematiek aangespreek.

Na aard is bemiddeling nie 'n juridies bindende proses nie en ook nie finaal nie. In *Blue Circle Projects (Pty) Ltd v Klerksdorp Municipality*[146] is die aansoek om 'n bevel wat die bemiddelaar se opinie as bindend en finaal bestempel van die hand gewys. Op die regsvraag na die juridiese bindingskrag van 'n bemiddelaarsopinie, het die hof uitdruklik verklaar dat 'n bindende en finale bevel slegs deur 'n geregshof gemaak kan word.

'n Onafhanklike, objektiewe en geskikte persoon tree as voorsitter van die bemiddelingsproses op. Hoewel dit 'n eenvoudige proses is, hang die sukses daarvan af van die bemiddelaar se kuns om met begrip te kan luister sonder om emosioneel betrokke te raak.[147] Die bemiddelaar het geen bevoegdheid om te stem of om partye te verplig om 'n skikking te aanvaar nie. Voorts kan die bemiddelaar hom nie uitspreek oor 'n beslissing of beslegtingswyse nie. Sy bevoegdheid strek sover as die kontrolering en beëindiging van die bemiddelingsproses.

Die Wet op Howe vir Kort Proses en Bemiddeling in Sekere Siviele Sake[148] bied 'n riglyn ten opsigte van die kwalifikasies[149] van 'n bemiddelaar vir 'n bepaalde gebied waarvoor 'n hof vir kort proses ingestel is. Die Minister van Justisie doen die aanstelling op aanbeveling van die Vereniging van Prokureursordes, die Algemene Balieraad en die Departement van Justisie.[150]

Hoewel die pendulum na die regspraktisyn of regsprekende beampte oorhel om as bemiddelaar op te tree, behoort die regsgeleerde op sy hoede te wees om nie té regsanalities te werk te gaan nie.

> "Although a grasp of legal principle may sometimes be useful such expertise when misused is detrimental to mediation ... Legal analysis generally provides much too narrow a summation of perceptions, interests, needs and opportunities and more particularly approaches human affairs on the basis of their being devoid of perceptions and emotion ... It is for these reasons that conventional legal processes so often provide inadequate dispute resolution. Whatever the final legal determination it seldom lays to rest prevailing perceptions and emotions."[151]

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145 Van der Merwe "Keuses tussen bemiddelingstegnieke" 1989 *Acta Academica* 92.

146 1990 1 SA 469 (T); Schulze "Arbitration and mediation – when is a final opinion final?" 1990 (1) *Codicillus* 55.

147 Simoncelli "Mediasie en arbitrasie in dispuutoplossing" 1992 *Entrepreneur* 14.

148 103 van 1991.

149 A 7: Die bemiddelaar moet in so 'n mate gekwalifiseer wees dat hy toegelaat kan word as prokureur of advokaat, of aangestel kan word as landdros of die persoon moet vir 'n ononderbroke tydperk van vyf jaar gepraktiseer het as prokureur of advokaat of by regsonderrig betrokke gewees het.

150 A 2(1).

151 Trollip *Alternative dispute resolution* 52.

Partye tot bemiddeling het die gerusstelling dat hulle geregtig is op regsverteenwoordiging; hulle regte ten opsigte van gedingvoering nie aangetas word nie; geen oorkonde van die verrigtinge gehou word nie; hulle geen getuienis in 'n geregshof hoef af te lê oor die bemiddelingsverrigtinge nie; vertroulike inligting aan die bemiddelaar as sodanig behandel sal word; dit 'n vrywillige proses is; en dat 'n party sonder opgaaf van redes kan onttrek.[152]

By die aanvang[153] van die bemiddelingsproses stel die bemiddelaar homself, sy kwalifikasies, sy spesialisasiegebied en bemiddelingsoptredes in die verlede aan die partye bekend. Die bemiddelaar dui die bemiddelingsdoel aan, naamlik die oplossing van 'n geskil en wys die partye daarop dat vanweë hulle bereidheid tot bemiddeling, dit 'n stap op die pad na sukses is en dat indien hulle 'n skikking sou bereik, dit die partye se eie oplossing vir die probleem is. Die bemiddelaar dui ook aan oor watter inligting hy beskik[154] en verseker die partye dat hy as onpartydige optree en hoegenaamd geen geldelike belang by die uitslag het nie. Voorts word die bemiddelingsprosedure kortliks verduidelik.

Elke party kry die geleentheid vir 'n openingsrede in mekaar se teenwoordigheid. Die feite waarop elke party steun, word uiteengesit. Die party wat bemiddeling versoek het, kry eerste geleentheid. Geen onderbreking word in hierdie stadium toegelaat nie. Partye kry daarna die geleentheid om op die weergawes te reageer. Hierop word die geskilpunte uitgelig en die bemiddelaar gee 'n kort weergawe van elke party se saak. Voorstelle ter oplossing van die geskil word gevra en partye kry geleentheid om te reageer. Voorstelle met die meeste steun word vervolgens bespreek.

Die bemiddelaar ontmoet partye individueel in koukus. Vertroulike mededelings wat partye maak, word op versoek aldus hanteer. Wanneer 'n skikking bereik is, word die ooreenkoms op skrif gestel en deur die partye onderteken. Partye moet dit eens wees oor die doeltreffendheid van die ooreenkoms en welke gevolge sal intree indien 'n party versuim om by die ooreenkoms te hou.

Indien 'n party *mala fide* optree of indien daar geen vooruitsig op 'n skikking is nie, kan die bemiddelaar die verrigtinge afgelas.

6 SLOTOPMERKINGS

Daar bestaan verskillende meganismes waardeur medies-deskundige getuienis in 'n geregshof aangebied kan word. Die gewone siviele prosedure beantwoord egter nie aan die verwagtinge wat medici, regsgeleerdes en die publiek in mediese wanpraktykseise stel nie. Geskikte assessore en skeidsregters kan 'n welkome oplossing bied mits hulle na behore vergoed word. Die waarde van voorverhoorsamesprekings kan nie genoeg beklemtoon word nie en 'n gebiedende bepaling in die landdroshof word in dié verband bepleit.

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152 *Idem* 41–57.

153 *Idem* 45–46.

154 Trollip *idem* 43 verkies om dmv direkte kommunikasie en interaksie met partye as bemiddelaar die geskil te evalueer ipv oplees en voorbereidingswerk wat voor die bemiddeling reeds afgehandel word: "Direct and immediate recourse to documentation has the disadvantage of neutralising emotions and perceptions – it carries the risk of premature legal analysis which ... can be counterproductive ... and have the unfortunate effect of anchoring the process to the documentation ... [It] may very well give parties a sense that the mediator has already made up his mind ... in relation to the matter and is not listening to them impartially ... [and] documents may be misleading."

Alternatiewe geskilbeslegtingsmetodes hou beslis meriete in. Hoewel keuringspanele onsekerhede laat, kan die waarde van die ombudspersoon, arbitrasie en bemiddeling nie geringgeskat word nie – aan laasgenoemde drie metodes is voor- en nadele verbonde. Die geskikste metodes is waarskynlik die optrede van die ombudspersoon as keurder in 'n voor-litigasieproses en arbitrasie in plaas van litigasie. Die ombudspersoon is vanweë sy kundigheid en professionaliteit in staat om kwelsieke, onbenullige en ongegronde eise te ontmoedig.

Indien 'n party wil voortgaan met litigasie kan die ombudspersoon, wie se verslag *prima facie* getuienis is, die hof van groot hulp wees. Die ombudspersoon behoort egter die bystand van 'n regsgeleerde in te roep rakende regsaspekte. Vrywillige arbitrasie bied deskundigheid, 'n private forum, informele prosedure, finaliteit van beslissing, billike toekennings, keusevryheid ten opsigte van plek en tyd van verrigtinge, spoedige afhandeling en verminderde koste. Enkele moontlike nadele kan by wyse van die arbitrasie-ooreenkoms ondervang word.

Benewens meganismes binne die geregshofstruktuur is daar dus ook alternatiewe gepaste forums vir 'n benadeelde pasiënt beskikbaar. Die vrese van die pasiënt, naamlik 'n "conspiracy of silence", en die vrese van die geneesheer, naamlik die geregshof as 'n "torture chamber", word in van bogenoemde forums grotendeels in die kiem gesmoor. Beide partye, asook die medies-deskundige getuie, kan met groot verwagting uitsien na 'n beslissing gebaseer op die grondslag van geregtigheid en billikheid aangesien die voorgestelde forums die klimaat vir groter "verbruikersvriendelikheid" skep.

The minister, priest, rabbi or moulana in our society performs an important function as the receptacle of their congregants' pain, anguish, indecision and lingering trauma. The importance of this function cannot be calculated in pecuniary terms, but the law respects it none the less. The right to speak frankly to one's advisers, medical, legal and indeed also spiritual, is in the end a matter of public interest. The defendant's entitlement to speak to her priest at her home, even at risk to the plaintiff's right to his reputation, must therefore be upheld (per Cameron J in *O v O* 1995 4 SA 482 (W) 492).

Nalatige wanvoorstelling in die Skotse reg: Betekenis vir die Suid-Afrikaanse reg

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SUMMARY

Negligent misrepresentation in Scottish law: Significance for South African law

This article investigates the Scottish law of negligent misrepresentation. Apart from a brief historical overview, it deals with both the general legal principles as regards misrepresentation and the specific principles regarding negligent misrepresentation. Like the South African law on the subject, Scottish law is still in a process of development and it is submitted that it could be beneficial to our own law if cognisance is taken of the developments taking place in Scotland.

1 INLEIDING

Die Skotse reg (wat amptelik nie deel van die Engelse reg vorm nie) is sterk deur die Romeinse reg beïnvloed. Hierdie regstelsel is op algemene beginsels gebaseer en nie, soos die Engelse reg, op *ad hoc*-presedente nie. Omdat die Suid-Afrikaanse reg (wat ook van Romeinsregtelike oorsprong is) eweneens op beginselgrondslae funksioneer, word daar in hierdie bondige ondersoek van die Skotse reg na raakpunte met en gemeenskaplike oplossings rakende nalatige wanvoorstelling vir die Suid-Afrikaanse reg gesoek. Hierdie ondersoek bestaan uit 'n historiese oriëntering asook 'n bespreking van die algemene beginsels insake wanvoorstelling en die besondere beginsels rakende nalatige wanvoorstelling.

2 HISTORIESE ORIËNTERING

Die Skotse reg[1] het uit die Keltiese reg ontwikkel.[2] Gedurende die elfde eeu is feodalisme in Skotland gevestig, wat noodwendig 'n invloed op die Skotse reg

1 Alhoewel Skotland deel van die Verenigde Koninkryk is, het dit nie dieselfde regstelsel as Engeland nie: McCluskey "Auditors' and lawyers' negligence: the present law in England and Scotland" 1993 *De Rebus* 258.

2 "The laws of Scotland" *Stair memorial encyclopaedia* vol 22 (1987) 225.

gehad het.[3] Die *Wars of Independence* het tot gevolg gehad dat die Skotse reg tot en met die einde van die sestiende eeu min ontwikkel het en dié tydperk staan as die "dark age" bekend.[4] Met die instelling van die *Court of Session* in 1532 het daar 'n opbloei (onder die invloed van die Romeinse reg) in die Skotse reg plaasgevind.[5]

Alhoewel die Romeinse reg (van die Justiniaanse tydperk) nie formeel[6] in die Skotse reg opgeneem is nie, is dit 'n gegewe dat die Romeinse reg, tesame met die Kanonieke reg, direk en indirek as *ius commune* 'n belangrike invloed op die Skotse reg (veral die kontraktereg[7]) gehad het.[8] Veral vanaf die einde van die vyftiende eeu is daar duidelike spore van Romeinsregtelike beïnvloeding op die Skotse statutêre reg.[9] Belangrike faktore vir die resepsie van die Romeinse reg is dat Skotse juriste hoofsaaklik in die Romeinse reg opleiding ontvang het en dat heelwat regsliteratuur op die Romeinse reg gebaseer is.[10] Hierdie resepsie het primêr deur die howe, veral die *Court of Session*, praktiese beslag gekry.[11] So meld regter Lesley in 1564:[12]

> "This far to the lawis of the Realme we are restricted, gif ony cummirsum or trubilsum cause fal out, as oft chances, quhilke can nocht be agriet be our cuntrey lawis, incontinent quhatevir is thoct necessar to purify this controversie, is cited out of the Roman lawis."

Omdat die Skotse reg aan die einde van die agtiende eeu tot 'n koherente nasionale unitêre regsisteem ontwikkel het, het die invloed van die Romeinse reg daarna stelselmatig afgeneem.[13]

3 ALGEMENE BEGINSELS RAKENDE WANVOORSTELLING

As algemene reël berus die Skotse sivielregtelike aanspreeklikheid op beginsels en nie *ad hoc*-presedente soos in die Engelse reg nie.[14]

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3 *Idem* 225–228; Dickinson *Scotland from the earliest times to 1603* (1977) 82 ev; Smith *A short commentary on the law of Scotland* (1962) 19.

4 *Stair memorial encyclopaedia* vol 22 228–230 en vol 11 (1990) 361; Paton "The dark age 1329–1532" in *An introduction to Scottish legal history* (1958) 18 ev.

5 *Stair memorial encyclopaedia* vol 22 230–232; Smith 19.

6 Die resepsie van die Romeinse reg in die Skotse reg het *imperio rationis* geskied: *Stair memorial encyclopaedia* vol 22 244.

7 *Idem* 247.

8 *Idem* 244; Redden ea *Modern legal systems cyclopedia* (1990) 3.240.12.

9 Bv die Prescription Act 1469 en die Tutors Act 1474: *Stair memorial encyclopaedia* vol 22 246; Redden ea 3.240.13.

10 *Stair memorial encyclopaedia* vol 22 246; Smith 19–21.

11 *Stair memorial encyclopaedia* vol 22 246; Smith 20 22.

12 Soos aangehaal deur Stein "The influence of Roman law on the law of Scotland" 1963 *JR* 216.

13 *Stair memorial encyclopaedia* vol 22 247; Redden ea 3.240.13 ev; Smith 24.

14 *Stair memorial encyclopaedia* vol 11 363; Cooper "The common and the civil law – a Scots view" 1950 *Harv LR* 468 471; Walker *The Scottish legal system* (1981) 126; McCluskey 1993 *De Rebus* 259; Marshall *General principles of Scots law* (1982) 284; Smith 24; Blaikie "Negligent solicitors and disappointed beneficiaries" 1990 *Scots LT* 317. Sien bv Gloag *The law of contract: a treatise on the principles of contract in the law of Scotland* (1985) 319 waar bevestig word dat die Skotse verbintenisreg (soos die Romeinse verbintenisreg) uit die volgende kategorieë bestaan: (a) *ex contractu*; (b) *quasi ex contractu*; (c) *ex maleficio*; en (d) *quasi ex maleficio*.

'n Wanvoorstelling[15] (wat tot kontraksluiting aanleiding gee[16] of die vorm van 'n kontraktuele waarborg[17] of beding[18] aanneem) is alleen gedingsvatbaar indien dit:[19]

(a) onwaar is;[20]

(b) op 'n bestaande feit slaan;[21]

(c) met 'n feitelike gegewe (nie 'n regsvraag[22] nie) handel;[23]

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15 Wat uitdruklik, deur gedrag of nie-openbaarmaking gemaak kan word: Walker *Principles of Scottish private law* (1988) (*Principles*) 75 76–77; Walker *The law of contracts and related obligations in Scotland* (1985) (*Contracts*) 261 ev; *Beddie v Milroy* 1812 Hume 695; *Schneider v Heath* (1813) 3 Champ 506; *Murray v Selkrig* (1815) 18 Fac Coll 176; *Paul v Old Shipping Co* (1816) 1 Mur 64; *Broatch v Jenkins* (1866) 4M 1030; *White v Dougherty* (1891) 18R 972; *Murray v Marr* (1892) 20R 119; *Ferguson v Wilson* (1904) 6F 779; *Boyd and Forrest v The Glasgow South-Western Railway Co* 1912 SC 93 (HL); *Shankland v Robinson* 1920 SC 103 (HL); *Park v Anderson Brothers* 1924 SC 1017; *Zurich General Accident Insurance Co v Leven* 1940 SC 406. In *Cullen's Trustee v Johnston* (1865) 3M 935 936 beslis die hof: "A representation may be false by reason not only of positive misstatements made in it, but by reason of intentional suppressions, whereby the information it gives assumes a false colour, giving a false impression, and leading necessarily, or almost necessarily, to erroneous conclusions."

16 Die wanvoorstelling word gedurende die onderhandelingsfase gemaak, en vorm nie deel van die kontrak nie: *Behn v Burness* (1863) 1 B & S 751; *Manners v Whitehead* (1898) 1F 171; *Hay v Rafferty* (1899) 2F 302.

17 *Hunter v Carson* (1824) 2S 596; *Kembles v Mitchell* (1831) 9S 648; *Johnstone v Owen* (1845) 7D 1046; *Park v Gould* (1851) 13D 1049; *Wallace v Gibson* (1895) 22R 56 (HL).

18 *Woods v Tulloch* (1893) 20R 477; *Robey and Co Ltd v Stein and Co* (1900) 3F 278. Om te bepaal of 'n wanvoorstelling deel is van 'n kontraktuele beding is 'n feitevraag: *Behn v Burness* hierbo; *Bentsen v Taylor Sons and Co* (1832) 2 QB 274; *Huyslop v Shirlaw* (1905) 7F 875; *Paul and Co v Corporation of Glasgow* (1900) 3F 119; *Crichton and Stevenson v Love* 1908 SC 818. In hierdie geval is die benadeelde op alle kontraktuele remedies geregtig wat skadevergoeding insluit: *Wade v Waldon* 1909 SC 571; *Bentsen v Taylor Sons and Co* hierbo; *Behn v Burness* hierbo.

19 Dunedin, Wark en Black *Encyclopaedia of the laws of Scotland* vol 10 (1930) 54–56; Wilkinson ea *Gloag and Henderson Introduction to the law of Scotland* (1987) 89 ev; Walker *Contracts* 257–260; Gloag *Contract* 462; Walker *The law of damages in Scotland* (1955) 62–63.

20 Walker *Principles* vol 2 (1988) 75; *Contracts* 257; *The law of civil remedies in Scotland* (1974) (*Civil remedies*) 482; *Damages* 62; *MacDonald v Fyfe Ireland and Dangerfield* (1895) 3 SLT 124.

21 *Jordan v Money* (1854) 5 HLC 185; *Stewart v Kennedy* (1890) 17R 1 (HL); *Jackson v Stopford* 1923 2 Ir R 1; *Zurich General Accident Insurance Co v Leven* hierbo; Woolman *An introduction to the Scots law of contract* (1987) 79; Gloag *Contract* 462; Marshall *Scottish cases on contract* (1978) (*Cases*) 100; Walker *Principles* 75; *Contracts* 257; *Civil remedies* 482; *Damages* 62.

22 'n Regsmening aangaande 'n buitelandse regsvraag of die regsgevolge van 'n kontrak kan wel as 'n wanvoorstelling kwalifiseer: *Leslie v Baillie* (1843) 2 Y & CCC 91; *Stewart v Kennedy* hierbo; *Lendrum or Chakravarti v Chakravarti* 1929 SLT 96; Walker *Principles* 75; *Damages* 62–63; Wilkinson ea 90; Gloag *Contract* 462–463.

23 So kwalifiseer verkoopspraatjies, beloftes en die uitspreek van 'n mening of voorspelling regtens nie as 'n wanvoorstelling nie: *Dimmock v Hallett* (1866) LR 2 Ch 21; *Rashdall v Ford* (1866) LR 2 Eq 750; *City of Edinburgh Brewery Co v Gibson's Trustee* (1869) 7M 886; *Reese River Silver Mining Co v Smith* (1869) LR 4 (HL) 64; *Gowans v Christie* (1873) 11M 1 (HL); *Edgington v Fitzmaurice* (1885) 29 Ch 459; *Dunnett v Mitchell* (1887) 15R 131; *Paul and Co v Corporation of Glasgow* hierbo; *Ferguson v Wilson* hierbo; *Bell Brothers (HP) Ltd v Reynolds* 1945 SC 213; *Flynn v Scott* 1949 SC 442 (OH); Wilkinson ea 90; Walker *Principles* 75–76; *Contracts* 258–260; *Civil remedies* 482; *Damages* 62–63; Gloag *Contract* 462; Marshall *Cases* 100.

(d) wesenlik is;[24]

(e) die geadresseerde oortuig het om anders te handel as wat hy in afwesigheid van die wanvoorstelling sou doen;[25]

(f) deur die voorsteller (nie 'n derde nie) aan die geadresseerde gemaak is;[26] en

(g) veroorsaak dat die geadresseerde in *error* verkeer.[27]

'n Wanvoorstelling[28] maak 'n kontrak vernietigbaar[29] en nie nietig nie.[30] Waar die wanvoorstelling egter so wesenlik is dat *consensus* daardeur uitgesluit word,

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24 *Royal Bank v Ranken* (1844) 6D 1418; *Kennedy v Panama Mail Co* (1867) LR 2 QB 580; *City of Edinburgh Brewery Co v Gibson's Trustee* hierbo; *Smith v Chadwick* (1882) 20 Ch 27; *Lees v Tod* (1882) 9R 807; *Menzies v Menzies* (1893) 20R 108 (HL); *Woods v Tulloch* hierbo; *Stewart v Kennedy* hierbo; *Gamage Ltd v Charlesworth's Trustee* 1910 SC 257; *Ritchie v Glass* 1936 SLT 591; *Winram v Finlayson* 1977 SC 19; Walker *Principles* 80; *Contracts* 257 267–268; *Civil remedies* 482; *Damages* 63; Woolman 79. Die vereiste van wesenlikheid is nie op kontrakte *uberrimae fidei* van toepassing nie omdat alle voorstellings in hierdie geval wesenlik is: *Dawsons Ltd v Bonnin* 1922 SC 156 (HL); *Glicksman v Lancashire and General Assurance Co* 1927 AC 139; Woolman 79–80. In *Ritchie v Glass* hierbo 593–594 word die inhoud en aard van wesenlikheid in geval van 'n wanvoorstelling soos volg gestel: "[T]hat matter need not be an essential of the contract, but it must be material and of such a nature that not only the contracting party but any reasonable man might be moved to enter into the contract."

25 *Attwood v Small* (1835) 6 Cl & Fin 305; *McLellan v Gibson* (1843) 5D 1032; *Gillespie v Russel* (1856) 18D 677; *Western Bank v Addie* (1867) 5M 80 (HL); *Lees v Tod* hierbo; *Arnison v Smith* (1889) 41 Ch 348; *Jordan v Money* hierbo; *Gamage Ltd v Charlesworth's Trustee* hierbo; *Robinson v National Bank of Scotland* 1916 SC 154 (HL). Dus analoog aan die vereiste van *dolus dans causam contractui*, in teenstelling met *dolus incidens in contractum: National Exchange Co v Drew* (1860) 23D 1; *Gamage Ltd v Charlesworth's Trustees* hierbo; *Boyd and Forrest v The Glasgow South-Western Railway Co* hierbo; Walker *Principles* 81; *Contracts* 270 ev; *Civil remedies* 482; *Damages* 63; Gloag *Contract* 469. Die wanvoorstelling hoef egter nie die enigste faktor te wees wat die geadresseerde oortuig het om te kontrakteer nie: *Falconer v N of S Bank* (1863) 1M 764; *Western Bank v Addie* hierbo; *Gamage Ltd v Charlesworth's Trustee* hierbo.

26 *Forth Marine Insurance Co v Burness* (1848) 10D 689; *Hockey v Clydesdale Bank* (1898) 1F 119; *Aitken v Pyper* (1900) 8 SLT 258; *Gillies v Campbell Shearer and Co* (1902) 10 SLT 289; *Laing v Provincial Homes Investment Co* 1909 SC 812; Walker *Principles* 80; *Contracts* 265–266. Waar 'n wanvoorstelling deur 'n verteenwoordiger in die uitvoering van 'n mandaat gemaak word, is die prinsipaal vir sodanige wanvoorstelling aanspreeklik: *New Brunswick Railway Co v Conybeare* (1862) 9 HL 725; *Western Bank v Addie* hierbo; *Mair v Rio Grande Rubber Estates Co* 1913 SC 74 (HL); Walker *Contracts* 266 ev; Gloag *Contract* 464–465.

27 *McLellan v Gibson* (1843) 5D 1032; *Ehrenbacher v Kennedy* (1874) 1R 1131; *Young v Clydesdale Bank* (1889) 17R 231; *Muir v Rankin* (1905) 13 SLT 60; *Gamage Ltd v Charlesworth's Trustee* hierbo; *Davies v Hunter* 1934 SC 10; Walker *Principles* 80–81; *Contracts* 268–269. Sien vn 32–33 hieronder oor die onderskeid tussen 'n wanvoorstelling en *error*.

28 Ongeag of die wanvoorstelling onskuldig, nalatig of bedrieglik gemaak is: *Adamson v Glasgow Waterworks* (1859) 21D 1012; *Wilson v Caledonian Railways* (1860) 22D 1408; *Morrisson v Robertson* 1908 SC 332; Walker *Principles* 84. Waar die wanvoorstelling onskuldig gemaak is, het die benadeelde geen *ex delicto* remedie nie. *Adams v Newbigging* (1888) 13 AC 308; *Manners v Whitehead* hierbo; *Boyd and Forrest v The Glasgow South-Western Railway Co* hierbo; Walker *Principles* 652; Wilkinson ea 88; Woolman 80.

29 Wat *restitutio in integrum* tot gevolg het: Walker *Principles* 85; *Contracts* 284. Gedeeltelike *restitutio in integrum* is regtens onmoontlik: *Smyth v Muir* (1891) 19R 81; *United Shoe Machinery Co v Brunet* 1909 AC 330; Gloag *Contract* 480. Die volgende vereistes moet nagekom word alvorens 'n kontrak vernietigbaar is: (a) *Restitutio in integrum* moet regtens

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is die betrokke kontrak nietig.[31] Laasgenoemde is moontlik omdat daar nie 'n besliste onderskeid tussen 'n *error*[32] en 'n wanvoorstelling gemaak word nie en voormelde regsfigure juridies as sinonieme beskou word.[33] Verder maak 'n wanvoorstelling 'n kontrak slegs vernietigbaar indien dit 'n *error* aan die kant van die benadeelde veroorsaak.[34] Die benadeelde moet dus onbewus wees van die ware feite alvorens enige regshulp op grond van 'n wanvoorstelling verleen mag word.[35] 'n Wanvoorstelling aangaande 'n persoon se kredietwaardigheid maak 'n kontrak vernietigbaar slegs indien dit op skrif gestel is.[36]

Daar bestaan geen algemene openbaringsplig in die Skotse reg nie.[37] *Caveat emptor*[38] is 'n stelreël wat steeds algemene aanwending vind.[39] Gevalle waar

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moontlik wees; (b) die kontrak moet nie deur die benadeelde aanvaar wees nie; en (c) die aksie moet so spoedig moontlik gebring word (sien Woolman 83; *Morrisson v Robertson* hierbo; *MacLeod v Kerr* 1965 SC 253).

30 *Tulloch v Davidson* (1860) 22D 7 (HL); *Graham v Western Bank* (1864) 2M 559; *Western Bank v Addie* hierbo; *Stewart v Kennedy* hierbo; *Woods v Tulloch* hierbo; *Ferguson v Wilson* hierbo; *Price and Pierce v Bank of Scotland* 1912 SC 19 (HL); *Edgar v Hector* 1912 SC 348; *Macleod v Kerr* hierbo; Walker *Damages* 63; *Principles* 74–75; *Contracts* 280 284; Gloag *Contract* 456 471; Marshall *Cases* 91 ev. Alhoewel daar regsonsekerheid bestaan, blyk dit dat 'n wanvoorstelling *essentialibus* moet wees alvorens dit 'n kontrak vernietigbaar maak: *Hart v Fraser* 1907 SC 50; *Boyd and Forrest v The Glasgow and South-Western Railway Co* hierbo; *Woods v Tulloch* hierbo; Walker *Principles* 75 84 ev; Wilkinson ea 89; Woolman 79 80; Marshall *Principles* 285; *Cases* 102 ev. Waar die wanvoorstelling skuldloos is, kan geen skadevergoeding *ex delicto* geëis word nie: *Stewart v Kennedy* hierbo; *Manners v Whitehead* hierbo; Walker *The law of delict in Scotland* (1981) 901; *Civil remedies* 483 ev. Indien die skuldlose wanvoorstelling egter deel van 'n kontraktuele beding vorm, kan skadevergoeding *ex contractu* verhaal word: Walker *Damages* 64. Waar die wanvoorstelling bedrieglik of nalatig gemaak is, kan daar benewens terugtrede ook skadevergoeding geëis word: Walker *Civil remedies* 482; par 4 hieronder.

31 *Adamson v Glasgow Water Works* hierbo; *Morrisson v Robertson* hierbo; Walker *Principles* 75; *Contracts* 280–281 284; Marshall *Cases* 88 ev.

32 Volgens Walker *Contracts* 281–283 word *error* in die volgende kategorieë ingedeel, nl ingevolge die (a) aard van die kontrak; (b) ware identiteit van die persoon met wie gekontrakteer word; (c) aard van die prestasie wat gelewer moet word; (d) omvang van die prestasie wat gelewer moet word; en (e) die wese ("subject matter") van die kontrak.

33 Walker *Principles* 74; *Contracts* 257 268–270.

34 *Attwood v Small* hierbo; *Ehrenbacher v Kennedy* hierbo; *Young v Clydesdale Bank* (1889) 17R 231; *Edinburgh United Breweries v Molleson* (1893) 20R 581; *Menzies v Menzies* hierbo; *McMorland's Trustees v Fraser* (1896) 24R 65; *Muir v Rankin* hierbo; *MacLeish v British Linen Bank* 1911 2 SLT 168; *Westville Shipping Co v Abram Shipping Co* 1922 SC 571; *Davies v Hunter* hierbo; *Ritchie v Glass* hierbo; *McCulloch v McCulloch* 1950 SLT 29; Walker *Contracts* 268–269; *Civil remedies* 482; *Damages* 62; Gloag *Contract* 468 472–473.

35 *Begbie v Phosphate Sewage Co* 1875 1 QB 679; *Paterson v Landsberg* (1907) 7F 675; Gloag *Contract* 468–469.

36 A 6 Mercantile Law Amendment (Scotland) Act, 1856; *Scott v Steele* (1857) 20D 253; *Robeson v Waugh* (1874) 2R 63; *Rough v Moir and Son* (1875) 2R 529; *Clydesdale Bank v Paton* (1896) 23R 22 (HL); *Robey and Co Ltd v Stein and Co* hierbo; *Huyslop v Shirlaw* hierbo; *Union Bank of Scotland v Taylor* 1925 SC 835; Gloag *Contract* 473–474; Walker *Damages* 65.

37 *Morison v Boswell* 1801 Hume 679; *Paterson v Allen* 1801 Hume 681; *Gillespie v Russel* hierbo; *Young v Clydesdale Bank* hierbo; *Murray v Marr* hierbo; *Park v Anderson Brothers* hierbo; *N of S Bank v Mackenzie* 1925 SLT 236; *Walker v Greenock Hospitals Board* 1951 SC 464; Walker *Principles* 77–78; Woolman 79–80; Gloag *Contract* 257; Marshall *Cases* 93 ev.

daar wel 'n spesifieke openbaringsplig bestaan, is by kontrakte *uberrimae fidei*,[40] waar die nie-openbaarmaking *per se* 'n wanvoorstelling sal meebring,[41] waar daar 'n fidusiêre verhouding tussen die partye bestaan[42] en waar nuwe feite (wat na kontraksluiting aan die lig kom) openbaarmaking noodsaak.[43]

Slegs persone wat direk of by implikasie deur die wanvoorstelling aangespreek is, het *locus standi* om op grond daarvan te litigeer.[44]

4 BESONDERE BEGINSELS RAKENDE NALATIGE WANVOORSTELLING

Alhoewel die Skotse positiewe reg aanvanklik nie 'n onderskeid gemaak het tussen onskuldige en nalatige wanvoorstelling nie,[45] bestaan daar tans 'n definitiewe onderskeid tussen onskuldige,[46] nalatige[47] en bedrieglike[48] wanvoorstelling.

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38 Waar handelsware foutief omskryf word, geld die bepalings van die Trade Descriptions Act, 1968 wat bloot strafregtelike sanksies skep maar nie die regsgeldigheid van die kontrak raak nie: Walker *Contracts* 285.

39 *Murray v Marr* hierbo; Walker *Contracts* 263. Daar rus egter nie 'n verpligting op die geadresseerde om die korrektheid van elke voorstelling na te gaan nie: *Scottish Widows' Fund v Buist* (1876) 3R 1078; *Bloomenthal v Ford* 1897 AC 156; Gloag *Contract* 470–471.

40 *Stirling and Robertson v Goddard* (1822) 1 Ch App 238; *Buist v Scottish Equitable* (1878) 5R 64 (HL); *Harvey v Seligmann* (1883) 10R 680; *Blackburn v Vigors* (1886) 12 AC 531; *Zurich General Accident Insurance Co v Leven* hierbo; *Walker v Greenock Hospital Board* hierbo; *McCartney v Laverty* 1968 SC 207; Walker *Principles* 79; *Contracts* 263–264; Gloag *Contract* 257 471–472; Marshall *Cases* 98 ev.

41 *Schneider v Heath* hierbo; *Dimmock v Hallett* hierbo; *White v Dougherty* hierbo; *Smith v Soeder* (1895) 23R 60; *Patterson v Landsberg* hierbo; *Edgar v Hector* hierbo; *Royal Bank v Greenshields* 1914 SC 259; *Shankland v Robinson* hierbo; *Gibson v National Cash Register Co Ltd* 1925 SC 500; *Curtis v Chemical Cleaning Co* 1951 1 KB 805; Walker *Principles* 79; *Contracts* 265; Gloag *Contract* 459; Marshall *Cases* 95 ev.

42 *York Buildings Co v Mackenzie* (1795) 3 Pat 378; *Irvine v Kirkpatrick* (1850) 7 Bell 186; *Smith Cuninghame v Anstruther's Trustees* (1872) 10M 39 (HL); *Dempster v Raes* (1873) 11M 843; *Gillespie v Gardner* 1909 SC 1053; *Burrell v Burrell's Trustee* 1915 SC 333; *Park v Anderson Brothers* hierbo; Walker *Principles* 79; *Contracts* 264; Gloag *Contract* 488.

43 *Brownlie v Miller* (1880) 7R 66 (HL); *Blakiston v London and Scottish Banking and Discount Corporation Ltd* (1894) 21R 417; *Shankland v Robinson* hierbo; Walker *Principles* 79; *Contracts* 264–265; Gloag *Contract* 460–461.

44 *Macfarlane Strang and Co v Bank of Scotland* (1903) 40 SLR 746; *M'Lintock v Campbell* 1916 SC 966; Wilkinson ea 90; Walker *Contracts* 265 287; Gloag *Contract* 483.

45 Walker *Principles* 82; *Civil remedies* 482.

46 'n Wanvoorstelling is onskuldig indien die voorsteller *bona fide* in die waarheid daarvan glo: Walker *Contracts* 279; *Damages* 63; Gloag *Contract* 471; *Angus v Clifford* hierbo; *Ferguson v Wilson* hierbo.

47 'n Voorsteller is nalatig indien hy versuim om die nodige redelike sorg ("reasonable care") aan die dag te lê om seker te maak dat die inhoud van die voorstelling feitelik korrek is: *John Kenway Ltd v Orcantic Ltd* 1979 SC 422; *Foster v Craigmillar Laundry* 1980 SLT 100; *Stair memorial encyclopaedia* vol 11 281; Woolman 82; Walker *Contracts* 274–275; *Civil remedies* 483; Gloag *Contract* 477.

48 'n Wanvoorstelling is bedrieglik indien die voorsteller bewus daarvan is dat die voorstelling onwaar is, of indien dit roekeloos gemaak word sonder dat die voorsteller omgee of dit waar is of nie: *Western Bank v Addie* hierbo; *Brownlie v Miller* hierbo; *Lees v Tod* hierbo; *Boyd and Forrester v The Glasgow and South-Western Railway Co* hierbo; *Smith v Sim* 1954 SC 357 (OH); Woolman 81; Walker *Contracts* 272–273; *Civil remedies* 483; *Damages* 63; Gloag *Contract* 475; Marshall *Cases* 110. In geval van 'n bedrieglike wanvoorstelling is 'n benadeelde ook op gederfde wins geregtig: *East v Maurer* hierbo.

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Van besondere belang vir hierdie bydrae is die feit dat die Skotse reg 'n algemene aanspreeklikheidsnorm op grond van nalatigheid erken.[49] Gevolglik kan 'n voorsteller vir skadevergoeding weens 'n nalatige wanvoorstelling (wat nie tot kontraksluiting aanleiding gegee het nie) aanspreeklik wees.[50] Die grondslag van aanspreeklikheid is deliktueel[51] en skadevergoeding word dienooreenkomstig bereken.[52] 'n Absolute voorvereiste is dat daar 'n "duty of care"[53] (onafhanklik van 'n kontrak[54]) moet bestaan om in die betrokke omstandighede nie 'n nalatige wanvoorstelling te maak nie.[55] Hierdie skadevergoedingsaksie is ook beskikbaar waar die nalatige wanvoorstelling deur 'n derde gemaak is.[56]

Indien 'n nalatige wanvoorstelling deur 'n kontraksparty tot kontraksluiting aanleiding gegee het, was die benadeelde aanvanklik[57] slegs op terugtrede maar

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Alhoewel teensinnig, is die Engelse sleutelbeslissing *Derry v Peek* (1898) 14 AC 337 (HL) as deel van die Skote reg aanvaar: *Gamage Ltd v Charlesworth's Trustee* hierbo; *Boyd and Forrest v The Glasgow and South Western Railway Co* hierbo; Walker *Contracts* 274.

49 *Kemp and Dougall v Darngavil Coal Co Ltd* 1909 SC 1314; McCluskey 1993 *De Rebus* 259.

50 *Stair memorial encyclopaedia* vol 11 281; Walker *Principles* 75 86; *Contracts* 276 284; *Civil remedies* 483 493 1012; *Damages* 62; Woolman 80; Marshall 284; Smith (TB) 862; *Graham v Western Bank* hierbo; *Campbell v Blair* (1897) 5 SLT 28; *Manners v Whitehead* hierbo; *Heilbutt Symons and Co v Buckleton* 1913 AC 30; *Bryson and Co v B* (1916) 1 SLT 361; *Robinson v National Bank of Scotland* hierbo; *Barnes v Cadogan Developments Ltd* 1930 1 Ch 479; *Smith v Sim* hierbo; *Macleod v Kerr* hierbo; *John Kenway Ltd v Orcantic Ltd* hierbo; *Oliver v Douglas* 1981 SC 192. Aldus word die Engelse beslissings *Hedley Byrne and Co Ltd v Heller and Partners Ltd* 1963 2 All ER 575 en *Esso Petroleum Co v Mardon* 1975 1 All ER 203 aanvaar as synde in ooreenstemming met die Skotse reg. Daarenteen blyk dit dat *Derry v Peek* hierbo in stryd met die algemene beginsels van die Skotse verbintenisreg is: *Oliver v Suttie* (1840) 2D 514; *Campbell v Boswall* (1841) 3D 639; *Cullen's Trustee v Johnston* hierbo; *Brownlie v Miller* hierbo; *Lees v Tod* hierbo; *Dunnett v Mitchell* (1887) 15R 131; Gloag *Contract* 478; Walker *Delict* 899.

51 Walker *Delict* 899 is van mening dat die voorsteller redelikerwys moet voorsien dat die benadeelde op sterkte van die nalatige wanvoorstelling sal handel en dat skade daardeur veroorsaak sal word. Dieselfde aanspreeklikheidsvereistes as in geval van 'n bedrieglike wanvoorstelling word gestel: Walker *Delict* 900; *Damages* 65; Smith 674 739 834–835 862.

52 *Thin and Sinclair v Arrol* (1896) 24R 198; *Robbie v Graham and Sibbald* 1989 SC 578 (OH); Marshall 284; Walker *Civil remedies* 483; *Contracts* 265 275 284. Walker *Civil remedies* 1012 verklaar: "*Prima facie* the damages recoverable in such a case should be compensation for all loss which follows naturally and directly from reliance on the misrepresentation . . . but not such speculative loss as profit which might have been made if the representation had been true." Sien ook sy *Damages* 65 waar dieselfde standpunt gehuldig word. In *Watts v Morrow* 1991 WLR 1421 word hierdie berekeningsmetode verder onderskryf; die hof bevind dat die omvang van die skade die verskil tussen die werklike en voorgestelde waarde van die eiendom is.

53 Sien vn 66–79 hieronder tav hierdie "duty of care".

54 Walker *Delict* 900.

55 *Young v Clydesdale Bank* hierbo; *French v Cameron* (1893) 20R 966; *Aitken v Pyper* hierbo; *Russel v Farrell* (1900) 2F 892; *Arenson v Casson Beckman Rutley and Co* 1977 AC 405; Gloag *Contract* 477; Walker *Delict* 899. Die bestaan van 'n fidusiêre verhouding is nie 'n absolute voorvereiste om aanspreeklikheid daar te stel nie: Marshall 284.

56 *Webster v Christie* (1813) 1 Dow 247; *Young v Clydesdale Bank* hierbo; *Thin and Sinclair v Arrol* hierbo; *Aitken v Pyper* hierbo; *Robinson v National Bank of Scotland* hierbo; *Fortune v Young* 1918 SC 1; Walker *Contracts* 288.

57 Dit is egter onduidelik wat die werklike regsposisie was: Woolman 82; Gloag *Contract* 480. Walker *Delict* 896–897 meld egter: "It is a more difficult question whether damages are

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nie skadevergoeding nie, geregtig.[58] 'n Verdere anomalie het egter ontwikkel deurdat 'n benadeelde wel op skadevergoeding geregtig was indien die nalatige wanvoorstelling (wat tot kontraksluiting aanleiding gegee het) deur 'n derde gemaak is.[59]

Artikel 10(1) van die Law Reform (Miscellaneous Provisions) (Scotland) Act, 1985[60] het voormelde regsposisie[61] soos volg gewysig:

> "A party to a contract who has been induced to enter into it by negligent misrepresentation made by or on behalf of another party[62] to the contract shall not be disentitled, by reason only that the misrepresentation is not fraudulent, from recovering damages from the other party in respect of any loss or damage he has suffered as a result of the misrepresentation; and any rule of law that such damages cannot be recovered unless fraud is proved shall cease to have effect."[63]

Die geadresseerde moet in laasgenoemde geval steeds nalatigheid,[64] kousaliteit[65] en die aanwesigheid van 'n "duty of care"[66] bewys.[67] Daar bestaan egter nie 'n

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recoverable *ex delicto* for loss caused by a negligent misrepresentation. It is clear that they can be recovered *ex contractu*, as between parties bound by contract, where one owes the other a contractual duty not to cause him loss, and is in breach thereof."

58 *Manners v Whitehead* hierbo waar die hof nie eers die kwessie van nalatigheid ondersoek het nie maar sonder meer die skadevergoedingseis van die hand gewys het. Sien ook *Brownlie v Miller* hierbo; *Dunnett v Mitchell* (1887) 15R 131; *Boyd and Forrest v The Glasgow and South-Western Railway* hierbo; Forte "Negligent Misrepresentation Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 s 10" 1988 *Journal of the Law Society of Scotland* 93; Gloag *Contract* 471 478–479. Indien 'n bedrieglike wanvoorstelling gemaak is, was die benadeelde wel op terugtrede en skadevergoeding geregtig: *Stair memorial encyclopaedia* vol 11 281; *Western Bank v Addie* hierbo. Waar die wanvoorstelling egter deel van 'n kontraktuele beding vorm, is die benadeelde op skadevergoeding geregtig: vn 83 hieronder. Indien die nalatige wanvoorstelling nie deel van 'n kontraktuele beding vorm nie, is dit steeds moontlik dat dit 'n kollaterale kontrak kan daarstel: *Heilbutt Symons and Co v Buckleton* 1913 AC 30; Walker *Principles* 87; vn 93–94 hieronder.

59 Scottish Law Commission *Obligations: report on negligent misrepresentation* no 92 (1985) 2. Die rede vir hierdie anomalie is dat *Manners v Whitehead* hierbo steeds deur die positiewe reg as gesag aanvaar is. Sien veral *Foster v Craigmillar Laundry Ltd* hierbo; *Eastern Marine Services (and Supplies) Ltd v Dickson Motors Ltd* 1981 SC 355; *Twomax Ltd v Dickson McFarlane and Robinson* 1983 SLT 98 waar die howe uitdruklik bevind het dat *Manners v Whitehead* hierbo steeds van krag is.

60 Aanbeveel deur die Skotse Regskommissie (vn 59 hierbo).

61 Dws slegs daardie gevalle waar die nalatige wanvoorstelling tot kontraksluiting aanleiding gee: Scottish Law Commission *Negligent misrepresentation* 5.

62 Sien *Andrew Oliver and Son Ltd v Douglas* 1981 SC 192 waar die nalatige wanvoorstelling deur 'n derde gemaak is. Dus is bg anomalie uitdruklik deur die wetgewer ondervang: vn 60 hierbo.

63 Sodoende is die regsposisie soos uiteengesit in *Manners v Whitehead* hierbo uitdruklik deur die wetgewer gewysig. Sien ook Wilkinson ea 89; Woolman 82. Volgens Forte 93 sal die regsreëls ingevolge hierdie wetgewing *in tandem* met die bestaande deliktereg moet ontwikkel. Die regskommissie *Negligent misrepresentation* 7 bevind uitdruklik dat die gemeenregtelike reëls tov 'n nalatige wanvoorstelling wat nie tot kontraksluiting aanleiding gee nie, geen statutêre ingryping noodsaak nie.

64 As algemene reël is dit makliker om nalatigheid as bedrog te bewys, maar die bewys van nalatigheid is steeds problematies: *Stair memorial encyclopaedia* vol 11 282. Forte 93 wys daarop dat die stelreël *res ipsa loquitur* van geen nut in die onderhawige geval is nie.

65 *McGhee v National Coal Board* 1973 SLT 14; Wilkinson ea 553–554. Kousaliteit word as 'n feitevraag (nie 'n regsvraag nie) hanteer: *Leyland Shipping Co v Norwich Union*

vervolg op volgende bladsy

algemene "duty of care" om nie 'n nalatige wanvoorstelling te maak nie.[68] 'n "Duty of care" om nie 'n wanvoorstelling te maak nie, bestaan sonder meer waar[69] –

(a) 'n nalatige wanvoorstelling binne besigheidsverband gemaak is;[70]

(b) die voorsteller oor besondere vaardighede beskik;[71]

(c) daar 'n "special relationship"[72] tussen die partye is;[73]

(d) die voorsteller bewus is of redelikerwys bewus moes wees dat die geadresseerde op die voorstelling staatmaak;[74] of

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Fire Insurance Co 1918 AC 350; *Yorkshire Dale SS Co v MOWT* 1942 AC 691; *Brown v MOP* 1946 SC 471; *Boy Andrew v St Rognvald* 1947 SC 70 (HL).

66 In *Bourhill v Young* 1942 SC 78 (HL) 88 word hierdie "duty of care" soos volg omskryf: "The duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others, and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed." Sien ook *Muir v Glasgow Corporation* 1944 SLT 62 vir 'n soortgelyke omskrywing.

67 *Stair memorial encyclopaedia* vol 11 282; Forte 94; Walker *Contracts* 275; *Andrew Oliver and Son Ltd v Douglas* hierbo. Forte 97 is van mening dat daar op die geadresseerde 'n plig is om self die korrektheid van die voorstelling na te gaan.

68 *Robinson v National Bank of Scotland* hierbo. Daarenteen bestaan daar altyd 'n "duty of care" om nie 'n bedrieglike wanvoorstelling te maak nie: Walker *Principles* 80; *Contracts* 276; *Delict* 899; Gloag *Contract* 477; Wilkinson ea 547; Blaikie 1990 *Scots LT* 317. In *Midland Bank v Cameron Thom Peterkins and Duncans* 1988 SC 209 (OH) 216 stel die hof die volgende vereistes alvorens daar 'n "duty of care" deur 'n prokureur teenoor 'n derde bestaan om nie benadeling deur 'n nalatige wanvoorstelling te veroorsaak nie: "(1) The solicitor must assume responsibility for the advice or information furnished to the third party. (2) The solicitor must let it be known to the third party expressly or impliedly that he claims, by reason of his calling, to have the requisite skill or knowledge to give the advice or furnish the information. (3) The third party must have relied upon that advice or information as matter for which the solicitor has assumed personal responsibility. (4) The solicitor must have been aware that the third party was likely so to rely." In *John Kenway Ltd v Orcantic Ltd* hierbo word soortgelyke vereistes vir die bestaan van 'n "duty of care" gestel.

69 *Argy Trading Development Co Ltd v Lapid Developments Ltd* 1977 3 All ER 785; *John Kenway Ltd v Orcantic Ltd* hierbo; *Foster v Craigmillar Laundry Ltd* hierbo; Forte 94; Scottish Law Commission *Negligent misrepresentation* 3–4.

70 *Arenson v Casson Beckman Rutley and Co* hierbo; *John Kenway Ltd v Orcantic Ltd* hierbo; *Foster v Craigmillar Laundry Ltd* hierbo; *Eastern Marine Services v Dickson Motors Ltd* hierbo; *Twomax v Dickson McFarlane and Robinson* hierbo; *Luxmoore-May v Messenger May Baverstock* 1990 WLR 1009; Walker *Contracts* 278–279; *Delict* 899–900; Gloag *Contract* 477.

71 Sien veral *John Kenway Ltd v Orcantic Ltd* hierbo; *Foster v Craigmillar Laundry Ltd* hierbo; *Eastern Marine Services v Dickson Motors Ltd* hierbo; *Twomax v Dickson McFarlane and Robinson* hierbo en *Luxmoore-May v Messenger May Baverstock* hierbo waar hierdie beginsel aanvaar is. Sien ook Walker *Contracts* 278–279.

72 Of daar 'n "special relationship" aanwesig is of nie, is 'n feitevraag wat van elke geval se besondere omstandighede afhang: Forte 94. Die regskommissie *Negligent misrepresentation* 6 bevind egter dat 'n "contractual or pre-contractual relationship" nie *per se* 'n "special relationship" daarstel nie, maar dat elke geval nav die besondere omstandighede beoordeel moet word. Die nabyheid ("proximity") van die partye se verhouding is 'n belangrike faktor om te bepaal of daar 'n "special relationship" aanwesig is: Walker *Delict* 899.

73 *Fortune v Young* 1918 SC 1; *John Kenway Ltd v Orcantic Ltd* hierbo; Gloag *Contract* 477; Walker *Delict* 900.

74 *Al Nakib Investments (Jersey) Ltd v Longcroft* 1990 WLR 1390; Walker *Contracts* 278–279 en gesag aldaar.

(e) daar 'n kontraktuele verhouding tussen die partye bestaan.[75]

Alhoewel daar 'n duidelike onderskeid tussen onregmatigheid[76] en skuld bestaan, blyk dit dat die regsbeginsels rondom nalatigheid en die "duty of care"-begrip vermeng word.[77] Nalatigheid en 'n "duty of care" word na aanleiding van die objektiewe redelike man-toets bepaal.[78] Tog blyk dit dat daar 'n onderskeid gemaak word[79] tussen 'n "duty of care" in geval van

(a) 'n fisiese handeling (wat saak- of persoonskade veroorsaak); en

(b) woorde (wat suiwer vermoënskade tot gevolg het).

Alvorens 'n skadevergoedingsaksie op grond van 'n nalatige wanvoorstelling sal slaag, moet die benadeelde aantoon dat sy vertroue op die voorstelling redelik is.[80] Die voorsteller beskik egter oor 'n geldige verweer indien hy kan aantoon dat hy redelike gronde het om in die waarheid van die voorstelling (of die bron waarop die voorstelling berus), te glo.[81]

Indien die nalatige wanvoorstelling egter deel vorm van 'n kontraktuele beding,[82] is die benadeelde op al die normale kontraktuele remedies, wat

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75 *London Joint Stock Bank v Macmillan* 1918 AC 777; Gloag *Contract* 478. Die grondslag van die skadevergoedingsaksie is in hierdie geval kontraktueel: *Robinson v National Bank of Scotland* hierbo; *Luxmoore-May v Messenger May Baverstock* hierbo; Gloag *Contract* 286.

76 Onregmatigheid word op menslike belange gebaseer en enige skending van 'n privaat- of openbare reg is onregmatig. Eweneens is enige skuldige handeling (of late) onregmatig maar nie gedingsvatbaar nie, tensy kousaliteit tussen die handeling (of late) en die gevolg daarvan, tesame met skade bewys is: *Stair memorial encyclopaedia* vol 11 362–363 367.

77 *Idem* 362–369. Ten einde nalatigheid te bewys, moet die benadeelde aantoon dat die verweerder 'n "duty of care" gehad het om redelike sorg aan die dag te lê, dat voormelde "duty of care" verbreek is en dat die nie-nakoming van hierdie "duty of care" skade veroorsaak het: Wilkinson ea 547.

78 *Muir v Glasgow Corporation* hierbo; *Bolton v Stone* 1951 AC 850; *Overseas Tankship (UK) v Miller Steamship Co* 1966 3 WLR 498; *Stair memorial encyclopaedia* vol 11 366–367; Wilkinson ea 547 552.

79 Gloag *Contract* 477.

80 Yates en Hawkins *Standard business contract: exclusions and related devices* (1986) 140; Forte 94.

81 *Dovey v Corey* 1901 AC 477; *Re City Equitable Fire Insurance Co Ltd* 1925 Ch 407; Forte 95. Tav statutêre verwere in die onderhawige geval, sien bv a 151(1) en 167(1) van die Financial Services Act, 1986 wat maatskappydirekteure (in sekere omstandighede) teen aanspreeklikheid weens 'n nalatige wanvoorstelling in 'n prospektus vrywaar.

82 Dit is egter problematies om te bepaal of 'n nalatige wanvoorstelling deel van 'n kontraktuele beding vorm of uitsluitlik 'n wanvoorstelling is: *Robey and Co Ltd v Stein and Co* hierbo; Wilkinson ea 89–90; Gloag *Contract* 266–268; Walker *Damages* 64. Die bedoeling van die partye, die tydstip waarop die voorstelling gemaak is, skrifstelling, die kundigheid van die voorsteller en die steun wat die benadeelde op die wanvoorstelling plaas, is belangrike faktore om te bepaal of die wanvoorstelling deel van 'n kontraktuele beding vorm of nie: *Scott v Steele* hierbo; *Robeson v Waugh* hierbo; *Rough v Moir and Son* hierbo; *Paul and Co v Corporation of Glasgow* hierbo; *Hyslop v Shirlaw* hierbo; *Heilbutt Symons and Co v Buckleton* hierbo; *Harrison v Knowles and Foster* 1918 1 KB 608; Woolman 96–97. Waar die voorstelling nie pertinent met die *res* van die betrokke kontrak handel nie, is dit bloot 'n wanvoorstelling en nie 'n kontraktuele beding nie: *Steward v Kennedy* hierbo; *Menzies v Menzies* hierbo; *Hart v Fraser* 1907 SC 50; Gloag *Contract* 467.

skadevergoeding insluit, geregtig.[83] In laasgenoemde geval moet die skadevergoeding ooreenkomstig kontraktuele beginsels bereken word.[84] Dus moet die benadeelde finansieel in die vermoënsregtelike posisie geplaas word asof die wanvoorstelling waar is.[85] Waar 'n koopkontrak ter sprake is, geld die bepalings van die Sales of Goods Act, 1979 wat bepaal dat die benadeelde geregtig is op[86]

> "the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract".

Indien 'n markprys beskikbaar is, word die omvang van die skadevergoeding *prima facie* bereken as

> "the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or (if no time was fixed) at the time of the refusal to deliver".[87]

Omdat dit makliker is om te bewys dat 'n voorstelling deel van 'n kontraktuele beding vorm as wat dit is om aan te toon dat dit 'n nalatige wanvoorstelling is, sal die benadeelde eerder eersgenoemde uitweg volg.[88] Slegs skade wat redelik voorsienbaar is en *causa proxima non remota spectatur*,[89] kan verhaal word.[90]

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83 *Wilson v Caledonian Railway* hierbo; *Heilbutt Symons and Co v Buckleton* hierbo; *Lawrence v Hull* (1924) 41 TLR 75; Walker *Contracts* 291–292; *Damages* 64; Gloag *Contract* 467.

84 Walker *Principles* 164–165; Wilkinson ea 89.

85 *Fleming v Airdrie Iron Co* (1882) 9R 473; *Stroms Bruks v Hutchison* (1905) 7F 131 (HL); *Dougall v Dunfermline* 1908 SC 151; *D Portland v Wood's Trustees* 1927 SC 1 (HL); *Buchanan and Carswell v Eugene Ltd* 1936 SC 160; *Dudley Brothers v Barnet* 1937 SC 632; *Karlshamns Oljefabriker v Monarch SS Co* 1949 SC 1 (HL); *Jarvis v Swans Tours* 1973 1 QB 233; *Hussey v Eels* 1990 WLR 234; Marshall *Principles* 325. Die omvang van skadevergoeding is 'n feitevraag: *British Westinghouse v Underground Electric Railways Co Ltd* 1912 AC 637; *Karlshamns Oljefabriker v Monarch SS Co* hierbo; *Hussey v Eels* hierbo; Smith 861. In *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* hierbo 689 beslis die hof dat in geval van kontrakbreuk die benadeelde "is to be placed, as far as money can do it, in as good a situation as if the contract had been performed . . . the fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach". Lg beslissing is in *Hussey v Eels* hierbo as deel van die Skotse reg aanvaar. Dieselfde beginsel geld waar die nalatige wanvoorstelling deur 'n verteenwoordiger in die uitvoering van sy mandaat gemaak is: Walker *Damages* 66.

86 A 51; Marshall 325.

87 *Peach v Chalmers and Co* 1992 SC 423 (OH) waar die omvang van die skade bereken is as die verskil tussen die *pretium* en die markwaarde van die *merx*. Die feit dat die *merx* later vir meer as die markwaarde (en die *pretium*) daarvan verkoop word, het geen invloed op voormelde berekeningsmetode nie: *Hussey v Eels* hierbo.

88 Woolman 98.

89 *Liesbosch v SS Edison* 1933 AC 449; *Malcolm v Dickson* 1951 SC 542; Wilkinson ea 555.

90 *Hadley v Baxendale* hierbo; *Macdonald and Co v Highland Railway Co* (1873) 11M 614; *Hobbs v London and South Western Railway Co* 1874 LR 10; *"Den of Ogil" Co Ltd v Caledonian Railway Co* (1902) 5F 99; *Carmarthenshire CC v Lewis* 1955 AC 549; *Harvey v Singer Co* 1960 SC 155; Wilkinson ea 547–548; Marshall *Principles* 327. Daar rus 'n plig op die benadeelde om alle redelike stappe te doen om die omvang van die skade (waar dit onafgebroke oploop) te beperk: *Ireland and Son v Merryton Coal Co* (1894) 21R 989; *Bellingham v Dhillon* 1973 1 QB 301; *Perry v Sydney Phillips* 1982 WLR 1297; *Hussey v Eels* hierbo; Marshall *Principles* 326; Walker *Civil remedies* 1012; Smith (TB) 860.

Waar die nalatige wanvoorstelling nie spesifiek handel met die *res* waaroor gekontrakteer word nie[91] maar 'n kollaterale aangeleentheid aanspreek, vorm sodanige wanvoorstelling nie deel van 'n kontraktuele beding nie.[92] Die voorsteller kan moontlik op grond van so 'n kollaterale kontrak[93] weens nalatige wanvoorstelling aanspreeklik gehou word.[94]

'n Eis vir suiwer vermoënskade word ook in die onderhawige geval erken.[95] As voorvereiste blyk dit dat daar 'n "special relationship"[96] tussen die betrokke partye moet bestaan alvorens suiwer vermoënskade verhaalbaar is.[97] Skadevergoeding word in die onderhawige geval op die volle omvang van die benadeling,[98] ooreenkomstig werklike en realistiese waardes,[99] bereken.[100] 'n Kontraktuele vrywaring teen aanspreeklikheid weens 'n nalatige wanvoorstelling is aan die bepalings van die Unfair Contract Terms Act, 1977 onderworpe,[101] wat bepaal dat sodanige vrywaring slegs geldig is indien dit redelik en billik is.[102] Deliktuele aanspreeklikheid word beperk[103] deur[104] –

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91 Of die nalatige wanvoorstelling met die *res* waaroor gekontrakteer word, handel of nie, word deur die bedoeling van die partye bepaal: *Hyslop v Shirlaw* (1905) 7F 875; *Heilbutt Symons and Co v Buckleton* hierbo; Wilkinson ea 90.

92 Wilkinson ea 90; *Robey and Co Ltd v Stein and Co* hierbo.

93 Sodanige kollaterale kontrak moet aan al die normale kontraktuele vereistes voldoen: *Heilbutt Symons and Co v Buckleton* hierbo.

94 *British Workman's and General Assurance Co v Wilkinson* (1900) 8 SLT 67; *Heilbutt Symons and Co v Buckleton* hierbo; Walker *Contracts* 285; *Damages* 64.

95 *Robinson v National Bank of Scotland* hierbo; *Dynamco v Holland and Hannen and Cubitts Ltd* 1971 SC 257; *Vauglan v GGPTE* 1984 SLT 44; Walker *Principles* 653; *Al Nakib Investments (Jersey) Ltd v Longcroft* hierbo; *McLeod v Scottish Special Housing Association* 1990 SLT 749 (OH); *Parkhead Housing Association v Phoenix Preservation* 1990 SLT 812 (OH); Wilkinson ea 549–551. Walker *Civil remedies* 1010 meld egter dat "by no means every economic loss justifies a claim for damages against the person responsible".

96 Walker *Delict* 901 is van mening dat daar slegs in geval van 'n kontraktuele verbintenis 'n "duty of care" bestaan om nie suiwer vermoënskade deur 'n nalatige wanvoorstelling te veroorsaak nie. As gesag word aangehaal: *Somerville v Thomson* (1818) 6 Paton 393; *Wilson v Riddell* (1826) 4S 739; *Buchanan v Pearson* (1840) 2D 1177; *Goldie v Goldie* (1842) 4D 1489; *Robertson v Fleming* (1861) 4 Macq 167; *Williamson v Begg* (1887) 14R 720; *Raes v Meek* (1889) 16R (HL) 31; *Tully v Ingram* (1891) 19R 65; *Auchincloss v Duncan* (1894) 21R 1091.

97 *Andrew Oliver and Son Ltd v Douglas* hierbo; *Parkhead Housing Association v Phoenix Preservation* hierbo; Forte 94.

98 Uitgesonderd gederfde wins: *Cassaboglou v Gibb* (1883) 11 QB 797; *Johnston v Braham and Campbell* 1917 1 KB 586; Walker *Civil remedies* 1011.

99 *Twycross v Grant* (1877) 2 CPD 469; *Arkwright v Newbold* (1881) 17 Ch 301; *Glasier v Rolls* (1889) 42 Ch 436; *McConnel v Wright* 1903 1 Ch 546; *Shepheard v Broome* 1904 AC 342; Walker *Civil remedies* 1012.

100 *Polhill v Walter* (1832) 3 B & Ad 114; *Smout v Ilbery* (1842) 10 M & W 1; *Randell v Trimen* (1856) 18 CB 786; *Richardson v Silvester* (1873) LR 9 QB 34; *Wilkinson v Downton* (1897) 2 QB 57; *Starkey v Bank of England* 1903 AC 114; Walker *Civil remedies* 1011. Die omvang van suiwer vermoënskade word nie ooreenkomstig die hipotese, as synde dat die wanvoorstelling waar sou wees, bereken nie: *Twycross v Grant* hierbo; *Broome v Speak* 1903 1 Ch 586; *Clark v Urquhart* 1930 AC 28.

101 'n Nie-kontraktuele vrywaring is nie aan die bepalings van voormelde wet onderworpe nie: *Hadden v City of Glasgow District Council* 1986 SLT 557; Forte 98.

102 Sien a 15(1) 24(4) 25(3)(d). Sien verder *Continental Tyre and Rubber Co Ltd v Trunk Trailer Co Ltd* 1987 SLT 58; Forte 98. 'n Prinsipaal mag hom in soortgelyke omstandighede teen 'n nalatige wanvoorstelling van sy verteenwoordiger vrywaar: *Laing v*

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(a) statutêre maatreëls;[105]

(b) kontraktuele bedinge;[106]

(c) bydraende nalatigheid;[107]

(d) mede-aanspreeklikheid; en

(e) die verwyderdheid van skade ("remoteness of damage").[108]

Alhoewel die regsbeginsels vasstaan waarvolgens 'n skadevergoedingsaksie op grond van 'n nalatige wanvoorstelling (binne en buite kontraktuele verband) erken word, is die riglyne waarbinne hierdie aksie met regsekerheid moet funksioneer nog vir afronding vatbaar.

5 SAMEVATTING EN GEVOLGTREKKING

In die Skotse reg het 'n wanvoorstelling 'n spesifieke regstegniese betekenis, naamlik dat dit deur die voorsteller self of sy verteenwoordiger gemaak moet word, uit 'n wesenlike onware verklaring bestaan, op 'n bestaande feit slaan wat met 'n feitelike gegewe handel, die geadresseerde oortuig het om anders op te tree as wat hy in afwesigheid daarvan sou doen en die belangrikste oorsaak vir die geadresseerde se *error* is. Daar word egter nie 'n duidelike onderskeid tussen 'n wanvoorstelling en *error* gemaak nie.

As algemene reël maak 'n wanvoorstelling (met die voorbehoud dat dit 'n *error* aan die kant van die benadeelde moet veroorsaak) 'n kontrak vernietigbaar. Waar die wanvoorstelling egter so wesenlik is dat *consensus* daardeur uitgesluit word, is die betrokke kontrak nietig. Slegs persone wat direk of by wyse van implikasie deur die wanvoorstelling geadresseer is, het *locus standi* om op grond daarvan te ageer.

Aanvanklik was daar nie 'n onderskeid tussen 'n onskuldige en nalatige wanvoorstelling gemaak nie en het eersgenoemde laasgenoemde ingesluit.

Op grond van elke geval se feitelike omstandighede word daar onderskei tussen 'n wanvoorstelling wat –

(a) tot kontraksluiting aanleiding gee;

Provincial Homes Investment Co 1909 SC 812; *Mair v Rio Grande Rubber Estates Co* hierbo; Gloag *Contract* 465–466. Geen kontraktuele vrywaring teen 'n bedrieglike wanvoorstelling is regtens moontlik nie: *Boyd and Forrest v The Glasgow and South-Western Railway Co* hierbo; Walker *Civil remedies* 483; *Damages* 63. Die Engelse beslissing *Smith v Eric S Bush* 1990 1 AC 831 word as in ooreenstemming met die Skotse reg aanvaar: *Robbie v Graham and Sibbald* hierbo.

103 Dieselfde aanspreeklikheidsbeperkende faktore kan aangewend word om oewerlose aanspreeklikheid in geval van 'n nalatige wanvoorstelling te beperk.

104 Marshall 438–441.

105 Bv die Railway Fire Act, 1923 wat bepaal dat die spoorweë vir brandskade aan landbougewasse tot die maksimum bedrag van £200 aanspreeklik is.

106 Hierdie beperking is aan die bepalings van die Unfair Contract Terms Act, 1977 onderworpe. Sien vn 101–102 hierbo.

107 Die Law Reform (Miscellaneous Provisions) (Scotland) Act, 1940 bepaal dat waar die benadeelde bydraend nalatig is, die skadevergoeding ooreenkomstig die persentasie bydraende nalatigheid verminder moet word. Sien ook Marshall *Principles* 445. Geen gesag kon gevind word dat voormelde wet nie op 'n deliktuele skadevergoedingsaksie weens 'n nalatige wanvoorstelling van toepassing is nie.

108 Die toets vir die voorsienbaarheid van skade geld nie in die onderhawige geval nie: *McKillen v Barclay Curle and Co Ltd* 1967 SLT 41. Sien verder vn 89–90 hierbo.

(b) uitsluitlik 'n wanvoorstelling is; en wat

(c) deel vorm van 'n kontraktuele beding.

In laasgenoemde geval is die benadeelde op alle kontraktuele remedies (wat skadevergoeding insluit), geregtig. Faktore wat in ag geneem word om te bepaal of 'n nalatige wanvoorstelling deel vorm van 'n kontraktuele beding, is die tydstip waarop die voorstelling gemaak is, skrifstelling, die kundigheid van die voorsteller, die steun wat die benadeelde op die voorstelling geplaas het en of die voorstelling deel van die *res* van die kontrak uitmaak. Skadevergoeding word in hierdie geval ooreenkomstig kontraktuele beginsels bereken. Die benadeelde moet dus finansieel in die vermoënsregtelike posisie geplaas word asof die wanvoorstelling waar sou wees.

Omdat die Skotse reg 'n algemene aanspreeklikheidsnorm op grond van nalatigheid erken, word 'n deliktuele skadevergoedingsaksie op grond van 'n nalatige wanvoorstelling wat nie tot kontraksluiting aanleiding gegee het nie (sien (b) hierbo), sonder meer erken. Skadevergoeding (wat suiwer vermoënskade insluit) word in hierdie geval ooreenkomstig deliktuele beginsels bereken. Die benadeelde moet dus finansieel in die vermoënsregtelike posisie geplaas word asof die wanvoorstelling nie gemaak is nie. Verder is alle deliktuele aanspreeklikheidsvereistes van 'n bedrieglike wanvoorstelling *mutatis mutandis* in hierdie geval van toepassing.

Indien 'n nalatige wanvoorstelling tot kontraksluiting aanleiding gegee het (sien (a) hierbo), was die benadeelde aanvanklik slegs op terugtrede maar nie op skadevergoeding (*ex delicto*) nie, geregtig. Waar die nalatige wanvoorstelling in voormelde geval egter deel vorm van 'n kontraktuele beding, is skadevergoeding nog altyd *ex contractu* verhaalbaar. Anomalieë wat uit hierdie regsposisie ontwikkel het, was dat –

(a) indien 'n derde deur 'n nalatige wanvoorstelling benadeel is wat tot kontraksluiting aanleiding gegee het, hy 'n deliktuele eis vir skadevergoeding teen die betrokke kontraksparty gehad het; en

(b) indien 'n derde 'n nalatige wanvoorstelling gemaak het wat tot kontraksluiting aanleiding gegee het, 'n benadeelde kontraksparty eweneens 'n deliktuele eis vir skadevergoeding teen die derde gehad het.

Artikel 10 van die Law Reform (Miscellaneous Provisions) (Scotland) Act, 1985 het bogenoemde regsposisie gewysig deur 'n skadevergoedingsaksie (wat suiwer vermoënskade insluit) te erken waar 'n nalatige wanvoorstelling tot kontraksluiting aanleiding gegee het. Die grondslag van hierdie aksie is deliktueel en in ooreenstemming met die bestaande gemeenregtelike beginsels. Nalatigheid, onregmatigheid, kousaliteit en die aanwesigheid van 'n "duty of care" moet steeds bewys word. Nalatigheid word op grond van die objektiewe redelike mantoets bewys deur aan te toon dat die verweerder 'n "duty of care" gehad het om redelike sorg aan die dag te lê. Onregmatigheid is op menslike belange gebaseer en enige skending van 'n privaat- of openbare reg is *per se* onregmatig. Verder is enige skuldige handeling ook onregmatig maar nie noodwendig gedingsvatbaar nie. Ten einde gedingsvatbaarheid daar te stel, moet daar 'n kousale verband tussen die handeling, gevolg en skade bewys word. Kousaliteit word na aanleiding van die feitelike omstandighede bepaal.

Daar bestaan nie 'n algemene "duty of care" nie. Gevalle waar daar 'n "duty of care" bestaan, is binne besigheidsverband, waar die voorsteller oor besondere vaardighede beskik, waar 'n "special relationship" ter sprake is, by die aanwesigheid van 'n kontraktuele verhouding en waar die voorsteller bewus is of

redelikerwys bewus moes wees dat die geadresseerde op die voorstelling gaan reageer. Die benadeelde moet ook aantoon dat sy vertroue op die nalatige wanvoorstelling redelik is alvorens 'n skadevergoedingsaksie suksesvol sal wees.

'n Kontraktuele vrywaring teen aanspreeklikheid op grond van 'n nalatige wanvoorstelling is aan die bepalings van die Unfair Contract Terms Act van 1977 onderworpe, wat bepaal dat sodanige vrywaring slegs geldig is indien dit aan die maatstaf van redelikheid en billikheid voldoen. Aanspreeklikheidsbegrensing in die onderhawige geval word verder statutêr, op grond van bydraende nalatigheid, mede-aanspreeklikheid en die voorsienbaarheid van skade beperk.

Daar bestaan onses insiens geen twyfel nie dat die riglyne vir aanspreeklikheid in die onderhawige geval nog deur die maalstene van die praktyk in fyner besonderhede uitgewerk moet word.

Die belang van die Skotse reg vir die Suid-Afrikaanse reg is dat 'n skadevergoedingsaksie weens nalatige wanvoorstelling op 'n beginselgrondslag erken word. Verder blyk dit dat aanspreeklikheidsbegrensing in die Skotse reg onder beheer is en dat die vrees vir oewerlose aanspreeklikheid in die Suid-Afrikaanse reg moontlik 'n oordrywing van die juridiese werklikheid is. Net soos die Suid-Afrikaanse reg, is die Skotse reg ook in die onderhawige geval nog in 'n ontwikkelingsfase. Onses insiens kan die Suid-Afrikaanse reg met vrug kennis neem van die verdere ontwikkelinge aldaar.

The significance of marriage as one of the foundation stones of any civilised community still pertains to this day. It cannot simply be regarded as a consensual contract which can be breached and cancelled as easily as it was concluded. It is true that our legal system is a supple and dynamic one which will adapt to changing circumstances, just as the concept of public policy is not static. The values and attitudes of the community have not, however, changed in regard to the importance of maintaining healthy marriage relationships. It is still, in my view, characterised by a reluctance to see marriages dissolved without proper consideration being given to all the relevant facts and circumstances. And for this to be done, the Judge must be given the opportunity to consider and evaluate the relevant evidence at a hearing which must be commenced by action (per Van Zyl J in *Ex parte Inkley and Inkley* 1995 3 SA 528 (C) 536).

Deliktuele aanspreeklikheid weens nadeel deur onbekende lede van 'n groep toegebring IV: Demonstrasies, geweld en benadeling, en die reg op vrye meningsuiting[1]

(*vervolg*)

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SUMMARY

Delictual liability brought about by unknown members of a group IV: Demonstrations, violence and harm, and the right to freedom of expression

The problem with mass actions leading to harm, like some demonstrations, is that it often proves to be impossible to establish that a particular member of the group caused the harm; and without such proof, no liability will normally follow. Although many measures have been taken to regulate demonstrations, some of which still exist, the 1993 legislation flowing from the work of the Goldstone Commission has not yet come into effect. Moreover, the existing enactments from the previous era now have to be qualified in the light of the chapter on fundamental rights in the Constitution of the Republic of South Africa Act 200 of 1993.

Demonstrations are essentially of a political nature, as they are intended to influence people in positions of power, to achieve a desired change. They excite great attention and involvement, and have the propensity to increase the risk of harm being caused by unidentified members of the group involved in the activity as a whole.

In the light of the debate in Germany, Switzerland and the Netherlands about the requirements of unlawfulness and causation for liability in such cases, the conclusion is that a defendant who joined in with, or remained part of a group, under circumstances which must be regarded as unreasonable in view of the extent to which that activity increased the risk of harm, acted unlawfully, was sufficiently connected to the physical cause of the harm, and can be held to be delictually liable for that harm on a basis of solidarity.

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1 Hierdie is die vierde deel van 'n ondersoek oor deliktuele aanspreeklikheid weens nadeel wat in die loop van groepsoptrede deur 'n onbekende dader toegebring is. Die ander drie dele het verskyn in 1995 *THRHR* 421; 1995 *THRHR* 613 en 1996 *THRHR* 57. Die finansiële en ander ondersteuning wat verleen is deur die Sentrum vir Wetenskapsontwikkeling, Getrouheidsfonds vir Prokureurs en PU vir CHO het meegehelp dat hierdie ondersoek onderneem kon word. Elke bydrae word met dank erken. Standpunte hierin ingeneem, moet uiteraard slegs aan die navorser toegeskryf word.

Although one has to be careful not to restrict the protection of the fundamental right to demonstrate by being overzealous in imposing liability in these cases, no such limitation can be construed from a situation where liability follows upon the defendant's unreasonable conduct; this is especially true where a demonstration is accompanied by violence.

While the initial question of the liability of a demonstrator for multi-causal harm brought about by some other person forming part of the group activity, and the requirements for such liability may have been answered for the present, it may be expected that changed circumstances will necessitate reconsideration of the matter from time to time in the light of the legal values of the community.

1 INLEIDING

1 1 'n Algemeen voorkomende probleem met massa-optrede

Die kwessie waaroor dit hierin gaan, doen hom in basies dieselfde gedaante in enige een van 'n aantal uiteenlopende situasies voor. Enkele grepe uit onlangse koerantberigte kan maklik illustreer waaroor dit handel en wat die probleme is waarmee dit ons reg in die algemeen en in die besonder in verband met multikousale nadeel konfronteer. Gestel krakers of betreders wend hulle tot die ongemagtigde besetting van geboue of persele om hulle aanspraak op huisvesting te demonstreer en nadeel vloei daaruit voort.[2] Of gestel 'n demonstrasie word deur 'n politieke groep gehou en dit het nadeel tot gevolg.[3] Of gestel verder dat 'n betoging plaasvind en dat nadeel daaruit ontstaan.[4]

Die volgende redaksionele kommentaar[5] skets nie alleen van die tipiese kenmerke van die betrokke vorme van groepsoptrede nie maar druk ook 'n bepaalde sentiment ten opsigte daarvan uit: "Betogers wat skade aanrig – ongelukkig gebeur dit deesdae te gereeld in Suid-Afrika – ontlok dikwels selfs by simpatiseerders 'n gevoel van diepe afkeer . . ."; dan word verwys na lede van die publiek en studente wat as selfaangestelde vredebewakers stokke, klippe, 'n wilde geskreeu en selfs honde ingespan het in pogings om die werk van die owerhede te doen – en word gesê hoe dit die werk van die polisie bemoeilik; dan gaan dit voort met: "Wie sy saak met massa-optrede wil stel, benadeel dit net as hy onbeskaaf optree. Dit geld ook buitestaanders wat hul neuse steek in sake wat niks met hulle te doen het nie."

Dit staan vas dat massa-optrede in 'n hoë mate die potensiaal vir benadeling het. Verder is dit duidelik dat meerdere groepe by 'n tipiese besetting, betoging of demonstrasie betrokke kan wees en dat elkeen se rol en posisie onderskei moet word, terwyl nooit uit die oog verloor mag word nie dat vir doeleindes van

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2 Sien bv die berig: "Die huislose mense wat Uitbreiding 13 (Lenasia) verlede week beset het, het skade van R300 000 aan die huise berokken" (*Beeld* 1995-02-25 2).

3 Dink bv aan die berig: "Leiers van 'n massa-optog dreig met 'n rasse-oorlog, die optog ontaard in geweld; klippe word tussen voor- en teenstanders gegooi en die polisie gebruik rubberkoeëls en donshael om orde te herstel; namens die organiseerders van die betoging is gesê dat dit die laaste vreedsame betoging sal wees" (*Beeld* 1995-02-23 7).

4 "'n Senior offisier van die Polisie is omgery deur 'n bus en twee ander is beseer ten tyde van 'n betoging deur busbestuurders op Empangeni" (*Beeld* 1995-02-25 2). "Een soldaat is gewond en veertig ander is in hegtenis geneem nadat 'n mini-oorlog eergister tussen die soldate en militêre polisie uitgebreek het" (tydens 'n sitstaking in Johannesburg) (*ibid*).

5 Dit het verskyn in *Beeld* van 1995-02-25 8.

die onderhawige ondersoek alle betrokkenes beskou moet word as lede van die groep waaruit die nadeel toegebring is.

1 2 Enkele terreine waarop verskyningsvorme van die probleem hom voordoen

Elders[6] is reeds verduidelik dat dit in al hierdie gevalle eintlik gaan oor verskyningsvorme van wat toenemend "multikausale Schäden" genoem word.[7] As sodanig val dit in dieselfde kategorie as milieuregtelike en produkte-aanspreeklikheid op die gebied van medies-genetiese middele (DES-gevalle), asook (minstens gedeeltelik) bydraende skuld.

Die dilemma waarin die onregmatige daadreg in die gevalle van multikousale nadeel is, is dat dit gevalle betrek waar nie vasgestel kan word wie uit die betrokke groep die nadeel teweeggebring het nie. Die nadeel is egter daar, en die vraag is of en, indien wel hoe, die onregmatige daadreg aan daardie nadelige resultaat gepaste regsgevolge kan knoop.

2 DIE POSISIE IN SUID-AFRIKA

2 1 Inleiding

Daar bestaan in Suid-Afrika 'n verskeidenheid maatreëls wat daarop gerig was – en eintlik steeds is, hoewel dit nie meer gebruik word nie – om die plaasvind van demonstrasies te verbied en onderdruk. Sedert die eerste vreedsame massa-optog teen apartheid met toestemming van die owerheid op 13 September 1989 in Kaapstad plaasgevind het, is talle pogings aangewend om sodanige aktiwiteite te orden. Hoewel ons reg hieroor kennelik nog in 'n oorgangsfase verkeer,[8] sal hierna gekyk moet word aangesien dit 'n deel van die raamwerk daarstel waarbinne die onderhawige onderwerp beoordeel moet word.[9] Vir doeleindes van ons

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6 Sien die verwysings *supra* vn 1.

7 Bv Loser *Kausalitätsprobleme bei der Haftung für Umweltschäden* Diss Nr 1499 St Gallen (1994) (hierna Loser) 27.

8 Terwyl die nuwe Wet op Reëling van Byeenkomste 205 van 1993 nog nie in werking gestel is nie, en dit nie meer gerade is vir die polisie om op die vroeëre wetgewing (sien vn 9) terug te val as hulle ivm demonstrasies moet optree nie, tree die SAPD nou op met hulle gewone polisiëringsbevoegdhede, en in ooreenstemming met die beleid en verordeninge van plaaslike owerhede oor die hou van marse of optogte, die opstel van poste en/of byeenkomste op openbare paaie of strate. Een van die vereistes wat kragtens die beleid van die plaaslike bestuur van bv Potchefstroom geld, is dat die applikant wat só 'n massa-aksie wil hou teenoor die stadsraad verantwoordelikheid moet aanvaar vir enige skade of verlies wat die stadsraad gedurende die aktiwiteit kan ly, en die stadsraad moet vrywaar teen enige aanspreeklikheid of eise voortspruitend uit die beoogde aktiwiteit (sien klousule 3.7 van die Beleid van 1995-01-31).

9 Op die groot aantal bepalings en reëlings wat voor 1994-04-27 in hierdie verband gemaak is, en steeds bestaan, kan nie hier ingegaan word nie. Daaronder val veral die Wet op Byeenkomste en Betogings in die Omgewing van die Parlement 52 van 1973; Wet op Verbod op Betogings in of naby Hofgeboue 71 van 1982; sekere artikels van die Wet op Binnelandse Veiligheid 74 van 1982; en die Wet op Byeenkomste en Betogings in of naby die Uniegebou 103 van 1992. Nav die verslag van die Goldstone-kommissie is talle verbeterings aan die heersende situasie voorgestel (*Financial Mail* 1992-07-19 44). Dit het daarop neergekom dat baie van die vorige maatreëls moontlik herroep kan word, en dat talle kwessies wat voorheen hoegenaamd nie of nie deeglik gereël was nie, deur die Wet op Reëling van Byeenkomste 205 van 1993 (wat op 1994-01-14 goedgekeur is maar nog wag om deur proklamasie in werking gestel te word) gereël of op 'n beter manier gereël word.

bespreking word net na enkele aspekte van demonstrasies as verskynsel, en na enkele bepalings van die Wet op Reëling van Byeenkomste 205 van 1993 verwys. Uiteraard moet die toepaslike bepalings van die Grondwet van die Republiek van Suid-Afrika 200 van 1993 ook in die agterkop gehou word.[10]

2 2 Die begrip "demonstrasie"

"Demonstrasie" is nie 'n primêr juridiese begrip nie maar dit is duidelik dat die klem in elk geval rus op die publikasie van die een of ander standpunt of kennisgewing van die een of ander feit of toestand, en het meestal 'n politieke oogmerk.[11] Dit is dus altyd vir of teen iets of iemand gerig, en wil die openbare mening beïnvloed. Alle vorme daarvan kan tot nadeel of rusverstoring lei omdat dit dikwels reaksie ontlok – en eintlik juis daarop ingestel is.[12] Demonstrasies is dus op kennisname deur magshebbers ten opsigte van die betrokke kwessie gerig.

Dit kan op private grond (soos huisbesettings of besetting van sakepersele, kerke ensovoorts) of openbare terreine plaasvind. Laasgenoemde gevalle kom meer dikwels voor en het gewoonlik die grootste potensiaal om tot rusverstoring, geweld en nadeel te lei. Openbare strate het in die konteks van ons onderwerp 'n veel wyer gebruik as om net die beweging van verkeer te rig. Strate kan bestempel word as openbare plekke waar die fundamentele reg op vrye kommunikasie uitgeleef kan word.[13] Dit kom dus daarop neer dat openbare strate in beginsel vryelik ingevolge die fundamentele regte-leer vir enige "gemeenskaplike gebruik" beskikbaar is, terwyl daar slegs in uitsonderingsgevalle waar die gebruik die perke oorskry van wat vir die gemeenskap houdbaar geag word, vereis kan word dat toestemming gekry moet word en voorwaardes opgelê kan word.

Die belang van openbare strate vir die owerheid blyk uit die geskiedenis.[14] Daarom kan begryp word dat die owerheid beheer oor die gebruik daarvan wil

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10 Hier kan veral gedink word aan: "Freedom of expression: 15(1) Every person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media, and the freedom of artistic creativity and scientific research. 15(2) All media financed by or under the control of the state shall be regulated in a manner which ensures impartiality and the expression of a diversity of opinion." "Assembly, demonstration and petition: 16 Every person shall have the right to assemble and demonstrate with others peacefully and unarmed, and to present petitions." "Freedom of association: 17 Every person shall have the right to freedom of association."

11 Sien bv die *Brockhaus Enzyklopädie* sv "demonstration": "Beweisführung, Darlegung, Kundgebung." Sien ook Neuenschwander *Die Schadensersatzpflicht für Demonstrationsschäden* Zürcher Studien zum Privatrecht Nr 30 (1983) (hierna Neuenschwander) 9; Müller *Die Grundrechte der schweizerischen Bundesverfassung* (1991) (hierna Müller) 161.

12 Van Wyk "Protesoptogte en die rol van die Nederduitsch Hervormde Kerk" 1991 *Hervormde Teologiese Studies* 716 (hierna Van Wyk) 734–736 lys die positiewe en negatiewe aspekte en verskeie kenmerke van demonstrasies.

13 "Straßen [dienen] nicht nur dem Verkehr, sondern [sind] auch Foren öffentlicher, grundrechtsgeschützter Kommunikation, d.h. die für ideelle, soziale und wirtschaftliche Tätigkeiten im Rahmen der Interessen der Allgemeinheit grundsätzlich frei sind" (Saxer *Die Grundrechte und die Benützung öffentlicher Straßen, eine Untersuchung der Bundesgerichtspraxis unter Berücksichtigung deutscher Entscheidungen* Zürcher Studien zum öffentlichen Recht Nr 74 (1988) (hierna Saxer) 124 312).

14 "Straßen waren seit jeher Gegenstand staatlicher Machtansprüche und Herrschaftsausübung sowie Mittel zur Erschließung und Machtmäßigen Beherrschung eines Territoriums" (Saxer 46).

uitoefen, en dat vrye "gemeenskaplike gebruik" daarvan, asook "verhoogde gemeenskaplike" en "spesiale gebruik" daarvan as fundamentele reg beskerm moet word.[15]

Ongeag die plek waar 'n demonstrasie plaasvind, is dit altyd daarop gerig om die openbare aandag op 'n standpunt of toedrag van sake te vestig.[16] As sodanig is dit dus altyd daarop gerig om die openbare mening (of 'n deel daarvan, soos by verbruikers, pendelaars of inwoners) te verander, of die openbare mening as instrument te gebruik om die besluite en optrede van maghebbers in owerheidsliggame, maar ook in die handels- en bedryfswêrelde, die kerklike en ander terreine van die lewe te beïnvloed. In die sin van die beïnvloeding van magsuitoefening in die gemeenskap of 'n onderdeel daarvan deur die openbare mening te verander of te gebruik, kan gesê word dat demonstrasies altyd 'n politieke oogmerk het.[17] In hierdie opsig verskil 'n demonstrasie van 'n gedrang van winskopiejagters, straattog van luidrugtige sportondersteuners, of singende en jillende drinkebroers.

Sedert die groot demonstrasie teen die kernkragstasie te Brokdorf het die karakter van demonstrasies in Duitsland verander, in die sin dat dit toenemend weg van die beboude gebiede en strate in landelike omgewings plaasvind, terwyl die publisiteitskant daarvan aan die media oorgelaat word. Dit word ook toenemend gereël deur losse, informele aksiekomitees, wat net vir daardie doel byeengekom het en baie klein kan wees. Daar is dus nie meer 'n werklike organiseerder wat reëlings kan tref, toestemming kan vra, voorwaardes kan nakom, orde en dissipline kan handhaaf en, eventueel, aanspreeklik gehou kan word nie.[18] Hier kom dus dikwels al hoe minder publiekregtelike kwessies ter sprake, terwyl die polisiërings-, strafregtelike[19] en skadevergoedingsregtelike kwessies in verband daarmee nog nie opgelos is nie.[20] Daarmee is die probleem weer van die publiekregtelike na die straf- en privaatregtelike terreine verskuif sonder dat daardie terreine self genoegsaam ontwikkel is om die probleme bevredigend te hanteer.

Wat polisiëring betref, is dit veral die metodes wat die polisie aanwend deur 'n verbod op vermomming of die dra van uniforms op te lê,[21] of deur sommer voor die voet beeldmateriaal van byeenkomste te versamel, of om aanspraak te maak op beeldmateriaal deur joernaliste versamel wat as getuienis gebruik kan word.[22] Sekere polisiëringstegnieke, soos die lukraak afvuur van rookbomme, traangas, rubberkoeëls, waterkanonne, saamdruk van mense, gebruik van honde en perde,

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15 "Die Ausübung von Herrschaft über und auf Straßen erscheint zu sehr als ureigene hoheitliche Domäne, als daß sie sich mit einer gleichgearteten Berechtigung von Privaten vertragen würde" (Saxer 46).

16 Neuenschwander 6; BGE 100 1 a 392 396.

17 Neuenschwander 7.

18 Saxer 113–114.

19 Van Oosten "Boekbespreking: Demonstration und Strafrecht, by Dieter Weingärtner" 1991 *De Jure* 216.

20 Saxer 114.

21 *Idem* 303; Müller 163.

22 In Switserland word sodanige aanspraak afgedwing omdat die *Strafprozeßordnung* van Zürich geen swygreg aan joernaliste verleen nie – BGE 107 1a 45, 50–51; BGE 107 1a 64, 66; Saxer 115–116 bestempel dit nietemin ook daar as omstrede.

ensovoorts word dikwels gekritiseer,[23] daar dit dikwels as oormatig of eintlik as net ter beskerming van die polisie en dus as misbruik van hulle amptelike bevoegdheid aangemerk word.[24]

Die oogmerk van 'n demonstrasie is myns insiens meestal irrelevant wanneer dit handel oor die privaat- of publiekregtelike aanspreeklikheid van iemand vir die nadeel wat daaruit ontstaan het. Demonstrasie is 'n legitieme manier van optrede in die demokratiese proses, welke feit nie deur die misbruik wat daarvan gemaak kan word, verander word nie.[25] Die teenkant hiervan is dat geweld of die aanstigting daartoe in enige vorm die grense van die aanspraak op demonstrasievryheid oorskry.[26] Waar geweld of skadeberokkening dus as gevolg van of in die loop van 'n demonstrasie beplan of voorsien word, kan die heg van regsgevolge daaraan in die vorm van moontlike aanspreeklikheid myns insiens nie as 'n beperking op die uitoefening van daardie fundamentele reg gesien word nie.[27]

Anders as in Suid-Afrika, erken die Switserse Grondwet en hofuitsprake geen afsonderlike reg om te demonstreer naas die regte op vrye meningsuiting en assosiasie nie.[28]

Demonstrasies kan georganiseerd wees in die sin dat iemand dit beplan of byeengeroep het, desnoods met kennisgewing of die aanvra van toestemming. Dit kan egter ook spontaan ontstaan.[29]

2 3 'n Skets van die Suid-Afrikaanse statutêre raamwerk[30]

Die Wet op Reëling van Byeenkomste 205 van 1993 is daarop gerig om die hou van openbare byeenkomste en betogings op sekere plekke te reël en om voorsiening te maak vir aangeleenthede wat daarmee verband hou.[31] Hierdie wet is egter nog nie in werking gestel nie. In die tussentyd is alle betrokkenes dus nog aangewese op bepalings soos dié in artikels 46 to 53 van die Wet op Binnelandse Veiligheid 74 van 1982, besluite en verordeninge van plaaslike owerhede, ander maatreëls[32] en gewone polisiëringsoptrede. Dit was juis as gevolg van die leemtes wat in die bestaande maatreëls voorkom dat 'n subkommissie van die

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23 Sien bv Louw "'Ja, die gewone polisieman is gefrustreerd'" Des 1989 *Die Suid-Afrikaan* 22.

24 Saxer 115–116. Sien bv ook Louw "Van Waalstraat tot 'wettige protesoptogte' – die SAP en die pyn van oorgang" Des 1989 *Die Suid-Afrikaan* 14–15.

25 Sien bv ook Van Wyk 720 727–728.

26 Sien bv *idem* 728.

27 Du Plessis en Olivier "Onrus, geweld en vrede" 1992 *SA Publiekreg* 311, nav *Nyamakazi v Minister of Law and Order* 1992 1 SA 265 (BGD) 270F.

28 Neuenschwander 8–9.

29 Bv in reaksie op 'n onverwagte sterfgeval of politieke sluipmoord.

30 'n Volledige oorsig kan gekry word uit Du Pisani, Broodryk en Coetzer "Teoretiese, historiese en politieke aspekte van protesoptogte in Suid-Afrika" 1990 *Joernaal vir Eietydse Geskiedenis* 1–44.

31 Hier sal nie kommentaar gelewer word op die detail van die bepalings van Wet 205 van 1993 nie.

32 Bv besluite deur die raad van 'n universiteit mits dit natuurlik ordelik geneem is (sien bv *Durr v Universiteit van Stellenbosch* 1990 3 SA 598 (A), en die bespreking daarvan deur Ferreira en Olivier "Universiteitstudente en tugbepalings na *Durr*" 1991 *SA Publiekreg* 146). Verder val hieronder ook sekere provinsiale ordonnansies en regulasies, soos tov die hou van byeenkomste in openbare oorde (Ord 18 van 1969 (T) Bylae 2 Hfst 2 Reg 33).

Goldstone-kommissie van ondersoek sekere voorstelle met die oog op die beter reëling van aangeleenthede in verband met sodanige byeenkomste gedoen het.[33] Laasgenoemde voorstelle word reeds in 'n mate aangewend ten spyte daarvan dat die wet nog nie van krag is nie.[34]

2 4 Enkele bepalings van die Wet op Reëling van Byeenkomste 205 van 1993

Luidens die aanhef berus die wetgewing daarop dat elke persoon die reg het om vreedsaam en met behoorlike inagneming van die regte van ander met ander persone byeen te kom en sy sienswyse vryelik in die openbaar uit te druk. 'n *Betoging* word omskryf as 'n betoging deur een of meer as een persoon, met 'n maksimum van 15 persone, vir of teen enige persoon, saak, optrede of versuim om op te tree. 'n *Byeenkoms* word omskryf as enige vergadering, toeloop of optog van meer as 15 persone in of op enige openbare pad, of enige ander openbare plek of perseel wat geheel of gedeeltelik na bo oop is, en waarop die beginsels, beleid, optrede of versuim van enige regering, politieke party of politieke groepering (hetsy hulle geregistreer is al dan nie) bespreek, aangeval, gekritiseer, bevorder of gepropageer word; of wat gehou word om drukgroepe te vorm, versoekskrifte aan iemand te oorhandig, of steun of teenkanting teen die sienswyse, beginsels, beleid, optrede of versuim van 'n persoon of liggaam of instelling, met inbegrip van enige regering, administrasie of owerheidsinstelling, te mobiliseer of te betoon. *Onlusskade* word omskryf as enige verlies gely as gevolg van 'n besering aan of die dood van iemand, of enige skade aan of vernietiging van goed, wat regstreeks of onregstreeks en onmiddellik voor, tydens of na die hou van 'n byeenkoms veroorsaak word deur die hou daarvan.

Ingevolge artikel 11(1) van Wet 205 van 1993 is in die geval van 'n byeenkoms, elke organisasie namens of onder wie se beskerming die byeenkoms gehou is of, as dit nie so gehou is nie, die sameroeper en, in die geval van 'n betoging, elke deelnemer aan die betoging, behoudens enkele verwere,[35] gesamentlik en afsonderlik as gesamentlike daders ingevolge hoofstuk II van die Wet op Verdeling van Skadevergoeding 34 van 1956 vir die onlusskade aanspreeklik, saam met enige ander persoon wat sodanige onlusskade onwettig veroorsaak het of daartoe bygedra het en enige ander organisasie of persoon wat ingevolge artikel 11(1) daarvoor aanspreeklik is. 'n Bepaling wat effens lig kan werp op die aard van die aanspreeklikheid waaroor dit hier gaan, is artikel 11(3). Dit bepaal dat die aanspreeklikheid ingevolge artikel 11(1), vir doeleindes van

33 "Demonstrations – maturity gap" in *Financial Mail* 1992-07-17 44. Daardie voorstelle is, al is die wet nog nie in werking gestel nie, bv reeds in 'n groot mate in die beleid van die stadsraad van Potchefstroom (kragtens Raadsbesluit 47(3) tot (7) van 1994-09-28, en gewysig deur Raadsbesluit 41(1) van 1994-11-30) oor optogte of marse, of die opstel van poste of byeenkomste op 'n openbare pad of plek, opgeneem.

34 Sien vorige vn.

35 A 11(2) bepaal dat 'n aangesproke persoon of organisasie hom teen aanspreeklikstelling kan verweer deur te bewys dat: (a) hy die handeling wat die skade veroorsaak het nie toegelaat of oogluikend toegelaat het nie, en (b) die betrokke handeling nie binne die bestek van die doel van die byeenkoms of betoging geval het nie, en dit nie redelikerwys voorsienbaar was nie; en (c) die aangesprokene alle redelike stappe binne sy vermoë gedoen het om 'n handeling van die betrokke soort te voorkom. Getuienis dat die aangesprokene handelinge van die betrokke soort verbied het, stel uitdruklik nie toereikende bewys daar dat hy alle redelike stappe gedoen het om die handeling te voorkom nie.

regres teen of 'n bydrae deur 'n organisasie of persoon wat opsetlik en wederregtelik onlusskade veroorsaak of tot die veroorsaking daarvan bygedra het, of vir doeleindes van 'n bydrae deur 'n persoon of organisasie wat ingevolge artikel 11(1) gesamentlik vir enige onlusskade aanspreeklik is, geag word aanspreeklikheid op grond van onregmatige daad te wees. Artikel 11(4) stel dit duidelik dat aanspreeklikheid ingevolge artikel 11 geensins afdoen aan enige gemeenregtelike of ander statutêre aanspraak van 'n persoon of liggaam om die volle skadevergoeding voortspruitend uit die nalatigheid, opsetlike handeling of versuim, of onregmatige daad van watter aard ook al verrig deur of ten behoewe van 'n ander persoon, te verhaal nie.

Uit die voorgaande is die duidelike standpuntinname oor die deliktuele aard van die moontlike sivielregtelike aanspreeklikheid in die onderhawige gevalle te verwelkom. Omdat egter sonder meer verwys word na dinge soos gesamentlike daderskap en hoofstuk II van die Wet op Verdeling van Skadevergoeding, kan afgelei word dat steeds aan die geykte vereistes vir sodanige aanspreeklikheid voldoen sal moet word. 'n Ander, wyer moontlikheid word wel geopen deurdat iemand wat net "bygedra het" tot die onlusskade ook aanspreeklikheid kan oploop. Of onder *bydra* iets anders as feitelike kousaliteit verstaan moet word, is egter onseker en lyk selfs onwaarskynlik.

Totdat behoorlike wetgewing daargestel word – hetsy deur die inwerkingstelling van Wet 205 van 1993 (soos dit tans daar uitsien, of in 'n gewysigde vorm), of deur die invoering van 'n nuwe, ander wet – sal die posisie in Suid-Afrika dus ongekoördineerd en onbevredigend bly. Dit laat die vraag ontstaan hoe sodanige kwessies in die ander regstelsels wat ondersoek is, binne die konteks van die onderhawige onderwerp gehanteer word.

3 BETOGINGS EN DEMONSTRASIES IN ENKELE ANDER LANDE

3 1 Duitsland

Vir aanspreeklikheid ingevolge §830 1 1 *BGB* word, soos reeds geblyk het,[36] vereis dat persone wat deel gehad het aan sodanige optrede opset moet gehad het.[37] Die dwingende aard van norme vir massa-optrede,[38] wat as moeilik weerstaanbare impulse op die individu oorgedra word weens die solidariserende krag van groepvorming asook die moeite wat individue kan hê om hulle aan 'n demonstrasie te onttrek wat eenmaal aan die gang gekom het, moet hierby in ag geneem word.

Deur hier opset te vereis, beperk die Duitse reg die aanspreeklikheid van deelnemers aan sodanige aktiwiteite: hulle word nie aanspreeklik gehou bloot omdat hulle as nuuskierige omstanders betrokke geraak het, of selfs deelgeneem het aan 'n besetting, boikot, betoging of demonstrasie, of omdat van die deelnemers daaraan sonder hulle goedkeuring té ver gegaan het, of omdat hulle hulle nie betyds kon onttrek toe dinge begin skeefloop het nie. Andersyds kan sulke feite uiteraard getuienis van die aanwesigheid van opset by hulle daarstel, byvoorbeeld om bewustelik psigiese steun aan die dader(s) te bied omdat hulle weens in-

36 Sien 1995 *THRHR* 629–631.

37 BGH NJW 72 40; Bassenge *et al Palandt Bürgerliches Gesetzbuch Band* 7 53e Aufl (1994) (hierna Palandt) §830 Rz 3.

38 Dit word die "Eigengesetzlichkeit und Zwänge" van groepsoptrede genoem.

standhouding van die groep anoniem sal kan bly, ensovoorts. Oorwegings soos dat dit by 'n besetting of demonstrasie gegaan het oor 'n openbare gebou,[39] of dat dit die enigste manier was om die openbare aandag op 'n probleem te vestig,[40] het nie teen sodanige bewese opset enige nut nie.[41]

Deelname aan groot demonstrasies moet verder beoordeel word in die lig van die feit dat die verloop van gebeure meestal nie in tyd en ruimte oorsienbaar is nie. Die nodige opset om saam nadeel onregmatig aan te rig of te help aanrig, moet dus hier in die betrokke tyd- en ruimtelike konteks aanwesig wees. Vir hierdie beperking van aanspreeklikheid is die samestelling van so 'n groot groep (byvoorbeeld tien tot twintig duisend mense) uit individue en subgroepe, wat verskillende motiewe, voornemens, aksie- en gebeurlikheidsplanne en grade van betrokkenheid kan hê, verantwoordelik. Selfs waar iemand meedoen en in die algemeen voorsien dat geweld in die loop van die demonstrasie dalk nodig kan word, word hy nie as mededader tot sodanige geweld beskou nie tensy hy hom opsetlik by die geweldpleging aangesluit het of hom nie daaraan onttrek het nie, met die oog daarop om aan die dader die aanmoediging en sekuriteit te verskaf wat anonimiteit binne die groep aan die dader kan bied.[42] Selfs wat die aanwending van geweld betref, moet in gedagte gehou word dat 'n aangesprokene dalk juis teen geweld deur lede van die veiligheidsmagte, óf geweld deur ander lede van die groep teenoor hom toegepas, self met geweld gereageer het. Om in sulke gevalle die moontlike aanspreeklikheid van blote simpatiseerders met 'n groot demonstrasie enigsins skerper te beoordeel, word ingevolge die Duitse Grondwet as strydig met die reg op vrye meningsuiting[43] of die reg op vrye assosiasie[44] beskou. Die feit dat dit oor 'n demonstrasie teen die bou van 'n kernkragsentrale gehandel het, is byvoorbeeld in die berugte Brokdorf-geval nie deur die hof as genoegsaam beskou om van die gewone beginsels in verband met onregmatigheid af te wyk nie.[45]

Waar partye afgespreek het om 'n onregmatige daad te pleeg, bly elkeen ten volle aanspreeklik vir die nadeel wat net deur een toegebring is, al het die aangesprokene ook sy deelname aan die onderneming verbreek of hom selfs uitdruklik daaraan onttrek, mits sy aanvanklike instemming steeds die dader se handeling bevorder het, byvoorbeeld deur die dader aanvanklik tot die daad te oorreed het of deur aanwysings vir die pleeg van die daad te verskaf het.[46]

3 2 Switserland

Gevalle van nadeel wat aangerig word in verband met demonstrasies, sogenaamd geweldlose aksies en dergelike verrigtinge, word ingevolge artikel 41 *OR* gehanteer vir sover dit oor die aanspreeklikstelling van individue weens onregmatige daad handel, en ingevolge artikel 50 1 *OR* vir sover dit oor die aanspreeklik-

39 Ingevolge a 14 van die *Grundgesetz*.
40 BGHZ 63, 129.
41 Horn (red) *J von Staudinger's Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen* 12e Aufl (Schäfer) (1986) (hierna Staudinger) §830 Rz 15.
42 Staudinger §830 Rz 15, nav BGH *NJW* 1984, 12226; JZ 1984, 521.
43 A 5 Abs 1 *GG*.
44 Ingevolge a 8 Abs 1 *GG*.
45 Staudinger §830 Rz 15.
46 *Idem* 18.

stelling van meerdere persone handel. Waar dit gaan oor die moontlike aanspreeklikstelling van 'n aangesprokene weens 'n onregmatige daad in groepsverband gepleeg, word dit ook vanuit die oogpunt van artikel 50 1 *OR* benader.[47]

Verskeie moontlike verweerders kom in sodanige gevalle ter sprake: die organiseerders se moontlike aanspreeklikheid staan gewoonlik voorop al het hulle ook op die agtergrond gebly tydens die verrigtinge self. Hulle aanspreeklikheid kan daarop berus dat hulle in verband met die verrigtinge volgens ervaring en wat in die omstandighede verwag kon word, met die aanwending van geweld teen mense of eiendom rekening moes gehou het. Dit kan wees dat die aanwending van geweld 'n oogmerk was maar geweld kan ook uit 'n andersins vreedsame demonstrasie ontspring. Organiseerders kan uiteraard natuurlike of regspersone of ander versamelings mense sonder regspersoonlikheid wees (soos 'n aksiekomitee wat op eie inisiatief of deur 'n toeloop van mense daargestel is). Individuele deelnemers is 'n verdere moontlikheid hetsy hulle natuurlike of regspersone is. Deelnemers wat hulle nie duidelik aan die geweldpleging onttrek sodra die andersins vreedsame verrigtinge gewelddadig word nie, word dan ook aanspreeklik gehou. Die doel van die demonstrasie is hierby nie van belang nie. Owerheidsinstansies (op plaaslike, streeks- of sentrale vlak), soos beskermhere, verleners van toestemming om die verrigtinge te laat plaasvind (met of sonder voorwaardes) waarby regterlike amptenare ingesluit kan wees, veiligheidsmagte en -personeel (polisie, verkeersmense, noodhulpdienste), kan ook ter sprake kom. Dit geld ook persone of instansies in beheer van eiendom of persele waar die verrigtinge sal plaasvind, media en joernaliste, en dergelike mense wat by die reël en hou van sodanige verrigtinge betrokke is.

Benewens die kwessies wat in verband met moontlike privaatregtelike aanspreeklikheid oorweeg moet word, kom die strafreg se moontlike antwoorde op die problematiek van demonstrasies wat hande uitruk ook ter sprake. In die breër konteks van demonstrasies as 'n vorm van meningsuiting word voorts aandag geskenk aan die vraag of die grondwetlike beskerming van die vryheid van meningsuiting nie in gedrang kan kom as deelnemers aan sodanige aktiwiteite hulle fundamentele reg moet uitoefen onder die bedreiging van deliktuele en strafregtelike aanspreeklikheid indien die gebeure op die ontstaan van nadeel sou uitloop nie. Hierop is nog geen finale antwoord gegee nie hoewel algemeen aanvaar word dat die aanwending van geweld meebring dat die grense van die reg om te demonstreer oorskry word.

3 3 Nederland

3 3 1 Algemeen

Bloembergen bespreek die volgende hipotetiese geval:[48] 'n Regspersoon, die *Liga tegen Vrouwenemancipatie*, die *Toffe Rinussen* genoem, het met die nodige toestemming van die plaaslike owerheid 'n demonstrasie gereël. Laasgenoemde

47 "Man bleibt nicht unschuldig, wenn man eine mit Ausschreitungen verbundene Veranstaltung durch Teilnahme und Verhalten Mitträgt; dass ist der Fall, wenn man an einer unbewilligten Demonstration, bei der mit Gewalttätigkeit zu rechnen ist, teilnimmt oder wenn man bei einer bewilligten, die ausartet, munter mitmarschiert und mit den Randalierern gemeinsame Sache macht, statt nach Möglichkeit von ihrem Tun Abstand zu nehmen" (Keller *Haftpflicht im Privatrecht* Band 1 5e uitg (1993) 115.

48 Rechtsvraag 1971 *Ars Aequi* 347.

het hulle natuurlik laat vrywaar teen enige aanspreeklikheid vir nadeel deur die demonstrante veroorsaak. Die bestuur en enkele lede van die gemeentepolisie loop toe voor in die optog. Hulle kom 'n klompie aggressiewe vroue teë en 'n geveg ontstaan tussen hulle waartydens die houtborde wat deur die demonstrante gedra is, hewig rondgeswaai is. 'n Derde (meneer Rustig (*sic*)) se ruit (ter waarde van F300) word getref en dit breek. 'n Waardevolle klein antieke vaas (ter waarde van F3 000) wat agter die ruit gestaan het, word ook gebreek.

Volgens die opstellers van die nuwe Nederlandse kode[49] is dit duidelik dat die enkele deelname aan 'n optog nie aanspreeklikheid in sulke gevalle sal meebring nie en waar 'n geveg uitgebreek het, sal slegs diegene wat daaraan deelgeneem het vir die nadeel aanspreeklik gehou kan word. Alle "vechtersbazen en vechtersbazinnen"[50] kan dus aangespreek word omdat hulle "behoort te begryp het dat hulle optrede die kans op die geswaai van die borde en die gevolglike intrede van die nadeel sou vergroot, en hulle van sodanige groepsoptrede moes weerhou het". Die rede wat Bloembergen hiervoor aangee, slaan duidelik op skuld in die vorm van nalatigheid. Wat die direkte dader betref, sal opset, skuldlose aanspreeklikheid en risiko-aanspreeklikheid ook voldoen.[51] Indien een van die vegtendes teenoor meneer Rustig aanspreeklik gehou sou word, sal daardie persoon 'n gedeeltelike verhaalsreg teen die ander hê.[52]

'n Aksie teen die *Toffe Rinussen* of die bestuurslede daarvan sal waarskynlik nie slaag nie, want in die Nederlandse gemeenskap kan niemand normaalweg daarvoor verwyt word dat hy 'n demonstrasie of betoging gereël het nie. Bloembergen stel dit egter duidelik dat hierdie beoordeling kan en sal verander indien dit sou blyk dat die kans op gewelddadigheid, in die lig van die aard van die optrede van die deelnemers aan die optog en dié van hulle uiteindelike teenstanders, en gesien die verdere omstandighede (soos die plofbaarheid van die situasie) nie negeerbaar klein was nie. Dit sal in sodanige omstandighede dus vasstaan dat die reël van of deelname aan die demonstrasie onregmatig was.

Indien bevind sou word dat die reël van so 'n optog in die omstandighede onregmatig sou wees, kom die vraag na vore in watter stadium die organiseerders moes begryp het dat die grense van die vergunning oorskry sou word.[53]

3 3 2 Regspersone

'n Regspersoon is nie volgens die Nederlandse reg aanspreeklik vir delikte deur sy lede gepleeg nie behalwe as hulle organe daarvan was en orgaanshandelinge verrig het. Die lede wat in bogenoemde voorbeeld aan gevegte deelgeneem het, het nie daartydens as ledevergadering opgetree nie en hoewel die bestuur die situasie laat voortgaan het, moet nie vergeet word nie dat individue in só 'n stadium, as dit eenmaal begin het, weinig kan uitrig om sodanige oproer te stop. Die vraag sou myns insiens selfs in sodanige gevalle gevra moet word of die bestuur vooraf genoeg gedoen het om te keer dat die verrigtinge gewelddadig

49 *Ontwerp voor een Nieuw Burgerlijk Wetboek, Toelichting* 3e Gedeelte Boek 6 661.
50 Hulle vorm saam die "groep" vir doeleindes van ons onderwerp.
51 Van der Burg 5065 *WPNR* 499; *Toelichting* 661.
52 In die nuwe a 166 *Nieuw BW* word nou ook só bepaal. Sien 1996 *THRHR* 63–64.
53 Uiteraard moes alles rondom die verlening van die vergunning dan ook volgens die daarvoor geldende beginsels korrek verloop het.

kan raak en of hulle genoeg gedoen het om dit te stop of te beperk toe dit eenmaal 'n aanvang geneem het.

3 3 3 Plaaslike owerheid

Die plaaslike owerheid het in die bogenoemde voorbeeld 'n bevoegdheid waaroor hy beskik, uitgeoefen deur die toestemming om te betoog te verleen en kan dus nie daarvoor aangespreek word nie. Dit sal uiteraard anders wees as hy sy bevoegdheid vir 'n ander doel aangewend het as waarvoor dit verleen is, of willekeurig opgetree het.[54] Indien só iets ter sprake sou kom, sal die vrywaringsklousule wat soos gebruiklik is met die gee van die toestemming gepaard gegaan het, uiteraard nie teen 'n totale buitestander soos meneer Rustig opgewerp kan word nie.[55] Wat die berekening van skadevergoeding betref, sou in Nederland sowel die skade aan die ruit as dié aan die vaas toegeken word as dit daartoe sou gekom het.[56]

Bloembergen[57] meen dat ook nie maklik teen die plaaslike owerheid op grond van sy gebrekkige handhawing van die openbare orde opgetree kan word waar daaruit oproer ontstaan het wat tot saakskade vir sy burgers gelei het nie. Die plaaslike owerheid het 'n groot mate van beleidsvryheid oor sake soos die toelaat van demonstrasies en sal nie maklik aanspreeklik gehou word waar nagelaat is om dwangmatige optrede deur die polisiemag te laat uitvoer nie.[58] 'n Mooi illustrasie hiervan is die volgende:[59] 'n Skadevergoedingseis is ingestel weens 'n versteuring van rus en genieting van die duine en natuur, en weens betreding van die eiser se grond deur kampeerders (plakkers) met 'n gevolglike afname in die grondwaarde. Die verweerder was 'n plaaslike owerheid wat die statutêre diskresie het om self teen oortreders van hulle dorpsbeplannings- en kampeerregulasies op te tree, maar wat nie tot sodanige optrede verplig is nie. Die eis is van die hand gewys en appèl volg. Die Hooge Raad bevind dat die plaaslike owerheid self sy beleid oor sodanige sake kan bepaal, en dat hy dus geen deliktuele aanspreeklikheid oploop waar hy nie kragdadig teen beskadiging van die duineveld deur onwettige bewoners en rommelstrooiers in 'n geproklameerde duinenatuurgebied opgetree het nie. Die Hooge Raad maak dit egter duidelik dat die plaaslike owerheid se versuim om daadwerklik iets te doen, of om sy eie beplanningsregulasies af te dwing, onregmatig sou wees indien dit sou gebeur volgens 'n beleid van geen-optrede al word daar ook in stryd met die wetlike voorskrifte oor die gebruik van sodanige openbare gebiede gehandel. Die Hooge Raad beslis dat sodanige voorskrifte ook ten behoewe van individue daargestel is – en nie net ten behoewe van die owerheid nie. Die enigste gevalle waar hiervan afgewyk sal word, is waar die omstandighede sodanig is dat dit vir hulle werklik geen ander uitweg ooplaat as om die voorskrifte te oortree nie.[60] Geen onwettige bewoner kan in elk geval enige regte vestig wat teen die wettige bewoner s'n opgeweeg kan word nie. Prins wys daarop dat die eiser 'n beter kans op sukses

54 Bloembergen (red) *Onrechtmatige daad* Losbladige uitgave) 1 (Met supplement 267 – Junie 1992) (hierna Bloembergen) 349.
55 Bloembergen 350.
56 *Idem* 351.
57 349.
58 HR 29 Maart 1940 NJ 1940, 1128 met nota van Meijers.
59 Dit kom voor in HR 12 Maart 1971 NJ 1971, 265 met nota van Prins.
60 750.

sou gehad het as hy die plaaslike owerheid op grond van die nie-nakoming van sy eie beplanningsregulasies aangespreek het, eerder as om sy eis te gooi oor die boeg van die onbehoorlike uitoefening van die diskresie om sterk teen (ander) oortreders van sy regulasies op te tree. Dit kom daarop neer dat die delikregtelike pad hier 'n beter resultaat sou opgelewer het as die meer administratiefregtelike weg, ofskoon daar natuurlik vir albei benaderings ruimte is.

4 STAATSAANSPREEKLIKHEID

4 1 Suid-Afrika

Staatsaanspreeklikheid[61] word lankal statutêr gereël.[62] Tans geld die Wet op Staatsaanspreeklikheid 20 van 1957, waarvan artikel 1 bepaal dat die staat vir die delikte van sy dienaars middellik aanspreeklik gehou kan word.[63] Omdat die kern van die probleem in die onderhawige gevalle juis is dat nie aan die gewone deliksvereistes voldoen word nie, bring die bepaling in hierdie stuk wetgewing ons nie nader aan 'n oplossing vir die gevalle van multikousale benadeling waar geen kousale verband bewys kan word nie.

Ons sal dus verder moet kyk om 'n moontlike oplossing te vind.

4 2 Duitsland

Reeds in 1850 was daar in Pruise en Beiere wetgewing om die staat te verplig om *Tumultschäden* meegebring deur owerheidsoptrede teen onrus te vergoed. Dit is opgevolg deur die *Reichsgesetz über die durch innere Unruhen verursachten Schäden* van 12 Mei 1920 (*TSchG*). Wat die berokkening van liggaamlike nadeel betref, is dit ook andersins statutêr[64] gereël, wat meegebring het dat die *TSchG* verder net vir saakskade gegeld het. Die verantwoordelikheid ingevolge daardie twee reëlings is toe staatsregtelik[65] aan die bondslande toegewys waarkragtens dit tans (1991) nog 'n taak van die onderskeie bondslande is.[66] Pogings om dit te wysig en om dit in 'n kodifiserende wet oor staatsaanspreeklikheid op te neem,[67] het tot nog toe nie geslaag nie.[68] Die feit dat die bondslande die verantwoordelikheid ingevolge die bestaande wetgewing dra, is nie die enigste probleem wat op hierdie terrein bestaan nie.

Die beperkte oogmerk met die regsmiddel wat bestaan, verskaf ook talle probleme. Die *TSchG* het naamlik in elk geval net die ekonomiese oorlewing van 'n slagoffer van sodanige owerheidsoptrede in die oog. Die beskerming is naamlik beperk tot 75% van die nadeel en tree net in werking as dit oor die ekonomiese oorlewing van die slagoffer gaan.[69]

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61 Algemeen hieroor Steyn *Die aanspreeklikheid van die staat vir die onregmatige dade van sy dienare* (LLD-proefskrif 1929) (hierna Steyn) hfst 4.
62 Steyn hfst 6 bevat 'n oorsig van die vroeë wetgewing en regspraak.
63 Bv *Groenewald v Minister van Justisie* 1973 3 SA 877 (A) 879H.
64 In §18 van die *Personenschädengesetz* van 1922-07-15 (soos saamgevat in die wetgewing van 1927-12-22).
65 Ingevolge §§123–125 van die *Bonner Grundgesetz*.
66 Neuenschwander 161; Ossenbühl *Staatshaftungsrecht* 4e Aufl (1991) (hierna Ossenbühl) 317–318.
67 'n Poging daartoe van 1981 is weens tegniese redes deur die *Bundesverfassungsgericht* nietig verklaar.
68 Neuenschwander 161–162; Ossenbühl 370.
69 Neuenschwander 162.

In die praktyk word ook groot probleme ondervind om die regsmiddel (al is dit ook beperk) toe te pas, sodat dit al meermale gebeur het dat bondslande uitkerings aan slagoffers gedoen het sonder om hulle aanspreeklikheid te erken, eerder as om 'n potensieel langdurende hofstryd ingevolge daardie bepalings aan te knoop.[70] In die lig van al die probleme is daar skynbaar oorweeg om hierdie bepalings in die wetgewing oor sosiale versorging op te neem,[71] maar die oogmerk daarmee is klaarblyklik nie om slagoffers se beskerming teen benadeling deur owerheidsoptrede na besettings, betogings en demonstrasies uit te brei nie.[72] Volgens die huidige siening behoort die taak van die staat as die bewaarder van vrede eerder die grondslag te vorm van hierdie aanspreeklikheid, en nie die rol van die staat as sosiale versorger nie.

4 3 Aanspreeklikheid van die staat of *Gemeinwesen* in Switserland

4 3 1 Federale wetgewing

Ingevolge die *Verantwortlichkeitsgesetz* van 9 Desember 1850 was die federale bond nie aanspreeklik vir nadeel wat 'n beampte in die loop van sy diens onregmatig aan 'n derde toegebring het nie. Ingevolge die *Bundesgesetz über die Verantwortlichkeit des Bundes sowie seiner Behördenmitglieder und Beamten* (*Verantwortlichkeitsgesetz* genoem) van 14 Maart 1958[73] is die bond egter wel vir die vergoeding van sodanige nadeel kousaal aanspreeklik.[74] Dit gaan hier oor middellike aanspreeklikheid; hierdie aanspreeklikheid tree voorts slegs in waar dit oor die uitvoering van die take van 'n publiekregtelike aard van die bond gaan en vind dus nie eintlik in verband met demonstrasies aanwending nie.

Aangesien die beheer oor openbare strate en plekke en die handhawing van rus en orde in elk geval aan die kantons toegewys is, help die *Verantwortlichkeitsgesetz* 'n eiser boonop nie waar die nadeel onregmatig deur 'n kantonale beampte aangerig is nie. In die praktyk ontstaan die meeste van dié soort eise egter juis uit die optrede van kantonale amptenare. Die huidige posisie in Switserland kan dus nie juis as navolgenswaardig beskou word nie.

Die vraag word daar gevra of die gemeenskap (*Gemeinwesen*), wat vir die openbare veiligheid, rus en orde verantwoordelik is en oor die kompetensie beskik om dwingend op te tree om dit te bewaar, nie in gevalle waar nadeel deur owerheidsoptrede tydens demonstrasies veroorsaak word, as verweerder oorweeg moet word nie. In Switserland rus die taak om demonstrasies te beheer op die kantons wat dit deur hulle polisiemagte behartig. Die bond word net daarby betrek as 'n kanton nie meer sy taak kan uitvoer nie en 'n taak aan die bond oordra.[75] Aanspreeklikheid van die owerheid kan dus net ter sprake kom as dit uitdruklik deur 'n bonds- of kantonale verordening bepaal word.[76] Daar bestaan dus geen algemene aanspreeklikheidsreël vir nadeel veroorsaak deur

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70 *Idem* 163; Ossenbühl 318 vn 16.
71 Neuenschwander 164.
72 Ingevolge die *Referentenentwurf des Staatshaftungsgesetzes* van 1976 het die opstellers daarmee klaarblyklik eerder op die oog om 'n absolute skadevergoedingsperk van 300 000DM aan alle eise op te lê.
73 SR 170.32.
74 BGE 115 II 237, 242.
75 Neuenschwander 143.
76 *Idem* 144–145.

owerheidsoptrede ten opsigte van of die bond óf die kantons nie. Dit moet uiteraard as onbevredigend beskou word.

Ingevolge artikel 13 *Absatz* 1 van die *Haftungsgesetz* kan die owerheid op billikheidsgronde vir skadevergoeding aanspreeklik gestel word al het die polisie in 'n noodtoestand (soos hulle die situasie gesien het) gehandel en dus regmatig opgetree.[77] 'n Voorbeeld hiervan kan wees waar dit vir die polisie weens die duur van en gebied ten opsigte waarvan die dreigende geweld voorkom, eenvoudig onmoontlik is om tegelykertyd alles en oral te beskerm, en hulle dan doelbewus sekere gebiede, periodes of goedere onbeskerm of net algemeen beskerm (byvoorbeeld deur periodieke waarneming) laat. Dit kan in sommige gevalle van nut wees waar nadeel ontstaan het uit die gebrek aan optrede deur die polisie teen 'n demonstrasie wat hande uitgeruk het.

4 3 2 Kantonale wetgewing

Op kantonale vlak is daar byvoorbeeld die *Gesetz über die Haftung des Staates und der Gemeinden sowie ihrer Behörden und Beamten, vom 14 September 1969 (Zürich)*[78] ingevolge waarvan die kanton (en nie ook die betrokke beampte nie) weens nadeel veroorsaak deur 'n beampte aanspreeklik gestel kan word.[79] Dieselfde vereistes as wat gewoonlik vir deliktuele aanspreeklikheid gestel word, geld egter ook hiervoor. Dit bring die aangeleentheid met betrekking tot multikousale benadeling weens demonstrasies dus ook nie nader aan 'n oplossing nie.

4 3 3 Burereg

Die staat kan uiteraard ook ingevolge die burereg aanspreeklik gehou word vir die manier waarop hy sy eiendomsreg uitgeoefen het afgesien daarvan of dit vir sake- of administratiewe doeleindes geskied.[80] Dit geld net waar die eiendom vir gemeenskaplike gebruik benut word in die uitvoering van die owerheid se pligte as owerheid, en vir sover dit handel oor voorsienbare nadeel of oor nadeel wat nie redelikerwys verhoed kon gewees het nie.[81]

4 3 4 'n Besondere reëling om organisasies kousaal aanspreeklik te stel

Die Switserse *Studienkommission für die Gesamtrevision des Haftpflichtrechts*[82] het in sy verslag[83] aanbeveel dat 'n nuwe vorm van kousale aanspreeklikheid vir organisasies daargestel word. Dit moet nie eenvoudige risiko-aanspreeklikheid wees nie maar wel 'n effens ligtere vorm van kousale aanspreeklikheid. Die grondslag daarvoor moet die een of ander fout of gebrek wees in die manier waarop die organisasie (ook een wat demonstrasies of sportbyeenkomste reël) sy taak uitgevoer het.[84]

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77 *Idem* 157–158.
78 *GS* 170.1.
79 Neuenschwander 146–156.
80 A 684 ZGB, saamgelees met a 679 ZGB; Neuenschwander 160.
81 Neuenschwander 160.
82 Aangestel op 1988-08-26; onder voorsitterskap van dr Pierre Widmer, Lausanne.
83 Van Augustus 1991.
84 *Bericht der Studienkommission für die Gesamtrevision des Haftpflichtrechts* (August 1991 Bundesamt für Justiz Bern) 69–72.

Die *Studienkommission* se voorstelle moet vervolgens nog die hele voorfase van wetgewing in Switserland deurloop.[85] Hierdie voorfase is tans nog aan die gang.[86]

4 3 5 Samevatting

Ingevolge kantonale wetgewing kan die betrokke owerheid in Switserland soms wel aanspreeklik wees vir sekere nadeel wat die polisie aan buitestanders veroorsaak in die uitvoering van hulle taak om wet en orde te handhaaf deur teen oproermakers op te tree, maar dit geskied nie oral nie en die strekwydte daarvan is omstrede.[87] In elk geval word terughoudend gereageer op enige gedagte dat die breë publiek deur middel van belastinggeld die nadeel moet vergoed van mense wat as toeskouers of nuuskierige verbygangers by 'n demonstrasie rondgestaan het en in die loop van owerheidsoptrede daarteen beseer is.[88]

Staatsaanspreeklikheid het uiteraard verreikende implikasies. Neuenschwander[89] betoog dat die vraag of die owerheid aanspreeklikheid vir nadeel wat ontstaan uit owerheidsoptrede teen onrus moet oorneem, bespreek moet word teen die agtergrond van 'n reëling oor die vergoeding van die slagoffers van die geweldsmisdade. Hy meen dat dit nie wenslik is dat die owerheid algemeen so 'n verantwoordelikheid oorneem nie omdat dit te veel sal kos en groter geleentheid sal skep vir mense wat juis die bestaande gemeenskapsorde wil destabiliseer. Daarby sal dit lei tot sterker owerheidsoptrede teen onrus om sodoende die owerheid se aanspreeklikheid te beperk, wat maar net weer tot groter onrus sal lei en die openbare mening nadelig sal beïnvloed – 'n bose kringloop, dus.

Voorts is dit natuurlik so dat die owerheid in gepaste gevalle ook ingevolge die burereg aanspreeklikheid kan oploop vir wat op of van grond onder owerheidsbeheer gebeur.[90] Dit kan egter baie moeilik wees om by die verweer verby te kom dat die owerheid met die uitoefening van sy bevoegdhede ter wille van die openbare belang besig was, en dus nie onregmatig opgetree het nie. 'n Algemene oplossing kan die burereg in elk geval nie verskaf nie.

Terwyl die voorstel van 'n vorm van beperkte kousale aanspreeklikheid van organisasies klaarblyklik eers verder moet ontwikkel, bied dit intussen geen oplossing vir die talle probleme wat gereeld opduik nie.

5 VERSEKERING

Die gewone klasse versekering deug nie vir hierdie doel nie omdat hulle telkens nadeel veroorsaak deur onrus en oproer uitsluit.[91] Neuenschwander[92] meen dat

85 Eers word dit deur 'n *Expertenkommission* tot 'n *Vorentwurf* verwerk; dan moet dit 'n *Vernehmlassungsverfahren* (wye bespreking veral deur buiteparlementêre belanghebbendes) deurloop en dan in 'n *Botschaft des Bundesrates* aan die parlement voorgelê word, alvorens dit in die komitees van die parlement behandel kan word.

86 Loser 19 vn 57.

87 Sien bv Oftinger 1968 64 *SJZ* 228.

88 *Ibid* en gesag daar aangehaal.

89 164.

90 Dit sal ook in Suid-Afrika nie anders wees nie.

91 Neuenschwander 167–172. 'n Tipiese Suid-Afrikaanse korttermynpolis hieroor lui só: "Hierdie polisse dek nie verlies van of skade aan eiendom wat betrekking het op of veroorsaak is deur die volgende nie: (i) Burgerlike beroering, arbeidsonluste, oproer, staking, uitsluiting of openbare onrus, of enige daad of handeling wat tot gevolg het of

vervolg op volgende bladsy

spesiale onrusversekering 'n uitweg bied.[93] Neuenschwander[94] voorsien, soos te verstaan is, vir die onrusversekeraar ook 'n verhaalsreg teen die delikspleger. Dit bring ons natuurlik weer te staan voor die moeilike vrae van die vereistes vir aanspreeklikstelling hoegenaamd. Die vraag is gevolglik of 'n versekeraar, gesien die probleem om aan die gewone vereistes vir aanspreeklikstelling te voldoen, hoegenaamd daarin sal belangstel om sy verhaalsreg uit te oefen as dit hom in elk geval in 'n duur hofsaak betrokke sal laat raak.

6 AANSPREEKLIKSTELLING VAN 'N GROEPSLID WEENS ONREGMATIGE DADE IN GROEPSVERBAND GEPLEEG EN DIE BESKERMING VAN FUNDAMENTELE REGTE – IS DAAR NOODWENDIG SPANNING?

Oor hierdie belangrike vraag moet ook in Suid-Afrika ernstig nagedink word. Elders is al heelwat daaroor gedebatteer en ons kan daar gaan kers opsteek. Asser-Hartkamp[95] meen byvoorbeeld dat artikel 166 *Nieuw BW* in die geval van demonstrasies baie versigtig gehanteer moet word in die lig van die grondwetlik gewaarborgde reg om te betoog.[96] Indien daar uit demonstrasies nadeel ontstaan weens die uitbreek van gevegte of die gooi van klippe, sal volgens hom in beginsel slegs diegene wat aktief aan die gebeure[97] deelgeneem het vir die nadeel

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daarop gemik is om enige van die voormelde te veroorsaak . . . (iv) Enige optrede (hetsy ten behoewe van enige organisasie, liggaam of persoon, of groep persone) wat daarop bereken of gerig is om enige staat of regering, of enige provinsiale, plaaslike of stamowerheid met dwang, of deur vrees, terrorisme of geweld omver te werp of te beïnvloed. (v) Enige optrede wat daarop bereken of gerig is om verlies of skade te veroorsaak ten einde enige politieke doel, oogmerk of saak te bevorder, of om maatskaplike of ekonomiese verandering teweeg te bring, of uit protes teen enige staat of regering, of enige provinsiale, plaaslike of stamowerheid, of met die doel om vrees by die publiek of enige deel daarvan in te boesem. (vi) Enige poging tot optrede wat in klousule (iv) of (v) hierbo genoem word. (vii) Die optrede van enige wettig ingestelde owerheid by die beheer, voorkoming of onderdrukking van, of terwyl daar op enige ander wyse gehandel word met, enige gebeurtenis waarna daar in klousules (i) . . . (iv), (v) of (vi) hierbo verwys word." Hierdie sg SAVV-uitsonderings kan gedek word ingevolge 'n gepaste polis uitgereik deur die Suid-Afrikaanse Versekeringsvereniging vir Spesiale Risiko's (SASRIA), maar dit bevat ook bepaalde uitsonderings en beperkings, en bied dus ook net 'n gedeeltelike oplossing. 'n Tipiese langtermynpolis sluit ook die aanspreeklikheid van die versekeraar uit waar die risiko ingetree het agv "oproer, burgerlike onluste, opstand, geveg, . . ." Langtermynversekeraars behou egter uitdruklik die diskresie voor om uitbetalings in sulke gevalle te doen solank hulle dit goed ag.

92 173.

93 Quendoz *Modell einer Haftung bei alternativer Kausalität* Zürcher Studien zum Privatrecht Nr 85 (1991) (hierna Quendoz) 106 is teen die oplossing van die probleem dmv versekering gekant omdat dit enige voorkomende werking van deliktuele aanspreeklikheid loënstraf, en nie in ooreenstemming is met die etiese motief van individuele verantwoordelikheid vir onregmatig veroorsaakte skade nie. Met die invoer van SASRIA-versekering in Suid-Afrika is ook vir die versekeringsopsie gekies. Dit gaan mank aan dieselfde beginselbeswaar wat Quendoz opper.

94 174.

95 91.

96 A 9 van die Nederlandse Grondwet.

97 Hy sê nie of hy dáárónder aktiewe deelname aan die betoging of aan die gevegte en klipgooiery verstaan nie – dit lyk egter waarskynliker dat Ig bedoel is.

aanspreeklik wees.[98] Die individuele lid se verbondenheid tot die groep het sowel 'n objektiewe as 'n subjektiewe kant. Objektief beskou moet die lid deur sy optrede blyke gee van 'n aandeel in die gedraginge wat agterweë moes gebly het, gesien die verhoging daardeur van die kans op die intrede van nadeel. Subjektief beskou, moes daar blyke gewees het van "gedragingen in bewuste samenhang".[99] Of hierdie ontleding beter is as die een ingevolge waarvan daar vereis word dat 'n betrokkenheidsverband aanwesig moet gewees het,[100] is te betwyfel; dit behoort in elk geval op dieselfde neer te kom. Die vraag behoort te wees of die aangesprokene se deel-word of deel-bly van die groep redelik was, gesien die risiko dat nadeel uit die groepsoptrede kon ontstaan. Die betrokkenheid van die aangesprokene by die groepsaktiwiteit moet dus teen die agtergrond van die gemeenskap se regsoortuigings as onredelik aangemerk kan word alvorens só iemand se gedrag as onregmatig beskou kan word.

Hoe moet die voorgaande egter met die beskerming van die reg om te demonstreer versoen word? Die fundamentele belang van die reg op spraak- en meningsvryheid staan vas:

> "Das Grundrecht auf freie Meinungsäußerung ist . . . als unmittelbarster Ausdruck der menschlichen Persönlichkeit in der Gesellschaft eines der vornehmsten Menschenrechte überhaupt. Es ist für eine freiheitlich-demokratische Staatsordnung schlechthin konstituierend, weil es die ständige geistige Auseinandersetzung, den Kampf der Meinungen, der ihr Lebenselement ist, ermöglicht. Es ist in gewissem Sinne die Grundlage jeder Freiheit überhaupt."[101]

Dit is egter nie noodwendig so dat daar spanning bestaan tussen die fundamentele vryheid van spraak en meningsuiting, en potensiële aanspreeklikstelling weens onregmatige dade in groepsverband gepleeg nie. Dit is nietemin 'n belangrike kwessie as daaraan in die konteks van optogte en demonstrasies gedink word. Onduidelikheid oor hierdie vorm van aanspreeklikheid het al gelei tot die vrees dat die moontlikheid van aanspreeklikstelling mense daarvan sal weerhou om hulle reg op meningsuiting te benut, of, andersyds, sal lei tot misbruik juis van daardie reg tot onregmatige benadeling van ander.

Van Leeuwen[102] bepleit, met die oog op sinvolle begrensing van die fundamentele reg op meningsuiting, dat die "clear and present danger"-toets aanvaar word, maar die Nederlandse wetgewer het nie daaraan gebyt nie. Daar word ter oorweging gegee dat die mate waartoe die gedrag van die aangesprokene die kans verhoog het dat nadeel deur iemand uit die groep toegebring kon word ook

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98 Deelname aan 'n mediese span wat 'n op sigself verantwoorde operasie onbehoorlik uitvoer, stel glo nie 'n groep daar nie. Of deelname aan 'n demonstrasie waartydens nadeel veroorsaak word daaronder val, hang glo van die omstandighede van die geval af (volgens die *Memorie van Antwoord* (*Parlementaire Geschiedenis* 664 ev). Faktore van belang daarby is dan of die demonstrasie geoorloof of verbonde was en die mate waartoe die gewraakte gebeure voorsienbaar was. Meerdere bedrywe wat onafhanklik van mekaar die omgewing besoedel, sal glo ook nie as 'n groep ingevolge a 166 *Nieuw BW* aangemerk word nie (Asser-Hartkamp *Mr C Asser's Handleiding tot de beoefening van het Nederlands Burgerlijk Recht, Verbintenissenrecht Deel III: De Verbintenis uit de Wet* 9de druk (1994) (hierna Asser-Hartkamp) 91).

99 Boonekamp 218.

100 Sien 1996 *THRHR* 64 ev.

101 BVerfGE 5, 85, 205; 7, 198, 208 (sien Saxer 90).

102 "Aansprakelijkheid voor demonstratieschade en betogingsvrijheid" 1985 *NCJM-Bulletin Nederlands Tijdschrift voor de Mensenrechten* 99.

vir die Suid-Afrikaanse reg die gewensde resultate sal lewer.[103] Solank die aangesprokene se deelwees of -bly van die groep dus in die lig van genoemde omstandighede as onredelik bestempel kan word, kan hy aanspreeklik gestel word vir nadeel wat vanuit die groepsaktiwiteit toegebring is sonder dat die instandhouding van die fundamentele reg om te demonstreer daarmee in die gedrang kom. Dit gaan uiteraard hier oor 'n beleidsbesluit, wat wel deur sommige skrywers gekritiseer word maar wat myns insiens 'n wesenstrek van die deliktereg is.[104]

Die slotsom wat pas bereik is, maak dat die vraag wat hierbo gestel is maklik beantwoord kan word. Boonekamp[105] toon ook aan dat die vrees dat die moontlike aanspreeklikstelling weens onregmatige dade in groepsverband gepleeg op die fundamentele reg op meningsuiting inbreuk sal maak, misplaas is omdat artikel 166 *Nieuw BW* eers ter sprake kan kom as bewys is dat, in die lig van *al die omstandighede*, waaronder ook byvoorbeeld die aanspraak van demonstrante om die openbare pad vir hulle demonstrasie te gebruik, die deelname aan die groepsaktiwiteit onregmatig was gesien die nadeel wat daardeur veroorsaak kon word. Onregmatige optrede wat nadeel tot gevolg het, kan immers beslis nie ingevolge artikel 9 van die Nederlandse Grondwet – of die Suid-Afrikaanse Grondwet van 1993 – wat die vryheid van meningsuiting en reg om te demonstreer waarborg, geregverdig word nie. Dit geld des te meer vir enige vorm van gewelddadige optrede.[106]

Met hierdie slotsom[107] is die vraag wat aan die begin gestel is na die grondslag en vereistes vir die afwenteling van multikousale nadeel in 'n fundamentele regte-bedeling, op 'n demonstrant wat nie self nadeel aangerig het nie weens deelname aan so 'n groepsaktiwiteit,[108] voorlopig beantwoord. Aangesien dit in die deliktereg oor die voortdurende afweging van belange in die lig van die gemeenskap se regsoortuigings handel, kan verwag word dat veranderende omstandighede telkens 'n herevaluering van die inset wat vanuit die deliktereg gemaak kan word nodig sal maak.

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103 Iets van Whiting "Factual causation in perspective" in Kahn (red) *Fiat justitia: essays in memory of Oliver Deneys Schreiner* (1983) 370 se siening (sien Deel 1 par 4 5 1995 *THRHR* 438) kom hierin tot sy reg.

104 Sien Boberg 386, wat meen dat Whiting (sien vorige vn) se benadering op *ex post facto* rasionalisering oor oplossings wat hy op onuitgesproke gronde as wenslik beskou, neerkom. 'n Soortgelyke siening word deur Mundell "Causation in delict: do the means justify the ends?" 1987 *THRHR* 379–397 gehuldig. Mundell verklaar dat die oogmerk wat in elke soort geval met aanspreeklikstelling primêr nagestreef word, bepalend is vir die siening van die aard van die kousaliteitsvereiste in daardie geval. Afgesien van wat moontlik van die ekonomiese analise van die onregmatige daadreg gesê kan word, beklemtoon Mundell (396–397) tereg dat iets soos die kousaliteitsvereiste nie los van die oogmerke met aanspreeklikstelling ingevolge die deliktereg – in 'n vakuum dus – beskou kan word nie. Vanselfsprekend het Boberg gelyk as hy suggereer dat 'n mens net moet seker maak dat die beleidsoorwegings wat toegepas word, duidelik gestel word.

105 193.

106 Die "clear and present danger"-toets is dus hier nie aangewese nie en is volgens Boonekamp 193 tereg nie bygesleep nie.

107 Soos aangevul deur die gevolgtrekkings wat aan die einde van Deel I par 5 2; Deel II par 4; Deel III par 4 bereik is.

108 Sien Deel I par 2 4.

AANTEKENINGE

DIE OOGMERK VAN VERGELDING UIT DIE OOGPUNT VAN DIE KONSTITUSIONELE HOF

Inleiding

Een van die eerste en waarskynlik belangriker beslissings van die konstitusionele hof het oor die ongrondwetlikheid van die doodvonnis gehandel. Die bekende beslissing is gerapporteer as *S v Makwanyane* 1995 2 SASV 1 (CC) en was in menige opsigte 'n baanbrekersaak. Feitlik die hele Julie-uitgawe van die strafregverslae is daaraan afgestaan en dit is tot dusver die enigste beslissing van die konstitusionele hof waarin elke regter 'n afsonderlike uitspraak gelewer het. Volledige kommentaar oor die hele uitspraak is byna onmoontlik. Hierdie bespreking kyk net na die een aspek daarvan, naamlik die hof se hantering van die rol wat vergelding by vonnisoplegging speel.

Weens al die aandag wat vergelding al in Suid-Afrika geniet het, sou 'n mens 'n mening dat niks nuuts werklik oor die rol daarvan te sê is nie, kon begryp. Die teendeel is egter eerder waar want daar is waarskynlik min ander aspekte van ons strafstelsel waarby soveel onnadenkende napraat van vorige gesag plaasvind as juis by vergelding en die sogenaamde strafoogmerke. Die hoop dat die konstitusionele hof hierdie situasie sou verander, het nou ook beskaam. Ons land se hoogste hof het hom in *Makwanyane* en *S v Williams* 1995 2 SASV 251 (CC) deur verskeie monde oor die strafoogmerke uitgespreek maar die hantering daarvan was deurgaans teleurstellend. Daar is hoofsaaklik by bestaande beskouings gehou, terwyl die konstitusionele hof die leier behoort te wees en nie net navolger nie. Vergelding is só 'n basiese bousteen van elke vonnis wat in Suid-Afrika opgelê word dat 'n suiwer beskouing daarvan noodsaaklik is vir regverdige en konsekwente straftoemeting. Dit is dus jammer dat hierdie geleentheid verby is want die hof het nou 'n presedent geskep wat nie geredelik verander sal word nie.

Makwanyane se beskouing van vergelding

Tydens die argumenteringsfase van hierdie saak het die prokureur-generaal aangevoer dat die doodvonnis geregverdig kan word (al sou dit inbreuk maak op die reg op lewe en die reg teen wreedaardige en onmenslike strawwe) deurdat dit die gemeenskap se behoefte aan voldoende vergelding vir weersinwekkende misdade bevredig. In sy hantering van hierdie argument behandel president Chaskalson vergelding as een van die aanvaarde oogmerke van straftoemeting. Hy noem dat die hoofoogmerke van straf "have been held to be" afskrikking, voorkoming, hervorming en vergelding (vgl [46] 26*h*). As gesag vir hierdie

stelling word verwys na *S v J* 1989 1 SA 669 (A) 682G, *S v P* 1991 1 SA 517 (A) 523G–H en *R v Swanepoel* 1945 AD 444. Die president kon natuurlik na enige van tientalle ander sake verwys het waarin dieselfde beslis is. Dat hierdie strafoogmerke deur ons howe beskou word as die hoofoogmerke van straf, is sonder twyfel so. Die *Swanepoel*-beslissing word ook feitlik deurgaans gesien as dié oorspronklike bron van hierdie beskouing. Die ironie is egter dat die appèlhof in *Swanepoel* nié dit beslis het wat in die daaropvolgende beslissings daaraan toegeskryf is nie. Wat alom as die oorspronklike "bron" gesien word van die stelling dat die genoemde vier strafoogmerke die hoofstrafoogmerke in Suid-Afrika is, is nie werklik die bron daarvan nie. Hierdie mistasting word hieronder vollediger bespreek.

Later in sy uitspraak ([129] 52*d*) verwys president Chaskalson weer na vergelding as 'n strafoogmerk. Dan bring hy die geregverdigde woede van die vriende en familie van die slagoffer en die openbare verwerping van ernstige misdade ook met vergelding in verband. Hierdie woede, waarsku hy, kan maklik in 'n aanspraak op wraak ontwikkel. Ook die verband tussen vergelding en die *talio*-beginsel, volgens die Ou Testamentiese wet van 'n oog vir 'n oog en 'n tand vir 'n tand (*Ex* 21:23–25), word genoem saam met die mening dat ons strafstelsel hierdie beginsel lankal ontgroei het:

> "Punishment must to some extent be commensurate with the offence, but there is no requirement that it be equivalent or identical to it" ([129] 52*f*).

Laastens lê die president ook daarop klem dat vergelding nie soveel gewig dra as afskrikking nie ([129] 52*d*).

Verskeie van hierdie stellings verdien kommentaar. Vir perspektief moet toegegee word dat president Chaskalson se standpunte heeltemal in lyn is met die algemene standpunte wat al oor baie jare in ons hoogste howe gehuldig word. Hierdie standpunte is egter aanvegbaar. Eerstens kan vergelding beswaarlik 'n *strafoogmerk* wees. Tweedens is die erkenning van die woede van die slagoffers en die gemeenskap nie sonder meer dieselfde as vergelding nie. Beide hierdie argumente word hieronder volledig bespreek. Die oorblywende standpunte van president Chaskalson moet egter ondersteun word. Die *talio*-beginsel behoort inderdaad tot die verre verlede, en daarmee saam die vereiste dat die straf net soos die misdaad behoort te lyk. Wat wel daarvan oorgebly het, is die beginsel van *proporsionaliteit* (soos dit in Amerika bekend geword het), wat vereis dat die straf in verhouding met die blaamwaardigheid van die misdadiger moet wees.

'n Hele paar ander regters het in hulle uitsprake ook na vergelding verwys. Regter Didcott spreek hom soos volg daaroor uit:

> "I share the view taken by him [Chaskalson P, in par 129–131] that retribution smacks too much of vengeance to be accepted, either on its own or in combination with other aims, as a worthy purpose of punishment in the enlightened society to which we South Africans have now committed ourselves, and that the expression of moral outrage which is its further and more defensible object can be communicated effectively by severe sentences of imprisonment" ([185] 72*i* ev).

Met alle respek teenoor regter Didcott is daar hoegenaamd geen aanduiding nie in enigiets wat president Chaskalson gesê het, of in die toon van enige deel van sy uitspraak, wat die stelling regverdig dat vergelding te na aan wraak is *om aanvaarbaar te wees*. Dit is onverantwoordelik van die regter om so 'n betekenis aan die president se uitspraak te heg. Ek het dan ook al akademiese stukke onder oë gehad wat hierdie *dictum* van regter Didcott (verkeerdelik) as die hof se

beskouing van vergelding beskryf. Sy behandeling van vergelding dui eintlik daarop dat hy dit met wraakneming gelykstel, wat dui op 'n misverstand oor die ware aard van vergelding. Dit is inderdaad ironies dat regter Didcott meen dat die aanvaarding van vergelding nie tuishoort in 'n moderne samelewing nie terwyl die moderne beskouing, soos wat dit byvoorbeeld in die Verenigde State van Amerika toegepas word, juis is dat "just deserts" die grondslag van konsekwente, regverdige vonnisoplegging is. Die ware aard van vergelding moet gevolglik ook hieronder bespreek word.

Waarnemende regter Kentridge verwys na vergelding as 'n element van straftoemeting ([203] 80*h*). Die vraag is of 'n "element" iets anders is as 'n "oogmerk". Hierdie vraag sal aandag geniet by die oorweging van die ware aard van vergelding.

Regter Langa verwys op sy beurt ook daarna dat die vonnis die regverdige woede van die gemeenskap moet weerspieël, maar waarsku dat dit steeds nie 'n boodskap mag stuur dat ons gemeenskap na die oog-vir-'n-oog-beginsel terugkeer nie ([232] 88*a*).

Vir regter Mahomed is vergelding 'n toelaatbare oogmerk van straf

> "because there is an inherent legitimacy about the claim that the individual victims and society generally should, and are entitled to, enforce punishment as an expression of their moral outrage and sense of grievance" ([296] 101*h*).

'n Mens kan nie help om te wonder waar hierdie eis dat individuele slagoffers straf moet afdwing en daarop geregtig is om straf af te dwing, vandaan kom nie. Ek is nie bewus van enige sodanige eis nie. Dit sou 'n mens inderdaad verstom want dit lyk besonder baie na die neem van reg in eie hande. Miskien lê die verklaring daarin dat regter Mahomed eenvoudig gepoog het om die verband tussen vergelding en die eise van slagoffers en die gemeenskap op 'n effens ander wyse as die geykte manier te bewoord.

Die enigste ander regter wat iets oor vergelding te sê het, is regter O'Regan. Sy meld basies net dat vergelding as strafdoelwit nie te veel gewig gegee moet word nie en spreek twyfel uit of vergelding self ooit die doodstraf sal kan regverdig ([341] 114*h*).

Opsommenderwys kan daar dus gesê word dat van die ses regters wat hulle oor vergelding uitspreek, drie daarna verwys as 'n strafoogmerk, een as 'n element van straftoemeting, en dat die ander dit eenvoudig deurtrek na die eise van die gemeenskap.

Daar is gevolglik hoofsaaklik drie aspekte van die konstitusionele hof se behandeling van vergelding wat verdere bespreking verdien, naamlik wat die betekenis van die woord "vergelding" is, wat die aard daarvan is (en of vergelding 'n strafoogmerk kan wees) en derdens, hoe 'n vonnis se weerspieëling van die gemeenskap se gevoelens oor misdaad met vergelding te rym is.

Die betekenis van "vergelding"

Dit is nuttig om na die algemene betekenis van die woord "vergelding" te verwys. Die woord beskryf logieserwys die proses of handeling waardeur vergeld word. "Vergeld" word in die woordeboeke wat ek nageslaan het hoofsaaklik beskryf in terme van terugbetaal, wraakneem en straf (vgl *HAT* (1994); *The Oxford English dictionary* (1989)).

"Terugbetaal" kan dieselfde as "wraakneem" beteken. Maar dit kan ook 'n meer letterlike betekenis dra, naamlik om geld te betaal vir skade wat aangerig

is. Engelse woordeboeke maak juis veral melding van "repayment" as sinoniem vir "retribution".

Die gelykstelling van vergelding en wraakneming in die gewone sin van die woord is verstaanbaar. Uit 'n juridiese oogpunt is die twee begrippe egter nie sinonieme nie. Om dit in te sien, hoef 'n mens maar net te kyk na die geskiedkundige ontwikkeling van strafstelsels wat deur staatsowerhede bedryf word. In vroeë tye was wraakneming die basiese metode waarop reg geskied het. Met verloop van tyd het die samelewing egter verander van losstaande en taamlik nomadiese stamme na 'n meer gestruktureerde samelewing, in baie gebiede met feodale landhere en onderdane. Hierdie landhere sou mettertyd ontwikkel in stadsregerings. Privaat wraakneming was 'n chaotiese proses – die gevolge van een stam wat 'n ander inval om wraak te neem, spreek vanself. Die sentralisasie van mag het die onaanvaarbaarheid van hierdie chaos toenemend beklemtoon. Die gevolg was dat die owerhede begin het om die straffunksie oor te neem en so het openbare strafstelsels ontstaan (die detail van hierdie ontwikkeling kan in Von Bar *A history of continental criminal law* (1968) 57–118 nagespeur word; hierdie proses het in die Engelse reg heelwat vroeër plaasgevind – vgl Bartlett *Trial by fire and water* (1986) 127 ev). Juis omdat die owerhede nie by die misdade betrokke was nie was dit moontlik om straf objektief toe te meet. Hierdie situasie het wraakneming (as subjektiewe, chaotiese menslike bedrywigheid) in vergelding (as objektiewe, geordende staatlike bedrywigheid) verander. Wraak en vergelding kan vandag alleen gelykgestel word indien hierdie algemeen aanvaarde historiese verloop ontken word, of indien die kommentator daarvan onbewus is. Dit maak in elk geval geen sin om die straf wat deur 'n onbetrokke hof opgelê word en dan deur 'n sogenaamde gesiglose staatsorgaan uitgevoer word, met die persoonlike element wat by wraakneming opgesluit is, te probeer gelykstel nie. Dit is inderdaad interessant dat die *Oxford English dictionary* "wraakneem" nie direk as 'n betekenisvorm van "vergelding" (*retribution*) aandui nie (dieselfde posisie geld in die *Longman family dictionary* (1984)). Die naaste wat die *Oxford* kom, is "return of evil".

Dit laat die oorblywende betekenis van vergelding, naamlik "straf". Om vergelding aan bestrawwing gelyk te stel, maak juridies meer sin as enige ander sinoniem vir die woord. Dit is nodig om vergelding in hierdie sin deeglik te bekyk maar vir eers bring dit hierdie bespreking by die volgende onderwerp.

Die aard van vergelding: Die siening van ons howe

Vergelding word deur ons howe in hoofsaaklik twee terme beskryf. In die beslissing waaraan feitlik alle besprekings van vergelding gekoppel word, naamlik *R v Karg* 1961 1 SA 231 (A) 236A, word vergelding as 'n *aspek* en 'n *element* van straf gesien. Die hof beslis ook dat vergelding steeds belangrik is maar dat dit plek gemaak het vir die aspekte van afskrikking en hervorming (kyk ook *Williams* [65] 269*d*). Op gesag van *Karg* het ons howe al dikwels na vergelding as 'n element van straftoemeting (of selfs van straf) verwys (vgl *S v Khumalo* 1984 3 SA 327 (A) 330D; *S v Skenjana* 1985 3 SA 51 (A) 55B; *S v Pieters* 1987 3 SA 717 (A) 728I as enkele voorbeelde).

Die bespreking van *Makwanyane* hierbo maak dit egter duidelik dat daar ook van vergelding as 'n strafoogmerk gepraat word. Dit het ook dikwels in die appèlhof gebeur. Die bron van laasgenoemde beskouing is, soos reeds genoem, die beslissing in *R v Swanepoel*. Hierdie beslissing moet van nader beskou word. Hier kan egter reeds genoem word dat om vergelding beide as 'n oogmerk van

straf en 'n element van straftoemeting te beskryf, veel sê van die verwarring oor die aard daarvan. 'n Oogmerk is die doel waarna gestrewe word. 'n Element, aan die ander kant, is 'n bestanddeel, 'n inherente deel van die groter geheel. Een ding, soos vergelding, kan moeilik terselfdertyd doel én bestanddeel wees.

Die *Swanepoel*-beslissing

Waarnemende appèlregter Davis ag dit in hierdie beslissing nodig om konseptueel na straftoemeting te kyk. In die proses kyk hy eers na die uitsprake oor straf van ons gemeenregtelike skrywers en Beccaria. Dit word gevolg deur verwysings na enkele resenter skrywers, soos Salmond en Kenny, wat in hulle werke oor die algemeen verwys het na die vier strafdoelwitte met besondere klem op afskrikking. Die regter se kommentaar hierop is: "This statement may well be an oversimplification of a most difficult problem" en "[w]hat the future may bring in this regard I cannot forecast" (455). Daar is geen beslissing in *Swanepoel* dat afskrikking die belangrikste strafoogmerk is nie – nie eens *obiter* nie. Daar is ook geen bevinding dat die genoemde vier strafoogmerke ook in die Suid-Afrikaanse reg toepassing vind *as strafoogmerke* nie. Hierdie feit is by enkele geleenthede in die appèlhof uitgewys. In *S v S* 1977 3 SA 830 (A) 837F–838C kasty hoofregter Rumpff die landdros wat 'n vonnis op grond van afskrikking probeer regverdig het (op gesag van *R v Swanepoel*) daaroor, juis omdat *Swanepoel* nie die gesag bied wat allerweë daaraan toegedig word nie.

Die enigste ander saak waarin *Swanepoel* noukeurig in oënskou geneem word, is die redelik onlangse *S v Nkambule* 1993 1 SASV 136 (A). Waarnemende appèlregter Harms kom na 'n deeglike kyk na die beslissing in *Swanepoel* eweneens tot die volgende (onvermydelike) slotsom:

> "Dit blyk hieruit [die aanhalings uit *Swanepoel*] dat Davis WnAR aanvaar het dat om altyd prioriteit aan afskrikking te gee, op 'n oorvereenvoudiging kan neerkom en dat hierdie filosofiese siening nie staties is nie . . . In besonder bied sy uitspraak nie 'n basis vir 'n benadering dat die hoofoogmerk van die oplegging van die doodvonnis afskrikking moet wees nie" (146*c*, 146*e*).

Benewens hierdie twee uitsonderlike beslissings het die appèlhof eenvoudig in een saak na die ander beslis dat daar vier strafoogmerke is (waarvan vergelding een is), dat afskrikking die belangrikste daarvan is en dat waarnemende appèlregter Davis se uitspraak in *R v Swanepoel* die gesag vir hierdie standpunt is (vgl *Whitehead* 1970 4 SA 424 (A) 436E–F; *Rabie* 1975 4 SA 855 (A) 862A–B; *Khumalo* 1984 3 SA 327 (A) 330D–E; *S v B* 1985 2 SA 120 (A) 124D–E; die sake hierbo waarna Chaskalson P verwys het).

Die ware aard van vergelding

Een van die redes hoekom dit so moeilik is om die aard van vergelding 'n konkrete vorm te gee, is omdat vergelding 'n abstrakte konsep is. Vergelding het egter, soos wat hierbo genoem is, sterk historiese bande met weerwraak en daarom kan heelwat oor die aard van vergelding uit die aard van weerwraak afgelei word. Dit is ten minste makliker om weerwraak in die verbeelding te sien afspeel en dit het dus 'n konkreter geaardheid as vergelding.

Die eerste kenmerk van weerwraak is dat dit 'n reaksie is. In die sin waaroor dit tans gaan, sal dit gewoonlik 'n reaksie deur die slagoffer van 'n misdaad teenoor die misdaadpleger wees. So 'n misdaad sal tipies die balans in die gemeenskap versteur omdat die slagoffer skade ly terwyl die misdadiger dikwels

voordeel daaruit trek. Gevolglik is dit 'n tweede kenmerk van weerwraak dat dit plaasvind ten einde hierdie balans te herstel. Oordadige weerwraak sal die balans egter nie herstel nie maar die wanbalans na die ander kant toe oorgooi en die oorspronklike misdadiger weer rede gee om self wraak te neem. Daarom is dit 'n derde kenmerk van geskiedkundige weerwraak dat dit slegs geregverdig was indien die omvang daarvan die versteurde balans herstel het. Hierdie kenmerk van weerwraak het gevolglik 'n perk geplaas op die omvang wat dit kon aanneem: té veel en die balans word na die ander kant versteur; té min en dit word nie herstel nie. Die oorsprong van hierdie gedagte lê taamlik stewig in die *talio*-beginsel geanker, dit wil sê in die gedagte dat 'n oog vir 'n oog en 'n tand vir 'n tand geneem kan word. Dit impliseer ook 'n lewe vir 'n lewe maar nie 'n lewe vir byvoorbeeld 'n arm nie.

'n Mens kan nou ook vra: wat kan of behoort die *doelwit* van die weerwraak te wees? Dit is interessant hoe maklik dit is om aan 'n paar kenmerke van weerwraak te dink maar hoe moeilik dit is om met enige nuttige doelwitte van weerwraak vorendag te kom. Eintlik is al wat geargumenteer kan word dat dit die doelwit van weerwraak is om die versteurde balans te herstel. Enige ander doelwit sal hiermee verband hou hetsy daar argumenteer word dat die doel van die weerwraak is om die misdadiger sy voordeel te ontneem, of om die slagoffer se skade te herstel, of bloot om die slagoffer beter te laat voel. Hierdie argumente is egter reeds die kenmerke van weerwraak, naamlik dat die wanbalans daardeur herstel word. Die doel met die aksie van weerwraak word dan eenvoudig dat die wreker die rede waarvoor die aksie bestaan, wil bereik. Dit skep onvermydelik die vraag of dit enige sin het om te vra wat die doelwit van weerwraak is. Myns insiens is die antwoord eenvoudig: indien die doelwit van weerwraak nie in ander terme as die wesenskenmerke daarvan beskryf kan word nie, het dit geen sin om doelwitte daarvoor te beskryf nie.

Elkeen van die kenmerke van weerwraak geld ook vergelding as nasaat van weerwraak: vergelding vind ook plaas in reaksie op die misdaad; vergelding herstel ook die wanbalans; die omvang van die vergelding word ook beperk deur die vereiste dat dit die wanbalans moet herstel en nie in die proses 'n nuwe wanbalans moet skep nie (vgl oa Rabie en Strauss *Introduction to punishment* (1994) 20–25; *Verslag van die Kommissie van Ondersoek na die Strafstelsel van die RSA* (RP 78/1976) par 5 1 2 5 en 5 1 2 8). Hierdie kenmerke beskryf vergelding – dit is inderdaad vergelding. Wanneer 'n mens egter begin soek na die doelwit van vergelding lê daar net soos in die geval van weerwraak geen duidelike doelwit voor die hand nie.

Al hierdie kenmerke van vergelding is ook kenmerke van behoorlike, konsekwente, regverdige vonnisoplegging. 'n Misdadiger word ook vonnis opgelê omdat hy of sy 'n misdaad gepleeg het; die vonnis behoort ook sodanig te wees dat dit die versteurde balans herstel, wat ook behels dat die vonnis nie nuwe wanbalanse moet skep nie. Hierdie ooreenstemming in kenmerke dui op so 'n sterk verband tussen vergelding en straftoemeting dat dit die argument dat vergelding en straftoemeting eintlik maar dieselfde ding is, kragtig ondersteun (vgl wat hierbo gesê is oor die algemene betekenis van die woord vergelding).

Wat hierdie verband ook na vore bring, is die sinloosheid daarvan om vergelding as 'n doelwit van straf te beskryf – dit beteken uiteindelik dat vergelding 'n doelwit van sigself is. Daar word in elk geval algemeen aanvaar dat vergelding van die ander strafoogmerke verskil deurdat dit terugskouend is – dit is inderdaad een van die groot punte van kritiek daarteen. Iets wat terugskouend is, word

baie moeilik ook 'n doelwit of 'n oogmerk wat noodwendig vooruitskouend moet wees. Dit is dan ook baie maklik om aan afskrikking, voorkoming of hervorming te dink as iets wat deur 'n vonnis bereik kan word maar dieselfde kan beswaarlik van vergelding gesê word.

Hierdie siening van vergelding is geen nuwigheid in Suid-Afrika nie. In *S v S* 1977 3 SA 830 (A) 837F–838C verwys hoofregter Rumpff (met verwysing na die beslissing in *Swanepoel*) onder andere na die volgende:

> "Today, there are people who also think that the way in which the word 'retribution' has been used, is wrong. Helen Silving in 'Essays in Criminal Science', vol 1, expresses the following opinion on the subject of retribution: '. . . Retribution operates in the form of punishment, and the latter always *is* retribution, whatever other goals, e.g. deterrence or reformation, it may serve, for there is implied in 'punishment' a 'retribution' connection with the conduct the like of which is to be averted by deterrence or reformation . . .'" (838A–C).

Dieselfde sentiment kom van Ross *On guilt, responsibility and punishment* (1975) 61–63, waar hy verduidelik:

> "Retributive theories, for their part, quite clearly have nothing at all to do with the aim of punishment . . . Retribution has never been understood by retributivists themselves as an aim – an intended effect – of punishment, but its legitimation and a principle for its measurement. This is quite clear in the case of modern authors like Hart . . . But it is also true of classical theorists like Kant, Stahl, Hegel, Binding and any other one cares to mention. If it has ceased to be obvious, then, this is due in the first instance, simply to the fact that these authors are no longer read. People simply parrot one another's hearsay that the absolute theorists claim retribution, not prevention, to be the aim of punishment. No one stops to consider how unreasonable such an assumption is; how a thinker of Kant's calibre could have thought anything so foolish."

Miskien is Ross té dogmaties as hy beweer dat vergelding nooit deur "retributivists" as doelwit van straf gesien is of word nie. Maar wat duidelik is, is dat straf en vergelding twee terme is wat in 'n strafstelsel onafskeidbaar met mekaar gepaard gaan (kyk ook hieronder by die bespreking van *R v Karg*).

Die rol van vergelding

Watter rol behoort vergelding dus in ons straftoemeting te speel? Omdat iemand 'n daad gepleeg het wat deur die wetgewer of die gemenereg verbied en met straf bedreig word, verdien daardie persoon dit om gestraf te word. Straf is sy verdiende loon, sy "just deserts". Meer as wat verdien word, is nooit verdiende loon nie want amper belangriker as die regverdiging wat vergelding vir die bestaan van 'n strafstelsel bied, is die funksie daarvan om perke te stel aan die straf waarvoor dit in 'n individuele geval as regverdiging dien. Vergelding is nie, soos dikwels gesê word, die rede hoekom swaar strawwe opgelê word vir misdade wat minder ernstig voorkom nie. Want om misdaad doeltreffend te voorkom, of die oortreder doeltreffend van die herhaling van misdaad af te skrik, of doeltreffend te rehabiliteer, verg meestal baie langer vonnisse as wat vergelding toelaat. Die rede daarvoor is eenvoudig: al hierdie vooruitskouende strafoogmerke neem tyd om effek te toon, terwyl die oorgrote hoeveelheid vonnisse wat in Suid-Afrika opgelê word juis vir minder ernstige misdade is en besonder min potensiaal het om af te skrik, te rehabiliteer of te voorkom. Vergelding is gevolglik 'n broodnodige fondament van die straftoemetingsreg.

Vergelding as weerspieëling van die gemeenskapsgevoel

In *R v Karg* 1961 1 SA 231 (A) 236B beslis appèlregter Schreiner:

> "But the element of retribution, historically important, is by no means absent from the modern approach. It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands."

Sedertdien het hierdie uitspraak geyk geraak. Hoewel daar nie gesê word dat vergelding die erkenning is van die gevoel van verontwaardiging van slagoffers en die gemeenskap nie, is dit wel die noodwendige implikasie van hierdie gedeelte. Daarvolgens het vergelding 'n dubbele rol, naamlik om eerstens erkenning te gee aan die "natuurlike" verontwaardiging en om tweedens te verhoed dat mense die reg in eie hande neem omdat die straf te lig is. Hierdie beskrywing noem egter nie die ander belangrike funksie van vergelding nie, naamlik om te verhoed dat die opgelegde straf te swaar is. Verder bevestig dit ook dat vonnisoplegging en vergelding eintlik maar dieselfde ding is, want die opgelegde straf moet tog die gemeenskap en die slagoffer se gevoelens van verontwaardiging weerspieël en die opgelegde straf moet nie so lig wees dat mense die reg in eie hande begin neem nie. In effek dui alles op dieselfde: die oortreder se blaamwaardigheid (in die lig van al die omstandighede van die saak) moet bepaal hoe swaar die straf behoort te wees. Natuurlik is dit baie maklik gesê en veel moeiliker gedoen – ek sal in die slotparagraaf weer iets hieroor sê.

Die internasionale aansien van vergelding

Die mening dat vergelding internasionaal min aansien het, het om die een of ander rede in Suid-Afrika vasgesteek (vgl die vele uitsprake dat vergelding in belangrikheid afgeneem het: Devenish "The historical and jurisprudential evolution and background to the application of the death penalty in South Africa and its relationship with constitutional and political reform" 1992 *SAS* 22). *Karg* was waarskynlik reg dat vergelding in daardie stadium in belangrikheid afgeneem het en dat afskrikking internasionaal as van groter belang geag was. Die vraag is natuurlik in vergelyking met watter tyd vergelding in belangrikheid afgeneem het. Geskiedkundig beskou, het vergelding die rol van weerwraak oorgeneem hoofsaaklik as regverdiging vir die staat om te mag straf. Maar afskrikking het te alle tye in die geskiedenis 'n geweldige rol gespeel. Die wrede strawwe wat die wêreld se strafstelsels tot in die negentiende eeu gekenmerk het, was suiwer op afskrikking gemik.

In die boek *Punishment* (1993) begin die Britse akademikus en redakteur Duff die inleiding met die volgende stelling:

> "The last two decades have seen striking changes in philosophical discussion of criminal punishment; most notably, they have produced a quantity of significant new writings on punishment, reflecting the renewal of interest in the subject. They have also seen the rebirth of retributivism in a variety of forms, both old and new" (*xi*).

Dit sou dus baie suiwerder wees om tans te sê dat *afskrikking* oor die laaste dekades minder belangrik geword het terwyl *vergelding* hernude erkenning geniet.

'n Laaste paar los toiings

In haar uitspraak oor vergelding het regter O'Regan ([341] 114*i*) verwys na regter Marshall se minderheidsuitspraak in *Furman v Georgia* 408 US 238 (1972) waar hy onder andere gesê het:

> "To preserve the integrity of the Eighth Amendment, the Court has consistently denigrated retribution as a permissible goal of punishment."

'n Mens moet egter baie versigtig wees om beslissings van ouer as 20 jaar as gesag van die Amerikaanse posisie oor straftoemeting aan te haal. In 'n stukkie elektroniese pos skryf Subin (op 1995-12-05): "While Justice Marshall may have 'denigrated retribution', the Supreme Court on which he sat certainly did not."

In elk geval het die Amerikaanse strafstelsel sedert 1972 'n drastiese verandering ondergaan. Onlangser beslissings is gevolglik veel toepasliker. Een voorbeeld is *Tison v Arizona* 481 US 137 (1987), 95 L Ed 2d 127 139 waar regter O'Connor beslis:

> "The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."

Op dieselfde trant beslis regter White in *Enmund v Florida* 458 US 782 (1982) 801:

> "Enmund's criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt. Putting Enmund to death . . . does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts."

In die Amerikaanse hoogste hof word ook nog gepraat van vergelding as doel van straf. Duidelikheid oor die presiese aard van vergelding is daar ook nog nie maar ten minste ontken die hof nie meer die belangrikheid van vergelding nie, selfs in sake van minder ernstige aard. In nog 'n stukkie elektroniese pos skryf professor Dressler (McGeorge School of Law, University of the Pacific op 1995-12-05):

> "There is small consolation in American death penalty jurisprudence for opponents of the death penalty, *but ironically some of the areas of protection are the result of retributivist philosophy*."

Teen hierdie agtergrond is dit nodig om nog 'n toiing op te klaar: Die kritiek teen die konstitusionele hof se hantering van vergelding raak nie die hof se uitspraak dat die doodvonnis ongrondwetlik is nie. Dit behoort baie duidelik te wees dat vergelding volgens die voorgaande beskouing daarvan, die doodvonnis nóg ondersteun nóg ondermyn.

"Much ado about nothing"?

Hoekom sou dit van praktiese belang wees om enige duidelikheid te verkry oor die ware aard van vergelding? Ons reg kom al eeue daarsonder klaar. Dieselfde geld in die geval van Amerika. Die antwoord op hierdie vraag verdien 'n verdere volledige artikel en sal dus nie meer as baie kernagtig hier beantwoord word nie. Eerstens word daar soveel tyd in ons howe verkwis met argumente oor vergelding dat duidelikheid alleen maar in die guns kan werk van almal wat by die praktiese regspleging betrokke is. Tweedens is daar 'n fundamentele oorweging: hoe kan howe beslissings uitbring oor 'n saak waaroor daar na dekades nog steeds geen duidelikheid is nie? Die derde oorweging is egter die belangrikste: vergelding dien as fondament vir straftoemeting. 'n Gebrek aan duidelikheid oor die aard van hierdie fondament moet die struktuur van straftoemeting noodwendig ook in die wiele ry. Terwyl daar onduidelikheid heers oor die rol van

vergelding sal verskillende howe in verskillende gevalle verskillende rolle aan vergelding toewys, met gevolglike inkonsekwente en dikwels onverdedigbare vonnisse. Terwyl hierdie ongunstige posisie voortduur, bly dit ook onmoontlik om groter helderheid te kry oor die kwantum en aard van straf wat in 'n bepaalde geval as *die gepaste straf* beskou behoort te word. Dit bly dus onmoontlik om vir ooreenstemmende misdade 'n groter mate van konsekwentheid tussen verskillende howe te bewerkstellig. Om die volle omvang van hierdie stellings te verduidelik en te omskryf, sal 'n groot deel beslaan van die "verdere volledige artikel" waarna hierbo verwys is. Hier kan bloot genoem word dat dit inderdaad moontlik is.

Verdere gesag

Dit is baie maklik om 'n aantekening oor 'n onderwerp soos hierdie onder gesag toe te gooi. Ek het spesifiek daarteen besluit. Enkele verdere nuttige bronne verdien nietemin 'n verwysing: Wasik *Emmins on sentencing* (1993) 43 ev; Von Hirsch *Doing justice: The choice of punishments* (1976); Morris en Tonry *Between prison and probation* (1990) 22 ev; Weigend "Sentencing in West Germany" in Tonry en Zimring (reds) *Reform and punishment: Essays on criminal sentencing* (1983) 21 45 ev; Van der Merwe *Sentencing* (1991) hfst 3 veral 3–10 tot 3–16.

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SKADEVERGOEDING WEENS OORVERHALING VAN RENTE?

1 Inleiding en probleemstelling

Die doel van hierdie aantekening is om enkele gedagtes uit te spreek oor die vraag of dit vir 'n kredietopnemer moontlik is om, benewens die bedrag aan rente wat van hom oorverhaal is, bykomstig skadevergoeding van die kredietverskaffer te verhaal op grond van sodanige oorverhaling.

Die volgende eenvoudige voorbeeld illustreer die probleem (talle ander voorbeelde is denkbaar): Maatskappy ABC (Edms) Bpk is 'n kliënt van XYZ Bank Bpk. ABC het drie persele aangekoop en is deur XYZ (verbandhouer) gefinansier. ABC hou 'n lopende (tjek-) rekening by XYZ. Ingevolge 'n skriftelike ooreenkoms tussen die partye, onderneem XYZ om aan ABC 'n lening by wyse van oortrokke fasiliteite op die tjekrekening tot 'n bepaalde maksimum te verskaf teen 'n wisselende finansieringskoers gelykstaande aan XYZ se prima uitleenkoers soos wat dit van tyd tot tyd kan wissel. Ten spyte van bovermelde ooreenkoms het XYZ egter op 'n nalatige wyse hoër finansieringskoste gehef op die oortrokke bedrae deur ABC aan XYZ verskuldig en verkeerdelik rente ten bedrae van R100 000 teen ABC se rekening gedebiteer.

Dit is gemeensaak dat ABC die R100 000-bedrag aan rente wat van hom oorverhaal is, óf gemeenregtelik met die *condictio indebiti* óf statutêr ingevolge artikel 7 van die Woekerwet 73 van 1968 van XYZ kan verhaal (sien vir 'n

volledige bespreking en gesag Malan *et al Malan on bills of exchange, cheques & promissory notes* (1994) par 205). Gestel XYZ aanvaar aanspreeklikheid vir die oorverhaling en krediteer ABC se lopende rekening met sodanige bedrag. Die kwelvraag is nou of ABC bykomstig hiertoe ook skadevergoeding van XYZ kan verhaal weens die nie-beskikbaarheid van genoemde R100 000: ABC redeneer naamlik dat indien hulle sodanige bedrag tot hul beskikking gehad het, hulle dit op een of ander ekonomies aktiewe wyse sou kon aangewend het, byvoorbeeld ter vermindering en/of delging van een of meer van die verbande oor hul persele.

2 Regsbeginsels

Deur rente te hef teen 'n koers hoër as dié waarop ooreengekom is, het XYZ strydig met sy kontraktuele onderneming presteer en dus kontrakbreuk in die vorm van positiewe wanprestasie gepleeg: Ingevolge die skriftelike ooreenkoms sou XYZ voorskotte aan ABC maak, maar het hy ook onderneem om nie rente teen 'n koers hoër as 'n van tyd tot tyd geldende koers te hef nie. XYZ se prestasie ingevolge die kontrak het dus uit sowel 'n positiewe as 'n negatiewe dadigheid bestaan. Alhoewel XYZ hier positief presteer het, het hy hom nie daarvan weerhou (negatiewe dadigheid) om meer rente te hef as waarop ooreengekom is nie. Laasgenoemde is 'n verskyningsvorm van positiewe wanprestasie (vgl Van der Merwe *et al Kontraktereg. Algemene beginsels* (1994) 253 ev en gesag aldaar).

Die benadeelde (ABC) is in beginsel op die gewone kontraktuele remedies geregtig, naamlik terugtrede, spesifieke nakoming en skadevergoeding, asook addisionele kontraktueel bedonge remedies in soverre laasgenoemde nie eersgenoemde uitsluit nie.

Daar bestaan geykte reëls in verband met die omvang, bewys en verhaal van skadevergoeding op grond van kontrakbreuk (sien bv die bespreking in Van der Merwe *et al* 299 ev). Ten einde *in casu* met 'n eis om skadevergoeding te slaag, sal ABC in die besonder moet bewys dat

(a) XYZ kontrakbreuk gepleeg het;

(b) skade gely is;

(c) daar 'n feitelike kousale verband tussen die kontrakbreuk en die skade bestaan; en

(d) die skade vir doeleindes van die reg nie te ver van die kontrakbreuk verwyderd is nie, vir sover dit redelik voorsienbaar was of die partye daarop ooreengekom het.

2 1 Kontrakbreuk

In die probleemstelling hierbo is reeds vermeld dat XYZ die rekening van ABC met 'n bedrag van R100 000 gekrediteer het en sodoende 'n oorverhaling van rente – en dus ook kontrakbreuk – erken.

2 2 Skade is gely

Dit is geykte reg dat 'n kontraksparty wat skadevergoeding eis, moet bewys dat hy werklik as gevolg van die kontrakbreuk skade of verlies gely het (vgl *Swart v Van der Vyver* 1970 1 SA 633 (A) 643C). Die howe is nie bereid om nominale skadevergoeding toe te ken waar werklike skade nie bewys kan word nie (vgl Erasmus "Damages" 7 *LAWSA* par 12 en gesag aldaar).

Van besondere belang insake die berekening en bewys van skade is die uitspraak in *Broderick Properties (Pty) Ltd v Rood* 1964 2 SA 310 (T). Die volgende uittreksels uit die uitspraak van regter Boshoff is van belang vir die onderhawige aangeleentheid. In die eerste plek gaan dit oor die bewys van die moontlike aanwending van die nie-beskikbare bedrag wat oorverhaal is:

> "The damage suffered by the plaintiff depends upon the use to which it intended to put the money during that period. If, for example, the plaintiff intended to keep the money in his safe to use it for the payment of interest free debts or the investment in shares, the value of which remain unchanged during the delay, it cannot be said that it suffered any damage, because it had to pay the interest in any event, apart from the delay in the registration. If indeed the plaintiff intended to invest the money in shares, which had dropped in value during the period of delay, the plaintiff could even have benefitted by the delay . . . No evidence was adduced to what use the plaintiff intended to put the balance of the loan. It will depend on the circumstances and the nature of the investment whether or not he suffered damage by reason of the delay. No evidence was led in this regard" (316B–F).

In die tweede plek gaan dit oor die berekening en bewys van skade en skadevergoeding:

> "In respect of the alleged breach of contract the plaintiff is entitled to a money payment which would place him in the position he would have occupied had there not been a breach of contract (*Victoria Falls and Transvaal Power Company Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22) and in respect of the alleged negligence the plaintiff is entitled to a money payment which would compensate him for the pecuniary loss actually sustained (*Union Government v Warneke* 1911 AD 657 at 662) and in both cases the damage must be explicitly and specially proved. In the first mentioned class of cases where monetary damage has been suffered, it is necessary for the court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the court is bound to award damages. It is, however, not so bound in the case where evidence is available to the plaintiff which he has not produced. In those instances the court is justified in giving, and does give, absolution from the instance. But where the best evidence available has been produced, though it is not entirely of a conclusive character and does not permit of a mathematical calculation of the damage suffered, still, if it is the best evidence available, the court must use it and arrive at a conclusion based upon it (*Hersman v Shapiro & Co* 1926 TPD 367 at 379 and 380). Similarly in the latter class of cases based on negligence, where there is a finding or an admission that damage has been caused in a monetary amount, the court must do its best to assess the amount on such evidence as is available and should not refuse to award damages because, in the nature of things, the damage cannot be computed in exact figures (*Turkstra Ltd v Richards* 1926 TPD 276 at 283).
>
> In the present case there is no evidence of any damage suffered by the plaintiff by reason of the fact that it was without the benefit of the use of the money during the period of the alleged delay. The probabilities are that the plaintiff had to pay interest on the bonds which had to be cancelled, that such damage is capable of exact proof and it is therefore not incumbent upon this court to do its best to assess the amount on such evidence as is available on record. The best evidence available to the plaintiff was not produced and, on the evidence before court, it is not even possible to attempt an estimate of the damage suffered by the plaintiff" (316G–317B).

ABC sal dus spesifiek moet beweer waarvoor die geld aangewend sou word en dat skade gely is as gevolg van die feit dat dit nie beskikbaar was nie. In die lig van die *Broderick*-beslissing sou dit onses insiens nie voldoende wees om te

beweer dat skade gely is as gevolg van die feit dat ABC nie aan vrye ekonomiese bedrywighede kon deelneem nie. Daar moet naamlik in gedagte gehou word dat die howe minstens oënskynlik die sommeskadeleer of verskilteorie as uitdrukking van die skadevergoedingsmaatstaf aanvaar. Hiervolgens is skade die verskil tussen twee bedrae, die een hipoteties en die ander werklik, naamlik die waarde wat ABC se vermoë of boedel sou gehad het indien die kontrakbreuk nie plaasgevind het nie, en die waarde van sy vermoë nadat dit wel plaasgevind het. Die verskil tussen die twee bedrae is die belang of *interesse* van ABC (Van der Merwe *et al* 300; sien Visser en Potgieter *Skadevergoedingsreg* (1993) 62 ev).

2 3 Kousale verband

Feitelike kousaliteit word tradisioneel in kontraktuele verband aan die hand van die *conditio sine qua non*-toets bepaal (vgl bv De Wet "Opmerkings oor die vraagstuk van veroorsaking" 1941 *THRHR* 126; Van Rensburg *Normatiewe voorsienbaarheid as aanspreeklikheidsbegrensingsmaatstaf in die privaatreg* (1972); De Wet en Van Wyk *Kontraktereg en handelsreg* vol 1 (1992) 225–226; Van der Merwe *et al* 303).

Om te bepaal of skade deur die betrokke kontrakbreuk veroorsaak is, moet die posisie nadat die kontrakbreuk plaasgevind het, vergelyk word met die posisie wat sou bestaan het indien dit nie plaasgevind het nie. Indien dit blyk dat daar geen skade sou gewees het as dit nie vir die kontrakbreuk was nie, is die kontrakbreuk die oorsaak van die skade. Die verlies of skade is egter dikwels die gevolg van meerdere oorsake. Indien XYZ argumenteer dat meerdere ekonomiese optredes bygedra het tot hierdie verlies, sal ABC moet bewys dat die kontrakbreuk op so 'n wyse bygedra het tot die skade dat dit deur die reg as belangrik beskou word. Anders gestel: Was dit belangrik genoeg in die omstandighede vir XYZ om aanspreeklik gehou te word vir hierdie skade? Kerr *The principles of the law of contract* (1989) 575 sê in hierdie verband:

> "It is often said that what is sought is a proximate cause but this phrase should be avoided. There are a number of cases in which the most significant factor or cause is disregarded. There are also many cases in which the factor or cause looked upon as legally significant is not proximate in time or space."

In *Shell Tankers Ltd v South African Railways and Harbours* 1967 2 SA 666 (OK) 674–675 verwys die hof met goedkeuring na 'n Engelse uitspraak, naamlik *Yorkshire Dale Steamship Company Ltd v Minister of War Transport (The Coxwold)* 1942 2 All ER 6 (HL). In dié beslissing sê Viscount Simon dat die dominante of bepalende faktor gesoek moet word en vervolg:

> "Most results are brought about by a combination of causes, and a search for 'the cause' involves a selection of the governing explanation in each case . . . It seems to me that there is no abstract proposition, the application of which will provide the answer in every case, except this: one has to ask oneself what was the effective or predominant cause of the accident that happened, whatever the nature of that accident may be" (9F–10A).

In dieselfde beslissing sê Lord Wright:

> "Once it is clear . . . that proximate here means, not latest in time, but predominant in efficiency, there is necessarily involved a process of selection from among the co-operating causes to find what is the proximate cause in the particular case" (14H).

Lord Porter merk op:

> "In this . . . problem, a proximate cause is alone to be looked at . . . [t]he proximate cause is not necessarily the nearest in point of time. It is the dominant cause" (19E).

2 4 Nie-verwyderdheid van skade: Algemene en besondere skade

In hierdie verband staan dit vas dat XYZ nie noodwendig vir alle skade as gevolg van kontrakbreuk aanspreeklik is nie al sou die skade feitelik uit sy optrede voortspruit.

Die appèlafdeling het herhaaldelik beslis dat tussen algemene (of intrinsieke) en besondere (of ekstrinsieke) skade onderskei moet word (vgl *Lavery & Company Ltd v Jungheinrich* 1931 AD 156; *Schatz Investments (Pty) Ltd v Kalovyrnas* 1976 2 SA 545 (A); *Holmdene Brickworks (Pty) Ltd v Roberts Construction Company Ltd* 1977 3 SA 670 (A); die onderstaande bespreking van die verskillende tipes skade is gebaseer op Visser en Potgieter 58 ev; Van der Merwe *et al* 308 ev).

Algemene skade word geag deur die partye voorsien te gewees het en is derhalwe sonder meer verhaalbaar. Besondere skade kan egter slegs in uitsonderlike omstandighede verhaal word. Besondere skade moet ook spesifiek gepleit word, algemene skade nie. Alle skade anders as algemene skade is besondere skade. Algemene skade vloei natuurlik en algemeen voort uit die besondere tipe kontrakbreuk. Daar word regtens vermoed dat die kontrakspartye by kontraksluiting in gedagte gehad het (dws die kontemplasiebeginsel – sien hieronder) dat hierdie skade deur die kontrakbreuk veroorsaak sou word. Die bedrag rente wat *in casu* oorverhaal is, is algemene skade. Ten opsigte van die rente wat oorverhaal is, hoef ABC slegs die omvang van die skade te bewys en nie dat dit voorsienbaar was nie aangesien die reg aanneem dat dit voorsienbaar was.

Alle ander beweerde tipes skade sal dus besondere skade wees. Ten einde te bepaal of besondere skade verhaal kan word, gebruik die howe twee beginsels, te wete die kontemplasiebeginsel en die konvensiebeginsel. Die presiese toets vir aanspreeklikheid by besondere skade is egter omstrede. In *Lavery v Jungheinrich supra* 169 het die hof aan die hand van die kontemplasiebeginsel of voorsienbaarheidstoets bepaal of die skade "too remote" is of nie. Volgens hierdie beslissing sal ABC die volgende noodsaaklike bewerings moet maak indien hy besondere skade wil eis: ABC moet ten eerste beweer en bewys dat XYZ die nodige kennis van die spesiale omstandighede buite-om die kontrak gehad het en tweedens dat die kontrak op die basis van sodanige kennis gesluit is.

Volgens Visser en Potgieter 254 bring die tweede vereiste

> "iets meer as blote voorsienbaarheid, kontemplasie of kennis na vore aangesien dit na 'n besondere kontraksbedoeling of kontraksbeding verwys. Dit het gebruiklik geword om hierna te verwys as die konvensiebeginsel aangesien dit handel oor 'n vermoedelike ooreenkoms tussen die partye dat skadevergoeding vir bepaalde soorte skade betaal sal word".

Van der Merwe *et al* 308–309 verduidelik soos volg:

> "Die kontemplasiebeginsel vereis dat die skade wat intree werklik voorsien of redelik voorsienbaar moes gewees het toe die kontrak gesluit is . . . Volgens die konvensiebeginsel is blote kontemplasie van die skade nie genoeg om aanspreeklikheid te grondves nie: daar moet skynbaar bewys word dat die kontraktant wat kontrakbreuk gepleeg het dermate van die moontlike skade bewus was dat vir alle praktiese doeleindes aanvaar kan word dat hy ingestem het om die ander kontraktant vir sodanige skade te vergoed."

Die appèlafdeling het 1976 in die *Schatz Investments*-saak beslis dat die konvensiebeginsel steeds die geldende reg weerspieël maar gemeen dat dit miskien tyd geword het om die *Lavery*-saak krities te heroorweeg.

Visser en Potgieter 255–256 som die regsposisie soos volg op:

> "Ondanks standpunte dat die *Lavery*-saak net vir die kontemplasiebeginsel voorsiening maak, beslis die hof nie dat 'n mens kan sê dat die konvensiebeginsel nie meer in ons reg geld nie. Totdat die Appèlafdeling die *Lavery*-saak verwerp het, moet die bestaan van die konvensiebeginsel dus aanvaar word"

(sien ook MacKeurtan *Sale of goods in South Africa* (1984) 121 vn 45; Belcher *Norman's Purchase and sale in South Africa* (1972) 449; Kerr 628–629; Mulligan "Damages for breach: Quantum, remoteness and causality" 1956 *SALJ* 37–40).

Visser en Potgieter 256 meld ook dat, alhoewel die formulering van bogemelde maatstawwe daarop dui dat die skade deur beide kontrakspartye voorsien(baar) moet gewees het, daar skrywers is wat slegs melding maak van die voorsien daarvan deur die skuldenaar. Indien die kontrakspartye nie dieselfde skade-omvang voorsien nie, kan dit ook 'n probleem skep. (Vgl *Victoria Falls and Transvaal Power Company v Consolidated Langlaagte Mines Ltd* 1915 AD 1 22; *Witfield v Philips* 1957 3 SA 318 (A) 328; *Schatz Investments (Pty) Ltd v Kalovyrnas supra* 550; Joubert *General principles of the law of contract* (1987) 253; De Wet en Van Wyk 227–228; Lubbe en Murray *Farlam and Hathaway: Contract – cases, materials and commentary* (1988) 626; en Kerr 618–619.)

Die regspraak bied gesag vir die standpunt dat die besondere gevolg of tipe skade waarvoor skadevergoeding geëis word, voorsien(baar) moet gewees het, maar nie die presiese wyse waarop die skade veroorsaak is nie (sien Visser en Potgieter 256 ev en gesag aldaar). Anders as by deliktuele aanspreeklikheid, word by kontrakbreuk klaarblyklik vereis dat nie net die aard van die skade nie maar ook die omvang daarvan binne die kontemplasie van die partye moet gewees het (*ibid*).

Onder die skrywers is daar oortuigende kritiek teen die gebruik van die konvensiebeginsel as aanvulling tot die kontemplasiebeginsel (vgl *idem* 256–257 en gesag aldaar). Vir doeleindes van hierdie aantekening is die gesag egter, en ons moet dit so aanvaar, dat die kontemplasiebeginsel soos aangevul deur die konvensiebeginsel die geldende reg is, asook dat die skade deur alle partye tot die kontrak voorsien moet gewees het. Daar is egter skrywers (bv Van der Merwe *et al* 308–309) asook regspraak (bv *Edouard v Administrator, Natal* 1989 2 SA 368 (D) 385B) wat aandui dat die presiese omvang van die skade nie voorsienbaar hoef te wees nie.

3 Gevolgtrekking

Ons is van mening dat die skade onder bespreking slegs in buitengewone omstandighede verhaal sal kan word. Daar sal dus in die eerste plek werklike skade bewys moet word. In ons voorbeeld sal 'n bewering dat die nie-beskikbaarheid van R100 000 meegebring het dat ABC nie aan vrye ekonomiese bedrywighede kon deelneem nie, en dus skade gely het, nie voldoende wees nie. In die tweede plek sal natuurlik ook 'n feitelike kousale verband bewys moet word, naamlik dat die nie-beskikbaarheid van hierdie R100 000 die dominante oorsaak is waarom die skade gely is. In die derde plek sal beweer en bewys moet word dat XYZ die werklike skade voorsien het of dat dit redelik voorsienbaar was, en ook dat XYZ dermate van die moontlike skade bewus was dat vir alle praktiese doeleindes aanvaar kan word dat hy ingestem het om ABC vir sodanige skade te vergoed. Indien 'n hof oortuig kan word dat die *Lavery*-beslissing nie meer moet geld nie, moet nog steeds bewys word dat die skade redelikerwys voorsienbaar was of dat die partye daarop ooreengekom het.

Die spesifieke omstandighede waarin die skade gely is, moet dus nagegaan word. Indien dit in sulke buitengewone omstandighede gely is, behoort ABC se aksie te slaag.

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THE RIGHT OF ACCESS OF A FATHER OF AN ILLEGITIMATE CHILD: FURTHER REFLECTIONS

The writer wrote an article on this topic under the title "The right of access of a father of an extramarital child: visited again" 1993 *SALJ* 261–275 (see also postscript *idem* 416). In that article, recent case law and academic opinion, as well as the considerations of the South African Law Commission in its Working Paper 44 Project 79 entitled *A father's rights in respect of his illegitimate child* were reviewed. The purpose of this note is to assess and comment upon the development in this area of the law since the time of writing and to make appropriate recommendations.

In order to pursue this goal, it is necessary to recapitulate briefly the more recent judgments reported in this matter, which were traversed in detail in the 1993 article. *B v P* 1991 4 SA 113 (T) was the first important decision that brought this vexed topic into the forefront of legal debate. It was a decision of the full bench of the Transvaal Provincial Division, and the crux of it was that there is no inherent right of access that vests in the father of an illegitimate child. In this case, Kirk-Cohen J, in an enlightened judgment, reminded us (115F–G; also see Goldberg 1993 *SALJ* 263ff), that the onus of proof in all civil litigation, including the issues of custody and access, is discharged on a balance of probability. This standard of proof cannot be altered by any qualification such as the one that various earlier judgments had erroneously read in, namely the requirement of strong compelling grounds before the court will intervene (see *Douglas v Mayers* 1987 1 SA 910 (Z) 914E–F, cited with approval in *F v B* 1988 3 SA 948 (D); also see Goldberg 1993 *SALJ* 262 fn 6 and 262–263).

Kirk-Cohen J went on to state (117B–D) that the test for determining issues of access to illegitimate children is simply what would be in the best interests of the particular child involved, which would turn on the facts of the particular case concerned. At the risk of being repetitious, it seems apposite to mention the statement of Milne DJP in *Dunscombe v Willies* 1982 3 SA 311 (D) 315H–316B which the judge in *B v P* cited with approval (117D–E):

> "I prefer, though this may be a difference of phraseology only, to think of the matter as being a question of the rights of the children, viz their right to have access to the non-custodian parent. It is in their interests, generally speaking, even where a family has broken up, that they should continue to have a sound relationship with both parents. Not infrequently, and perhaps more frequently than has been thought in the past, it is sometimes in the interests of the children to deprive them completely of access to non-custodian parents."

It would be interesting to review this statement at the present time, in the light of the interim Constitution, (Constitution of the Republic of South Africa Act 200 of 1993) which *inter alia* entrenches the protection of children in sections 8, 13 and 30. This aspect of the judgment in *B v P*, as well as the issues that it raises, will be revisited later in this note.

Another important decision that followed, which was highly controversial and which provoked a flurry of commentary, was that of *Van Erk v Holmer* 1992 2 SA 636 (W). Here, the lone voice of the single judge in the Witwatersrand Local Division was heard to champion the rights of the fathers of illegitimate children. Van Zyl J criticised the earlier cases and was of the view that where no legislation, precedent or custom exists to govern any particular matter, it should be decided in accordance with the principles of reasonableness, justice, equity and the *boni mores* (649F). The judge recognised that modern society has changed, so that cohabitation is widely recognised and practised. Women are making the choice to have children out of wedlock and the law should take cognisance of this. Van Zyl J opined that no distinction should be made between legitimate and illegitimate children nor between their fathers. He believed that the time had arrived for the recognition by South African courts of an inherent right of access by a natural father to his illegitimate child. This finding the judge believed to be justified by the precepts of justice, equity and reasonableness and the *boni mores* (649II–J 650A).

The judgment in *Van Erk* was welcomed by many and criticised by more. (See Goldberg 1993 *SALJ* 265 ff; also see Church "*Secundum ius et aequitatem naturalem*: a note on the recent decision in *Van Erk v Holmer*" 1992 (1) *Codicillus* 32; Clark "Should the unmarried father have an inherent right of access to his illegitimate child?" 1992 *SAJHR* 565; Sonnekus and Van Westing "Faktore vir die erkenning van 'n sogenaamde reg van toegang vir die vader van 'n buite-egtelike kind" 1992 *TSAR* 32; Kruger, Blackbeard and De Jong "Die vader van die buite-egtelike kind se toegangsreg" 1995 *THRHR* 696; Hutchings "Reg van toegang vir die vader van die buite-egtelike kind – outomatiese toegangsregte – sal die beste belang van die kind altyd seevier?" 1993 *THRHR* 310; Labuschagne "Persoonlikheidsgoedere van 'n ander as regsobjek. Opmerkinge oor die ongehude vader se persoonlikheids- en waardevormende reg ten aansien van sy buite-egtelike kind" 1993 *THRHR* 414.) Those who welcomed it seemed to do so for the same emotional reasons that the judge gave for delivering the judgment, while those who took exception to it felt largely that the judge ignored the precepts of legal precedent. The writer's view was that the judgment had gone too far (1993 *SALJ* 265ff). She felt that a *via media* approach should be adopted – that the position of the fathers should be ameliorated, but only once they have proved paternity and an existing commitment to the children involved. Once that has been achieved, a presumption should come into operation that it would be in the particular child's best interests for the father to have access, which presumption the mother can rebut.

After the *Van Erk* decision, there were further developments in this area of the law in 1993. One was the publication by the South African Law Commission of its Working Paper 44 Project 79 referred to above. This paper proposed two alternative solutions to this vexed problem. The more conservative proposition was that the *status quo* be retained in respect of the guardianship and custody of the mother, with the father having the option of approaching the court for relief in respect of access. In this matter, the court would have regard to the child's

best interests, based on certain recommended guidelines. Alternatively, all fathers, excluding rapists and gamete donors, could be given an automatic right of reasonable access, which right could be limited by the court on application by the mother. The writer submitted (1993 *SALJ* 274–275) that the former proposal is to be preferred.

Then two judgments in point were delivered by the Witwatersrand Local Division in 1993, both of which departed from *Van Erk*. In *S v S* 1993 2 SA 200 (W), Flemming DJP was of the opinion that Van Zyl J had breached the *stare decisis* principle, in that it has long been recognised in our law that there is no inherent right of access vesting in the father of an illegitimate child (205B). In this his lordship felt himself bound by the full bench in *B v P*, and considered that the decision in *Van Erk* was wrongly decided. (This case is discussed in detail by the writer in "*Law of persons and family law*" 1993 *AS* 109–110.)

In *B v S* 1993 2 SA 211 (W), Spoelstra J relied on Flemming DJP's criticism of *Van Eck* and found the latter case to be founded on fallacious and illogical argument and therefore clearly wrong (214C–D). What is interesting about the *B v S* decision is that Spoelstra J also felt constrained to follow *B v P*. He cited with approval a passage were the full bench in turn had referred (115) to a statement from *Douglas v Mayers supra* 914E, that the court will award access only if there is some very strong ground compelling it to do so.

The writer has submitted (1993 *AS* 112–113), that this aspect of the *B v S* judgment is incorrect. The full bench in *B v P* referred to the statement in *Douglas* to approve of the former part of it but to depart from the latter part. The whole thrust of the judgment in *B v P* was to confirm that the natural father of an extra-marital child has no inherent right of access. However, the court was at pains to place such a father on an equal basis with other interested third parties who might apply for access. Prior to *B v P*, these fathers were particularly harshly treated. This was a result of the "strong and compelling reasons" test, which had been used by the Appellate Division in *Calitz v Calitz* 1939 AD 56 64, a case relating to the custody of a legitimate child, and which was incorrectly applied in the *Douglas* case and the cases that had followed it. Kirk-Cohen J in *B v P* was at pains to depart from this test and that is the reason he cited it. Spoelstra J overlooked this and stated (214E–H) that the applicant had to satisfy him that there was a very strong and compelling ground to find that his access to the child would be in its best interests. This standpoint would have been a serious and unwarranted step backwards for the South African law on the subject. The onus of proof is on a balance of probability and it is prejudicial to the fathers in issue here, and therefore untenable, to graft on any such qualification. (The writer made this point in 1993 *SALJ* 416 and 1993 *AS* 112–113.) That this is so, has been confirmed by the Appellate Division, since judgment has now been delivered by the court on appeal in *B v S* 1995 3 SA 571 (A). This judgment is commented upon below.

In July 1994, the South African Law Commission issued the report referred to on *A father's rights in respect of his illegitimate child*. The report is comprehensive in that it covers all the controversial aspects of illegitimacy in South African law, as well as the position in other legal systems and their influence on the rights of fathers of illegitimate children. It focuses to a large degree on the right of access of these fathers to such children and contains a comparative study, as well as a survey of all academic writings and commentators on this issue. Finally, it contains a chapter of evaluations and recommendations. By and

large it advocates the retention of the *status quo* in relation to the access issue. Natural fathers of illegitimate children should have the right to approach the courts for access to such children, and the court should make an appropriate order, based on the best interests of the particular child involved, and having regard to various specified factors (s 2 of the proposed Bill on the Powers of Natural Fathers of Illegitimate Children, contained in Annexure A of the report). These recommendations are interesting and *ex facie* correct, since they are born out of an expressed wish (par 8 4 at 81 of the report), not to reverse the situation to place mothers in a situation which fathers found untenable. Whether this is constitutional, however, needs to be carefully considered.

The situation is such that one must surely admire the tenacity of certain fathers. It seems that as each avenue has proved fruitless, so another has been sought. This was the case in *B v S a quo supra*. Having been thwarted in the court *a quo* and by the South African Law Commission, the father in that case took the matter on appeal to the Appellate Division. Judgment in the appeal was delivered by Howie JA.

There were three main submissions advanced for the appellant father. The first and most commonly encountered one (574I), was that *ex lege*, the father of an illegitimate child has an inherent right of access by virtue of the fact of his paternity. This legal issue was dealt with first by the judge. He said (574I–575D) that the argument was that the silence of the common law writers on the access issue should not be construed to mean that such a right did not exist. In fact, counsel had argued that in Roman-Dutch law, the existence and identity of the illegitimate father *qua* father was undoubtedly recognised. This could be seen by his duty of support, by the impediment to his marriage to such illegitimate child, and by the fact that his consent was required for the marriage of the child. Howie JA saw no merit in this argument. He regarded access as an incident of parental authority and no such parental authority could be inferred from any of these examples (575D–E). In fact, the latter example may not even be accurate, in that his consent might not have been required. On the contrary, the judge (575H) cited various writers who confirmed that, in Roman-Dutch law, the parental authority of illegitimate children vested in their mothers. This then meant that the common law writers were not silent on the matter. The most that could be said for the appellant was that there was no express statement on the issue of access. However, the clear implication did not support counsel for the appellant's argument. This then was the common law which was received into the country and which, in Howie JA's opinion, still obtains.

In order to examine further whether the appellant's first argument was warranted, a study of the relevant case law on the subject was made by Howie JA (576A ff). He could find nothing of assistance to the appellant. *Van Erk* constituted the cornerstone of his case, and Howie JA reviewed the judgment at length (577D–579F). He took an illuminating and dismissive view of *Van Erk*, disposing of it, it is believed, once and for all. In his view, the present legal issue was never a contested one requiring decision in that case. The mother's opposition was based on the facts, and not on the basis that there was no right to access as of law. The fact that the matter was referred to the family advocate was consistent with the fact that the issue was whether access was appropriate in the circumstances. Even if the family advocate had recommended an inherent right of access, which Howie JA doubted, the consideration of such a recommendation was without the usual judicial process of adjudication, whereby arguments on

both sides are presented and a judgment or ruling provides the considered decision of the issues (578B-D). This meant, the judge believed (578E), that the court's duty did not include the obligation to furnish reasons for its acceptance of the report. In addition, if access was desirable, it could only have been because it was in the child's best interests, which in turn meant that the father had the right to approach the court for access anyway. Therefore any judgment on the point would have been *obiter*. Howie JA pointed out that once Van Zyl J had made an order incorporating the settlement, he had discharged his duty. However, the latter judge had been requested to give reasons for the decision on this legal issue as if the court was seized of it, which was not the case. Accordingly, such reasons could be considered to be no more than an opinion, and certainly not a judgment (579A). In this way, it is believed, Howie JA deftly reconciled the fact that later decisions had no difficulty in departing from *Van Erk* (see *S v S supra*, *B v S supra*, and *A v D* case 1456/92 SE (unreported)).

Recognising that the present legal issue has received much attention over the last few years, Howie JA none the less decided to consider the reasons given by Van Zyl J in the *Van Erk* decision as if they had constituted a judgment (579B–F). He traversed Van Zyl J's argument that although the common law is silent on this issue, this did not mean that a right of access did not exist. In fact, so the argument ran, since such inherent right was excluded neither by common law nor by legislation, it was the duty of the court to decide the issue according to the precepts of justice and equity. Howie JA reminded us that Van Zyl J had considered that the time had come to cease distinguishing between legitimate and illegitimate fathers, just as we should with their children. This was warranted particularly by the fact that extra-marital cohabitation is common nowadays. It was grossly inequitable to Van Zyl J that fathers could be compelled to pay maintenance even though they were not entitled, as of right, to have access to the child.

Howie JA's answer to these arguments was simply to reiterate that the common law is not silent on the matter, even if it is by way of implication (579F–G). This situation was applied in South African law by *F v L supra* and *B v P supra*. This meant that it was not open to a court to step in and effectively to create new law. Its task was merely to expound the law as it exists. The law as it exists, is clear – access depends on the incidence of parental authority, which these fathers do not have. All they do have is the right to approach the court to be granted access if this would be in the best interests of their children. Anything more can be awarded to them only by legislation (579J).

The appellant's first submission continued that even if no inherent right were found to exist, the law as it stands is discriminatory towards fathers of illegitimate children and that the court should declare an inherent right on the basis of justice and equity. In order to deal conclusively with this contention, Howie JA set out to consider to what extent the present law does so discriminate (580A ff). Here, the judge showed insight and clear thinking, as he cut through form seeking substance. His starting point was to enquire whether it is appropriate to talk of a parent having any legal right in this context. Allied to this problem was the question whether proceedings such as these are of an adversarial nature, and therefore whether one should even speak of an onus of proof (580B). In this enquiry, the judge sought assistance from the English *dicta* in point (*A v C* [1985] FLR 445 (CA), cited with approval in *Re KD (a minor) (ward: termination of access)* [1988] 1 All ER 577 (HL)). The upshot of these cases, is that it makes no

difference whether one talks of an inherent or fundamental right of access of the parent, or merely of a right to approach the court for relief. Whatever terminology one uses, the enquiry will turn mainly on what would be in the best interests of the child concerned. Everything else is of secondary import. As Lord Oliver succinctly put it, in *Re KD (a minor) (ward: termination of access) supra* 590 c–f:

> "Whatever the position of the parent may be as a matter of law, and it matters not whether he or she is described as having a 'right' in law or a 'claim' by the law of nature or as a matter of common sense, it is perfectly clear that any 'right' vested in him or her must yield to the dictates of the welfare of the child. If the child's welfare dictates that there should be no access, then it is equally fruitless to ask whether that is because there is no right of access or because the right is overborne by considerations of the child's welfare."

This approach held great appeal for Howie JA. He believed that no parental right or claim to access would be meaningful if it would be harmful to the child. It is the child's right to have or to be spared access that will determine the enquiry. So if one were to speak of any inherent right at all, it would be the child's inherent right. It is almost as if the judge was unable to understand all the fuss. Even if one were to recognise that an inherent right vests in these fathers, such rights would be subject to the welfare of the children in any event. So too, if no right is recognised as of law, if it is in the child's best interests that the natural father should have access to it, no court would hesitate to order it. This analysis by the judge is so logical that one wonders why it was not the end of the matter years ago. Could it perhaps be that these fathers are so overwhelmed by attacks of conscience which they wish to submerge, or are so bent on a power struggle between themselves and their erstwhile paramours which they wish to win, that they insist on a "right" by name? One is reminded here of the situations that often arise upon divorce. Parents are usually so caught up in the turmoil of property divisions and financial connotations, as well as a host of uncontainable and destructive emotions, that they lose sight of the implications for their innocent children, and what would be best for them. Similar power struggles often occur and what emerges is a whirlwind of destruction and devastation. How much better it would be if all that energy could be focused on assisting the children to cope with the changes in their lives. So too, in this context, would not it serve the children better to focus on their interests alone, without becoming swamped by a quagmire of terminology?

Realising that this approach would do little to assuage the feelings of the fathers who are caught up in this struggle, Howie JA continued to investigate the issue of discrimination (582C). The judge was able to conclude that the above clearly showed that the natural father was not discriminated against in our law. Whilst it is true that the father of a legitimate child has an inherent right of access which he can claim if the mother refuses it, this right will have little or no relevance if the mother persists in such refusal. He will have to approach the court for relief, and if it is found not to be in the child's best interests to allow the father access, he will fail in his suit. On the other hand, if the father of an illegitimate child believes that access would be in the child's best interests, he can approach the mother on this basis. If she refuses, he too would have to approach the court for relief, and this enquiry will also turn on the interests of the child, as determined by the court. This demonstrates that there is substantially very little difference between the position of the two fathers (582C–F).

In so far as it was contended that, even if no right was found to exist as a matter of law, one should be recognised on the precepts of justice and equity, the

judge found it significant that no appropriately comparative country could be cited as having done so. He stated in addition and quite correctly, that the precepts of justice and equity do not exist for fathers alone, but also for mothers and their children (582G). In fact, Howie JA approved of the approach in the United Kingdom in recent years, which has been to improve the lot of natural fathers of illegitimate children, but without equating their positions with that of fathers of legitimate children (this approach was commented upon in 1993 *SALJ* 268). The English courts allow the father of an illegitimate child to make an application for an order granting him parental rights, and have regard to three main factors in making their decision: first of all, the degree of commitment which the father has shown towards the child; secondly, the degree of attachment which exists between the two; and lastly, the reasons that the father has for wanting access. Howie JA felt (583D–E) that in any disputed case on access, these three points at least should be canvassed by the applicant, in order to enable the court to make a decision on what would be in the best interests of the child concerned. He also noted (583F) the recommendations of the South African Law Commission that an inherent right ought not to be recognised, but that the father's right to apply to court for a favourable order should be confirmed. All these factors indicated that the applicant's first submission should fail, in that no inherent right was found to exist in South African law; yet the father always has the right to apply for access, which will be available if this would be in the child's best interests (583G–H).

The next argument on behalf of the applicant was the point referred to above, regarding the misdirection of the court *a quo*, in stating that an applicant in a case such as the present one, had to satisfy the court that there was a very strong and compelling ground for granting access. It was apparent to the judge (583H–584H), that the lower court had clearly arrived at this conclusion from a misconstruction of the *B v P* decision, which had obviously departed from that test. He was of the opinion (584I) that not only was there not such a strong onus in matters such as these, but that in fact no onus of proof at all, in the sense of an evidentiary burden, rests on either party. Litigation of this sort merely involves a judicial enquiry, with no presumption or onus of proof existing either way. In support of this statement, his lordship referred to the *dictum* of Omrod LJ in *A v C supra*, which was endorsed by the House of Lords in *Re KD supra*, to the effect that it is a dangerous thing in cases of this sort to speak of presumptions and burdens of proof. The judge in *A v C* (456A–B) regarded it as putting the matter too strongly to say that *prima facie* a parent should have access to his child. He regarded this as a mere statement of common sense, that in present-day society as far as possible, both parents should be in contact with their children, even if not with each other. Any attempt to put it higher than this for either party should be deprecated. It was clear to Howie JA (585) that this was the correct approach, and that it seemed difficult to envisage how a thorough enquiry into the evidence regarding the best interests of the particular child would not yield a correct answer in regard to access. Accordingly the applicant's submission succeeded in this regard.

At first blush this approach appears commendable, for it seems to place the emphasis of the enquiry in the correct place. Clearly all that should matter is what would be in the child's best interests. Most courts around the world are now directed to be guided by the welfare of the child principle. This novel standard, "while magnanimous and egalitarian in principle, is not without its problems" (Bordow "Defended custody cases in the family court of Australia: Factors influencing the outcome" 1994 *Aust JFL* 252). True, its proponents view its

strength in that it offers flexibility and adaptability, and therefore allows the judge to issue a highly individualised order. However, it is believed that there is a measure of naiveté here. It is quite apparent from many of the cases before the courts, both in South Africa and in foreign jurisdictions, that the "best interests of the child" test often yields anomalous and imprecise results. Its critics regard the test as much too broad and discretionary, often allowing for arbitrary, over-reaching and discriminatory decisions (*ibid*). The writer is reminded of the comment ("Recent developments: Family law – unwed father's rights" 1991 *Harv LR* 807 referred to in 1993 *SALJ* 269), which highlights a fatal flaw in the "best interests" test:

> "Because the best interests test is 'as much the result of political and social judgments about what kind of society we prefer as [it is a] conclusion based upon neutral or scientific data about what is 'best' for children', a best interests determination is subject to abuse and may lead to paternalistic infringement on the parent-child relationship in the name of the child's welfare."

One may well ask what the concept of the "child's best interest" stands for and how it will translate in practice; in other words, what will a particular judge understand it to mean?

It has been demonstrated quite often that two different psychologists can come to completely divergent views about the best interests of a particular child in a certain situation (see eg *F v B* 1988 3 SA 949 (D)). If the evidence is not conclusive in either direction, there is the danger that the court will maintain the potentially discriminatory *status quo*. It is quite probable that the best-interests test will create a no-win situation for the unwed father who has not established an emotional tie with his baby. His failure to do so may be strictly due to the mother. In addition, a reputable psychologist acting for the mother may be able to demonstrate that the child will suffer no harm if it were never to have contact with the natural father. It is clearly dangerous to assume that the answer will be found in such a nebulous enquiry.

Then too, it has long been recognised that one of the aims of the law is to create certainty. This being said, there is a possibility that an approach such as that recommended by Howie JA may lead to even more uncertainty. One wonders if objective criteria for awarding access will become apparent, so that fathers will know from the outset whether the enquiry may go in their favour. Care needs to be taken that accusations of bias are not made. The writer is reminded of the trend in Australia, where, in relation to custody issues, the maternal preference presumption, that favoured mothers as care givers, was implemented for many years. Lately, this presumption has been attacked as sexist and discriminatory. Recent family law reforms introduced a fundamental change, that is the replacement of legally and socially imposed sex-role stereotypes with the insistence that both parents have equal legal standing. This new "gender neutral" premise officially rejected the endorsement of the maternal preference principle, and at least in theory, committed the decision-makers to the body of doctrine around the concept of the "welfare of the child" (Bordow 1994 *Aust JFL* 255). Even with the implementation of this change in Australia, by statute law, no less there are many commentators and litigants who believe that the maternal preference presumption continues to have an influence, even though it is not explicitly mentioned in the cases. We would do well to take heed of this, for it makes no sense to say that we will be guided by the best interests of the child principle, if few really know what that means, and still less make any valid attempt to put it into practice.

Then too, at least if the matter were to be regarded as the usual adversarial litigation, the *res judicata* principle would end the contest once it is heard. If, however, the case is regarded as nothing more than a judicial enquiry, this principle can surely not be invoked. Frightening scenarios of parents who feel aggrieved by the outcome of the enquiry come to mind. The prospect exists that they may approach the court repeatedly to try and persuade it that circumstances have changed in favour of either one of them. This can clearly not be in the child's best interests, as most writers and experts on the subject are agreed that stability and continuity are paramount to the child's emotional and psychological development.

Even more pressing problems come to mind here. To regard a case of this nature as nothing more than an enquiry, with no presumption either way, must surely create evidentiary difficulties. Who should initiate the enquiry? Surely, also, the mother here is in a stronger position still, for if she refuses access to the natural father, he is at a loss, and has no option but to approach the court? It seems to the writer impossible to circumvent the problem of discrimination that surely must arise.

Moreover, what starting-point will the court adopt? Someone must make allegations which will allow the opposing party to prepare its evidence. In addition, one wonders whether the court will ask that the costs be shared on an equal basis between the parties, as there will no longer be talk of an onus of proof, nor of winning or losing. Therefore to penalise an unsuccessful applicant with a punitive order of costs makes no sense.

It is most commendable to take heed of protectionist developments throughout the world, and to accord children full personhood in accordance with the United Nations Convention on the Rights of the Child. It is obvious that this is the policy behind the judgment of Howie JA. The adoption of principles of this nature has not always been the end of the matter, however. It is interesting to note, for example, how matters have progressed in the United States of America, long recognised as being at the forefront of pioneering development:

> "Two broad generalisations may be made about children's rights *vis à vis* other's interests ... First, there remains considerable support for the proposition that children were, and continue to be, seen as 'creatures' belonging to the parent; the result of this proposition is that when children's rights are balanced against their parents', children tend to lose ... It has become *de rigeur* to note that the move to accord children more rights has not overcome the judicial support for the traditional family system. When balanced against the family, the Court has been and continues to be reluctant both to interfere in the family domain and to recognize that children even have rights. For courts, the important factors in protecting children are preservation of the sanctity of the family and maintenance of strong parental rights, with children's interests presumed coterminous with their parent's. It is the somewhat mythical assumption that most people know what is best for their children which has made courts reluctant to interfere in the family domain ... Put differently, although the best interests of the child may be afforded priority when balancing child, parent, and State, the Supreme Court has clearly stated that parents have primacy in child-rearing and parents' liberty interest in the care, custody, and management of their children is of fundamental importance" (Levesque "International children's rights grow up: implications for American jurisprudence and domestic policy" 1994 *Cal West Int LJ* 202–203 206).

Many of the commentaries (see Clark "Children and the Constitution" 1992 *Univ of Ill LR* 41; also see Cohen "A guide to linguistic interpretation on the Convention

on the Rights of the Child" in Cohen and Davidson (eds) *American Bar Association Center on Children and the Law, Children's Rights in America: UN Convention on the Rights of the Child compared with United States Law* (1990)) that have analysed the American experience have concluded that the Convention on the Rights of the Child, if ratified, is most likely to have little, if any, effect. This is obviously because certain fundamental rights are protected in the American Constitution anyway. Thus it seems feasible that we should be able to take a lesson from American practice. A case that demonstrates American policy at present is *Michael H v Gerald D* 109 SCt 2333. In that case the child in question argued that a statute, which presumed irrebuttably that the mother's husband was her father, was unconstitutional, because she, the child, had been denied substantive due process either when the statute prevented her from maintaining a filial relationship with both her natural father and legal parent, or when it prevented her from having a relationship with her natural father. The child's claim was dismissed out of hand. The court refused to recognise that natural parents or their children have a constitutionally protected right to maintain relationships with each other. Most interesting is a comment on the case (see 1993 *SALJ* 269):

> "What seems clear from *Michael H* is that considerations for the child's interests had little or nothing to do with the Court's resolution of the case. (The only evidence the court had of the child's interests actually swayed in the opposite direction of the Court's findings. During the girl's first three years of life, she had lived with her natural father for about one year and had called him 'daddy'. *Id* at 2337. The court-appointed psychologist had recommended that Michael be permitted to have some visitation rights. *Id* at 2338.) The extent to which the Court will recognize the panoply of families – including conditions which the Court has called 'extraordinary' – remains questionable. For example, as equally 'extraordinary' is the rise in the number of children living with gay and lesbian parents. In those cases, the general pattern which has emerged has been to define 'parent' in strictly biological terms: the result of which has been that children are denied the right to maintain relationships with people whom they have come to see as parents."

These observations about the trend in America must put us on our guard. Entrenching constitutional rights, in theory, means very little, even in America, if the courts do not make every attempt to protect them in practice. Often it would require a pioneering court to do so, instead of applying time-warped principles, even if by other names. It makes no sense to state that we will accede to the precepts of the Convention on the Rights of the Child, without having the courage to uphold those precepts in practice. It serves little purpose to introduce a concept intended to act as a guide for later courts, which will be paid lip-service and no more. A proposal such as that proposed by Howie JA might only work in this country, if say, the office of the family advocate were to be involved as a matter of course in cases such as these, in order to make its own independent findings and recommendations about what is in the best interests of the child concerned, and if the courts were brave enough to adopt such recommendations, even if they were clearly opposed to the protection of the traditional family structure. To reinforce the *status quo* in the guise of the best-interests test, may have little practical import if the American attitude is adopted, and this will surely not satisfy the fathers who find themselves in this predicament.

Quo vadis for these fathers now? The present writer does not believe that the Appellate Division decision will be the end of the matter. It is believed that they will view the *B v S* (AD) case as taking the matter no further. We find ourselves at the start of the constitutional protection of equality, *inter alia*, in this country,

with all eyes upon us. The bill of rights is contained in chapter 3 of the Constitution of the Republic of South Africa Act 200 of 1993. Sections 8, 13 and 30 guarantee protection from unfair discrimination, and entrench equality between men and women, the equal protection of the law, privacy and the protection of children respectively. It seems only logical that the next step is to approach the newly instituted Constitutional Court, to try and champion the cause of fathers who contend that the law does indeed discriminate against them. It behoves us to investigate whether that approach may have a more favourable outcome for fathers, and if so, whether that would put paid to this legal issue once and for all.

The first substantive right protected by the Constitution is that of equality. Section 8(1) provides that every person shall have the right to equality before the law and to equal protection of the law. Furthermore, section 8(2) provides that no person shall be unfairly discriminated against, *inter alia*, on the basis of gender or sex. The inclusion of both terms "makes it clear that it is impermissible unfairly to discriminate against men or women whether on the basis of biological features or patterns of behaviour" (Albertyn and Kentridge "Introducing the right to equality in the interim Constitution" 1994 *SAJHR* 167). Discrimination, it should be remembered, does not simply mean making distinctions between individuals.

> "Indeed, it has been suggested that in some circumstances, it is the essence of equality to make distinctions between groups to accommodate their different needs and interests. As one Supreme Court justice put it, '[i]t must be recognized at once . . . that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality" (Sheppard "Litigating the relationship between equity and equality" 1993 *Ontario Law Reform Commission* 6).

It is important to note, however, that discrimination may be either direct or indirect. Direct discrimination would be that which disadvantages a person simply on the basis, say, of his gender or sex. Here the motive or intention behind the law is irrelevant. Indirect discrimination comes into play when certain policies are applied which, *ex facie*, are nondiscriminatory, but which have the effect of disadvantaging certain groups or individuals. (For a more in-depth discussion of these concepts, see Albertyn and Kentridge 1994 *SAJHR* 164 ff.)

One should, in this context, also remember the limitation clause contained in section 33 of the Constitution, which is to the effect that the rights entrenched in chapter 3 may be limited by law provided that such limitation is reasonable and justifiable in an open and democratic society based on freedom and equality, and does not negate the essential content of the right in question.

Against this background, it seems apparent that the fathers of the illegitimate children concerned who allege that their fundamental rights to equality have been violated, will bear the onus of proving that the interest or activity, that is the right to be placed on an equal footing with the mothers of such children, falls within the protection of chapter 3 of the Constitution, and that the failure to recognise an inherent right of access to such children, constitutes an infringement or violation of such a right. Once that onus has been discharged, the mothers of such children will have to prove that the limitation is justified in terms of section 33. (For a discussion of whether this involves a "bewyslas" or a "weerleggingslas", see Henderson "Who, how and how much?" 1993 *De Rebus* 641.)

It is for the Constitutional Court to give a definitive answer to this question. Clearly, if the answer is that the mothers are correct on the constitutional issue,

the *status quo* will once again be reinforced, and that will be the end of the matter. The writer wishes to comment on the contrary position, that is to say, if the Constitutional Court decides that fathers have a right which should be protected, and that all previous cases on this issue are unconstitutional. This may well be the outcome, given the mood of the country at present, as far as equality goes. The question is, will this be a favourable outcome?

In recent years, in the United States of America, men have demanded equal protection of their parental rights. This is reflected in various Supreme Court decisions, which have held that distinctions based on gender and illegitimacy cannot be upheld, unless substantially related to important state interests (see Wintjien "Make room for daddy: a putative father's rights to his children" 1990 *New England LR* 1071). The state interest has been expressed to be the "promotion of family integrity and stability, the preservation of an established familial relationship, and the protection of the child from [the] permanent stigma and distress of illegitimacy" (McCahey, Kaufman and Kraut *Child custody, visitation law and practice* (1989) § 30.13). What this has meant is that the court has sought to preserve these interests, and has been protective of the biological parent-child relationship. It has held, in *Meyer v Nebraska* 262 US 479 (1965), that the parent-child relationship is worthy of constitutional protection.

The first case in the United States to recognise that a man's interests in his biological children are worthy of constitutional protection was *Stanley v Illinois* 405 US 645 (1972). Here, because the natural father had shown an interest in, and played an active role in parenting the child, the court found for him, and regarded the state interest in protecting children from physical harm to be of little importance here, since it was believed that Stanley was a fit father. Justice White said that the interest "of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection" (651). Then, some years later, in *Quillion v Walcott* 434 US 246 (1978), the Supreme Court held that the denial of an unwed biological father's right to veto the adoption of his illegitimate child, because he was regarded by statute as an unfit parent, unlike an unwed mother, was not unconstitutional. The court felt justified in coming to this conclusion because Quillion had failed to exercise any parental responsibility toward the child, who was living in an intact family. Notwithstanding the unfavourable outcome for the father in the *Quillion* case, it has been interpreted as allowing unwed fathers to establish their paternity and to show an interest in custody of their illegitimate children.

Caban v Mohammed 441 US 380 (1979) was the next case on this point. It also had to do with the adoption by a new husband of the unwed father's biological child, without the father's consent, which was not required in terms of statute. Caban, the unwed father, argued that the relevant statute was unconstitutional, in that it violated the equal protection clause, because it treated unwed fathers differently from unwed mothers. The Supreme Court upheld this argument. It held that the State of New York's interest in protecting children from illegitimacy did not warrant such disproportionate treatment (388–394). The court held that the case demonstrated that "an unwed father may have a relationship with his children fully comparable to that of the mother" (389). It is to be noted that Caban already had a considerable relationship with the child, and since he was happy to admit his paternity, the state interest was not threatened.

Then came *Lehr v Robertson* 463 US 248 (1983). Here the New York Court held that a natural father was not entitled to notice of adoption proceedings. On

appeal, the Supreme Court distinguished this case from *Stanley* and *Caban*, stating that the father here did not have a significant custodial, emotional or financial relationship with his natural child, and in the court's view, did not deserve the same constitutional protection as the fathers in those cases.

It is clear from these cases that the United States Supreme Court places great emphasis on the father's development of a relationship with his natural child, as well as his willingness to abide by his correlative burdens, and will protect these constitutionally. Relationships that are based purely on the biological tie, however, will not be protected.

From the trend evidenced in the United States, it seems that the battle in South Africa, in respect of these fathers is far from over. It is probable that many will approach the Constitutional Court and with various arguments. Whilst any prediction would be merely speculative, it seems probable that the Constitutional Court will find for the father, particularly one who has initiated some emotional relationship with the child, and one who is steadfast in fulfilling his financial duties towards the child. In 1993 the writer expressed the view that an inherent right of access for fathers of illegitimate children ought not to be recognised. To say that these fathers may have a constitutional right worthy of protection does not, it is believed, fly in the face of that view. The former view is a personal one, with a modicum of practicality. The latter is one that accords with the mood of the country and the measure of equality that, we are instructed, ought to be invoked. In any event, what is abundantly clear, is that the Appellate Division decision in *B v S supra*, with its emphasis on the best interests of the child, will not be the end of the matter.

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DIE DOODGEWAANDE GADE EN DIE WIL VAN DIE TESTATEUR

Daar is reeds by herhaling beklemtoon dat die wetgewer met die wysiging van die erfreg ingevolge Wet 43 van 1992, saamgelees met die gepaardgaande wysigings van die Boedelwet 66 van 1965, in die algemeen die Suid-Afrikaanse reg ten beste verander het.

In den brede geld dit ook die wysiging wat deur die nuwe artikel 2B van die Wet op Testamente 7 van 1953 teweeggebring is. Die voorafgaande regsposisie waar geen erfregtelike kennis geneem is van 'n ingrypende verandering in die huweliksposisie van die erflater nie, het té veel ruimte gelaat vir minagting van die erflater se waarskynlike bedoeling. (Sien Sonnekus "Voorgestelde statutêre wysiging van die erfreg" 1992 *TSAR* 159–178; Kahn *1994 Supplement to Corbett, Hahlo, Hofmeyr and Kahn The law of succession in South Africa* (1994) 30 ev; De Waal en Schoeman *Erfreg studentehandboek* (1996) 29 ev 74.)

Anders as wat deur sommige kommentatore gehoop is, het die wetgewer nie voorsiening gemaak vir die outomatiese herroeping van 'n testament verly vóór huweliksluiting nie. (Sien Beinart "Testamentary form and capacity and the

Wills Act, 1953" 1953 *SALJ* 159 280 297; Hahlo "Revocation of wills by divorce" 1964 *SALJ* 381 382; Schoeman "Outomatiese verval van 'n testament weens veranderde omstandighede" 1991 *De Jure* 44 47, 268 275.) Die wysiging het slegs betrekking op die testament van 'n testateur wat sterf binne drie maande na sy huwelik deur 'n egskeiding ontbind of nietig verklaar is:

> "2B Uitwerking van egskeiding of nietigverklaring van huwelik op testament –
>
> Indien iemand te sterwe kom binne drie maande nadat sy huwelik deur 'n egskeiding of nietigverklaring deur 'n bevoegde hof ontbind is en daardie persoon voor die datum van sodanige ontbinding 'n testament verly het, word uitvoering aan daardie testament gegee op dieselfde wyse waarop daaraan uitvoering gegee sou word indien sy voormalige gade voor die datum van die betrokke ontbinding oorlede is, tensy uit die testament blyk dat die erflater ondanks die ontbinding van sy huwelik bedoel het om sy voormalige gade te bevoordeel."

Die wetgewer het met dié formulering oënskynlik bewonderenswaardige fyn voetwerk gedoen indien dit vergelyk word met die lastighede wat uit die interpretasie van artikel 18A van die Engelse Wills Act, soos in 1982 gewysig, ontstaan het. (Sien oor die Engelsregtelike posisie na die wysiging deur a 18(2) van die Administration of Justice Act 1982, Parry en Clark *The law of succession* (1983) 334.) In stede daarvan om die klaarblyklik maklike uitweg te kies en te bepaal dat 'n testament verly vóór die testateur se egskeiding as herroep geag word, word eerder bepaal dat die bepaalde bevoordeelde, te wete die voormalige gade, vir doeleindes van die testament dood gewaan word mits die testateur binne die voorgeskrewe drie maande na die ontbinding of nietigverklaring van die huwelik te sterwe sou kom.

Sodoende word die res van die testamentêre bepalings intakt gelaat en voorsiening gemaak dat moontlike ander testamentêre bevoordeeldes steeds op dié bevoordelings aanspraak het wat die testateur vir hul beoog het. (Sien die verduideliking vervat in die SA Regskommissie se verslag *Hersiening van die erfreg: Testamentsformaliteite; wysiging en herroeping van testamente; onbevoegdheid om te erf; substitusie en die erfregtelike posisie van aangenome kinders* Projek 22 (1991) § 3.51–63 op 77–82.) Soos met talle spesifieke statutêre bepalings, is dit egter geen waarborg dat billikheid in alle gevalle sal seëvier en die wil van die testateur uiteindelik uitgevoer sal word nie.

Gestel 'n testateur is twee maande voor sy skielike afsterwe van sy vrou geskei nadat dit op die lappe gekom het hy 'n avontuur met sy sekretaresse gehad het. Ingevolge die laaste geldige testament wat reeds meer as drie jaar tevore verly is, is sy voormalige gade sy primêre begunstigde terwyl die restant van sy bates uitdruklik aan 'n bepaalde liefdadigheidsinstelling bemaak is. Die gades was destyds deur hul vriendelike versekeringsadviseur, wat as diens ook vir die testament verantwoordelik was, daarvan verseker dat dit sake wesenlik sal vereenvoudig indien die langslewende gade die primêre bevoordeelde is ten aansien van die huis, die motors, die huisraad, die aandeleportefeulje en die spaarbankrekening en dat liefs niks deur die eerssterwende in sy testament *eo nomine* aan hul enigste kind, wat nog 'n minderjarige seun van 15 jaar oud was, nagelaat word nie. Nie alleen sal die langslewende as primêre bevoordeelde "uiteraard" vir die seun sorg nie, maar sodoende is daar ook geen gevaar dat die bates te gelde gemaak moet word ten einde die minderjarige se erfregtelike belange by die meester veilig te stel nie – langs hierdie weg word die onnodige geskarrel met die meester en die gevolglike voogdyfonds immers vermy.

Anders as die voorbeeldige redelike man het die testateur in ons voorbeeld nie ag geslaan op die goeie advies van sy regsadviseur en laatstens direk ná die egskeidingsbevel verleen is, sy testament gewysig nie. Trouens, die wetswysiging vervat in gemelde artikel 2B is immers uitdruklik bedoel vir die onderhawige ietwat agterlosige testateur wat nie gedurende die eerste dae of weke na sy egskeiding dadelik aandag gee aan sy testamentswysiging nie. Die wetswysiging sal juis daarvoor sorg dat sy voormalige gade, indien hy binne drie maande na die egskeiding te sterwe kom, niks uit sy boedel erf nie. Die teorie agter die wetswysiging is duidelik: die wetgewer skep 'n grasietyd van drie maande na sy egskeiding vir die testateur waarbinne aanvaar word dat die tipiese pasgeskeide persoon waarskynlik nie sy voormalige gade as testate bevoordeelde wil sien sou hy dan te sterwe kom nie. Daar word egter verder aanvaar dat die testateur na drie maande voldoende tyd tot normalisering van sy lewe gehad het en dat hy daarvan gebruik sou maak om 'n nuwe testament te laat verly om voorsiening te maak vir sy laaste wilsuiting met inagneming van die veranderde omstandighede weens die egskeiding. Sou hy dus nalaat om wel daarvan gebruik te maak en pas meer as drie maande na sy egskeiding te sterwe kom, vind hierdie artikel geen toepassing nie en sal enige bevoordeling in sy testament aan sy voormalige gade as geldige beskikking geag word wat steeds in ooreenstemming met sy laaste wil is. (Sien die hoofmeester se opmerkings in die gemelde Verslag van die Regskommissie § 3.53 op 77–78.)

Vir doeleindes van die bereddering van bogemelde erflater se bates vind die tersake artikel 2B wel toepassing. Daar word geag dat sy voormalige gade reeds vooroorlede is terwyl die testament uiteraard intakt bly vir doeleindes van enige ander bevoordelings of bepalings daarin vervat. In die onderhawige geval bring die statutêre wysiging mee dat die voormalige gade geen bevoordeling ontvang nie. Die minderjarige seun van die egpaar is nie in die testament uitdruklik vermeld nie en is dus nie in eie reg 'n testate bevoordeelde nie. Aangesien die testate erfreg die verdeling van alle boedelbates beheers, word die seun ook nie as intestate erfgenaam tot 'n bevoordeling in sy vader se boedel geroep nie. Hoewel die Romeinsregtelike spreuk *nemo pro parte testatus pro parte intestatus decedere potest* (*D* 50 17 7) nie meer 'n onwrikbare deel van die Suid-Afrikaanse reg vorm nie, kan die norme van die intestate erfreg slegs dan naas dié van die testate erfreg toepassing vind indien die erflater nie in sy testament oor al sy bates beskik het nie.

Die erfreg maak voorsiening vir representasie van 'n vooroorlede bevoordeelde. Daar moet egter onderskei word tussen representasie in die intestate erfreg en representasie in die testate erfreg (sien Joubert "Artikel 24 Algemene Regswysigingswet 32 van 1952" 1954 *THRHR* 1–43). Hoewel die minderjarige se moeder as voormalige gade van die testateur ingevolge artikel 2B as vooroorlede geag word, moet aan die statutêre vereistes vir testate representasie voldoen word alvorens die seun sy doodgewaande moeder kan representeer.

In artikel 24 van die Algemene Regswysigingswet 32 van 1952 is voorsiening gemaak vir statutêre substitusie wat toepassing gevind het indien die testateur geswyg het oor die plaasvervulling van sy bevoordeeldes. Sodanige statutêre substitusie het kennelik niks met die geuite wil van die testateur te make nie terwyl substitusie normaalweg op die geuite wil van die testateur met betrekking tot plaasvervulling berus. Die gemelde artikel 24 het ter sprake gekom indien 'n vooroorlede kind van die testateur ooreenkomstig laasgenoemde se testament op 'n *bemaking* uit hoofde van daardie testament geregtig sou gewees het indien hy

die testateur oorleef het. In daardie omstandighede het die wettige afstammelinge van die vooroorlede kind van die testateur *per stirpes* ten aansien van die vooroorledene se voordeel opgevolg. Daardie artikel 24 is uitdruklik herroep in die wetswysiging van artikel 1 Wet 43 van 1992.

Artikel 2C van die Wet op Testamente maak wel nou voorsiening vir statutêre representasie en aanwas maar dit is beperk tot die plaasvervulling *ten gunste van die langslewende gade van die erflater* of ter plaasvervulling van 'n vooroorlede afstammeling van die erflater. Daar word dus nie voorsiening gemaak vir plaasvervulling *deur* 'n afstammeling van die erflater *van* 'n vooroorlede gade van die erflater nie. Die seun kan dus nie by wyse van daardie statutêre representasie enige erfregtelike voordeel uit sy vader se boedel ontvang nie en al die boedelbates sal stellig ooreenkomstig die testate beskikking die benoemde liefdadigheidsinstelling as die geldige bevoordeelde ten aansien van die restant van die bates van die erflater toekom. Daar is weinig twyfel dat dit waarskynlik nie die resultaat is wat ooreenstem met die laaste wil van die erflater indien die scenario aan hom voorgehou sou gewees het nie.

Uiteraard behoort iedere gesonde volwassene self verantwoordelikheid te aanvaar vir sy eie dade én nalates en sou die regsgemeenskap sy spreekwoordelike skouers oor die voorgesketste resultaat kan ophaal. Het die erflater in die voorbeeld immers nie voldoende geleentheid gehad om dié ongewenste resultaat te vermy nie?

Hy kon enersyds direk ná die egskeiding die testament eenvoudig uitdruklik herroep het; die norme van die intestate erfreg sou dan die bereddering van die boedel beheers het en sy seun sou as enigste afstammeling ook die enigste erfregtelike bevoordeelde wees (sien a 1(1)(b) van die Wet op Intestate Erfopvolging 81 van 1987). Andersyds kon die testateur reeds met die verlyding van die gewraakte testament uitdruklik voorsiening gemaak het vir substitusie vir geval die gade nie kan of wil erf nie en stellig sou die testateur bedoel het dat sy seun dan wel as *substitutus* sy moeder as *institutus* se plek moet inneem.

Só gesien, is dit die erflater se eie skuld as die bereddering van sy bates nie verloop soos hy eintlik sou wou hê nie en behoort hy nie met argwaan op die spreekwoordelike oewer van die Styxrivier te wag nie.

Moontlik is daar ook ruimte om te vra of die reg nie tog soos die spreekwoordelike hoeder vir die arme broer behoort te wees nie (sien *Genesis* 4:9). Waar wel in die ietwat ondeursigtig geformuleerde artikel 2C Wet 7 van 1953 (soos gewysig) voorsiening gemaak word vir statutêre representasie en aanwas in gevalle waar die testateur nagelaat het om vir die bepaalde omstandigheid uitdruklik voorsiening te maak, kan moontlik tog betoog word dat ook voorsiening gemaak behoort te word vir 'n beknopte wysiging aan die gemelde artikel 2B. Dan kan dit lui:

> Indien iemand te sterwe kom binne drie maande nadat sy huwelik deur 'n egskeiding of nietigverklaring deur 'n bevoegde hof ontbind is en daardie persoon voor die datum van sodanige ontbinding 'n testament verly het, word uitvoering aan daardie testament gegee op dieselfde wyse waarop daaraan uitvoering gegee sou word indien sy voormalige gade voor die datum van die betrokke ontbinding oorlede is, *met dien verstande dat die bloedverwante van die erflater wat vir intestate bevoordeling in aanmerking sou gekom het indien hy intestaat te sterwe gekom het, geag word die voormalige gade te substitueer ten aansien van enige voordeel wat die voormalige gade sou toeval*, tensy uit die testament blyk dat die erflater ondanks die ontbinding van sy huwelik bedoel het om sy voormalige gade te bevoordeel.

Sodanige wysiging kan daartoe bydra dat nie 'n alte groot skare onvergenoegde testateurs ongeduldig op die anderkantste oewer van die Styx die aankoms van hul testamentadviseurs op die veerboot van Charon inwag nie.

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CUSTOMARY LAW OF MARRIAGE AND A BILL OF RIGHTS IN SOUTH AFRICA: *QUO VADIS*?

Introduction – Family law and the law of marriage

Family law may be defined as that branch of private law which regulates the relationship between husband and wife as well as that between parents and children and the relationship of the family with other members of the society. Family law therefore operates within the family – without a family, family law cannot exist. The existence of a family is brought about by the institution of marriage (Joubert "Law of marriage" in Schaefer (ed) *Family law service* (1987) 1; Cronjé *The South African law of persons and family law* (1994) 129).

Marriage may be generally defined as a legal institution through which a man and a woman are united and which results in legal relationships among the parties, their children, if any, and other legal subjects (see, *inter alia*, Church *Marriage and the woman in Bophuthatswana: A historical and comparative study* (LLD thesis Unisa 1989) 167). However, not each and every marriage is recognised by South African law. Marriages entered into in accordance with customary or traditional rites as well as those concluded according to Hindu and Muslim rites are not regarded as valid marriages (see, *inter alia*, *Nkambula v Linda* 1951 1 SA 377 (A); *Ismail v Ismail* 1983 1 SA 1006 (A); South African Law Commission: *Report on the rights of a father in respect of his illegitimate child* (1994) 28–30). These unrecognised relationships are therefore not regulated by family law in its narrow or traditional sense since they are not based on the existence of a valid (legal) marriage. They are nevertheless expressly recognised by statute for certain purposes (see Cronjé 129; s 31 General Laws Amendment Act 76 of 1963; s 5(6) Maintenance Act 23 of 1963; Bekker *Family law: an introduction* (1990) 123–125). It is possible, however, that recognition will be accorded to such marriages, in particular customary marriages, either by the courts in their interpretation of existing customary law and common law in the light of the Constitution of the Republic of South Africa Act 200 of 1993, or by express measures adopted by the legislature.

Legal dualism

Two systems of law are applicable in South Africa, namely common law and customary law. The common law is of general application and the application of customary (or indigenous) law is regulated by statute. The application of customary law is regulated by the Law of Evidence Amendment Act 45 of 1988. It must be pointed out that before the commencement of the 1993 Constitution

there were certain territories within South Africa which had been granted nominal constitutional independence (see Bekker *Seymour's Customary law in Southern Africa* (1989) 7–8). (These territories were formally reincorporated into South Africa on 27 April 1994, the day on which the 1993 Constitution came into operation.) Different laws for the recognition and application of customary law were enacted in these territories (*ibid*). The interpretation of these enactments is, however, presently subject to section 35(3) of the 1993 Constitution.

The basic measure with regard to the recognition and application of customary (indigenous) law is section 1 of the Law of Evidence Amendment Act of 1988 which provides as follows:

> "Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy or natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or similar custom is repugnant to such principles."

As pointed out above, our courts must have regard to the provisions of the present Constitution and, more particularly chapter 3, in the interpretation of this measure. It is also obvious that in the interpretation of the present legal position pertaining to marriages, due regard should be given to the "spirit, purport and objects of this Chapter" (ie chapter 3 – s 35(3) Act 200 of 1993). If this is done, all marital relationships hitherto unrecognised by our common law will be granted legal validity (see eg the Zimbabwean decision of *Zimnat Insurance Co Ltd v Chawanda* 1991 2 SA 1019 (ZS); also Ľabuschagne "Erkenning van die inheemse huwelik" 1991 *THRHR* 562; Maithufi "The extension of the Aquilian action to partners of customary marriages – the Zimbabwe experience" 1990 *De Jure* 379; Maithufi "Causing the death of the breadwinner – the customary marriage widow's problem" 1986 *De Rebus* 555).

The various marriage laws applicable in South Africa as at 27 April 1994

There is a plethora of legislative enactments governing marriage laws in South Africa. As these enactments have not been repealed by the 1993 Constitution, they continue to be of force and effect until repealed or amended by a competent authority (s 229 Act 200 of 1993). In terms of almost all these statutory measures (Black Administration Act 38 of 1927; Marriage Act 15 of 1980 (Bop); Marriage Act 21 of 1978 (Tk); KwaZulu Act on the Code of Zulu Law 16 of 1985; Natal Code of Zulu Law of 1987 (Proc R151 of 1987)), a clear distinction is made between a customary marriage and a civil marriage. These measures are almost all based on the Black Administration Act of 1927.

A customary marriage is defined as an "association of a man and a woman in conjugal relationship according to Black law and custom, where neither the man nor the woman is a party to a subsisting marriage" (s 35 Act 38 of 1927). This definition was also adopted by some former South African independent homelands (see s 1 Registration of Customary Unions Act 8 of 1977 (Bop)). The KwaZulu Act on the Code of Zulu Law and its counterpart (Proc R151 of 1987) provide that a customary marriage is a "customary union as defined in the principal Act, provided that such has been entered into in accordance with the essential requirements of the Act" (s 1 Act 16 of 1985; also Proc R151 of 1987). This definition must be read subject to the other provisions of these codes governing this institution. One such provision equates a customary marriage to a contract as follows:

> "A customary marriage is, subject to the essential requirements provided for in section 38(1), a civil contract entered into by and between intending partners and endures until the death of the first dying unless annulled or dissolved by a competent court" (see s 36 Act 16 of 1985 and Proc R151 of 1987 resp).

In the former Transkei, which is now part of the Eastern Cape province of the Republic of South Africa, a distinction is made between a customary marriage and a customary union (see Van Loggerenberg "The Transkei Marriage Act 1978 – A new blend of family law" 1980 *Obiter* 1). A customary *union* is defined as

> "a conjugal relationship in accordance with customary law between a man and a woman (at least one of whom is subject to customary law, but neither of whom is a party to a lawful civil marriage) prior to the commencement of this Act" (s 1 Marriage Act 21 of 1978).

In providing for this definition, the legislature had in mind customary marriages entered into in terms of the Black Administration Act of 1927. These customary marriages were, before the commencement of the Marriage Act of 1978, not recognised as valid marriages on par with civil marriages. The effect of the 1978 Act was to grant full recognition to these marriages, since they had previously been dissolved by a subsequent civil marriage of any of the partners. Hence the proviso to this definition to the effect that "but neither of whom is a party to a lawful civil marriage" (s 1 Act 21 of 1978).

A customary *marriage*, on the other hand, is defined as

> "a marriage contracted between a man and a woman (at least one of whom is subject to customary law) in accordance with customary law and the provisions of this Act: provided that any reference to a customary marriage contracted or consummated prior to the commencement of this Act, shall be construed as reference to a customary union" (s 1 Act 21 of 1978).

Upon registration of a "customary union" as envisaged by this Act, it is deemed to be a customary marriage (s 21 Act 21 of 1978). This means that the registration of such "unions" transforms them into valid customary marriages which are, in terms of this Act, recognised on the same footing as civil marriages.

A *civil marriage* is defined by our common law as the voluntary union of one man and one woman to the exclusion of all others (Hahlo *The South African law of husband and wife* (1985) 21; *Seedat's Executors v The Master (Natal)* 1917 AD 302; *Ex parte Soobiah: In re Estate Pillay* 1948 1 SA 873 (N)). Section 35 of the Black Administration Act 38 of 1927 also contains a definition of this concept which is to the following effect:

> "The union of one man and one woman in accordance with any law for the time being in force in any province governing marriages, *but does not include any union recognised as a marriage in Native law and custom or any union recognised as a marriage in Native law under the provisions of section one hundred and forty-seven of the Code of Native law contained in the Schedule to Law 19 of 1891 (Natal) or any amendment thereof or any other law*" (my emphasis).

The importance of this definition lies in the fact that it clearly distinguishes customary marriages from legally recognised (valid) marriages. The basis for the non-recognition of a customary marriage is that it is (potentially) polygamous (see, *inter alia*, *In re Bethel, Bethel v Hildyard* (1888) 38 ChD; *Seedat's Executors v The Master (Natal) supra*; *Ex parte Soobiah: In re Estate Pillay supra*). This non-recognition previously led our courts to hold that a customary marriage is dissolved by a subsequent civil marriage or is superseded by an existing civil

marriage of one of the partners (see, *inter alia*, *Nkambula v Linda supra*; *Malaza v Mndaweni* 1974 BAC (C) 45). This position was later reversed by the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 which provides, *inter alia*, that a man and a woman between whom a customary marriage subsists may marry each other, but only if the man is also not a partner in a customary marriage with another woman (see also Maithufi "Do we have a new type of voidable marriage?" 1992 *THRHR* 628; Maithufi "Marriage and succession in South Africa, Bophuthatswana and Transkei: a legal pot-pourri" 1994 *TSAR* 262; s 22(1) Act 38 of 1927 as amended).

It is clear from the above discussion that before the commencement of the 1993 Constitution, customary marriages were not recognised as valid marriages for all purposes. They were only recognised for the purposes of the common law by express legislative measures (see authorities cited above) and for all purposes of customary law where their recognition was not in conflict with the common law (see the proviso to s 1 Act 45 of 1988).

Can this non-recognition continue in the face of chapter 3 of the 1993 Constitution? The answer to this question depends on the correct interpretation of the provisions of the Constitution dealing with the institution of marriage. Before an attempt is made to do this, it is important to examine some provisions relating to marriage contained in the Universal Declaration of Human Rights of 1948 and the African Charter on Human and Peoples' Rights of 1981. This is of vital importance because

> "many states have incorporated or drawn on the Universal Declaration of Human Rights as a model for their constitutional and other legislative acts. Both the International Court of Justice and national courts have relied on the Universal Declaration of Human Rights as law for the purposes of providing a legal framework" (Eide and Alfredsson (eds) *The Universal Declaration of Human Rights: A commentary* (1992) 7; see also Hamalengwa, Flinterman and Dankwa (eds) *The international law of human rights (Basic documents and annotated bibliography)* (1988); s 35(1) Act 200 of 1993).

The Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights

The Universal Declaration of Human Rights contains provisions relating to the protection of the family and the institution of marriage. Article 16 of the Universal Declaration of Human Rights provides as follows:

> "1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and after marriage . . .
>
> 3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

This article grants persons of full age the right to marry and to found a family. The words "marriage" and "family" are not defined in the Declaration. This is understandable as there are various forms or types of marriage that may exist side by side within a particular country. A way was therefore created for member states, where circumstances demand, to recognise marriages which are not strictly monogamous. It should be noted that in most countries the common form of a recognised marriage is monogamous (Erikson 248; see also Nhlapo "International protection of human rights and the family: African variations on a common theme" 1989 *International J of Law and the Family* 1–20). On the recognition of such marriages, the family which, in terms of this article, is

defined as a "fundamental group of society and ... entitled to protection by society and the State", becomes an entity which is afforded protection by the national (internal) law of a state for all intents and purposes (art 16(3)). This measure encourages states to adopt measures, legislative or otherwise, which are necessary to provide the family with effective and special protection.

Partly inspired by the Universal Declaration of Human Rights, the Assembly of Heads of State and Government of the Organisation of African Unity adopted the African Charter on Human and Peoples' Rights in 1981. This Charter also contains provisions with regard to the right to marry and protection of the family, which is defined as "the natural unit and basis of society" (art 18; see also Nhlapo 14).

It is beyond the scope of this note to deal fully with the implications of these provisions. What is of significance is to indicate that the Charter of African origin also recognises the importance of the family and makes provision for its protection. The protection of a family, it is submitted, implies the recognition of a marriage that brought about such a family, regardless of the legal system (ie whether received law or customary law), that governs the requirements for such marriage.

The provisions of the 1993 Constitution relating to institutions governed by customary law

Unlike the Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights, the 1993 Constitution of the Republic of South Africa does not contain express provisions designed for the protection of the family, nor does it provide that a person shall have a right to marry. Be that as it may, the position of the customary marriage in the South African legal system that prevailed before the coming into existence of the Constitution will change fundamentally. The Constitution contains provisions for the continued existence and application of customary law. Such continued existence and application are, however, subject to the provisions contained in chapter 3 (Fundamental Rights) of the Constitution (*inter alia*). This means that whenever any court has decided to apply customary law, or whenever a court is faced with a problem relating to the recognition or non-recognition of an institution of customary law origin, such application or recognition, as the case may be, must be determined in the light of the fundamental rights enshrined in the Constitution (Bennett "Customary law under the 1993 Constitution" in De Kock and Labuschagne (eds) *Festschrift JC Bekker* (1995) 5). Furthermore, the Constitution requires that "in the interpretation of any law, a court shall have due regard to the spirit and purport and objects of this Chapter" (s 35(3); see also Constitutional Principle XIII).

It is not only customary law that must be applied and interpreted subject to the chapter on fundamental rights, but the common law too. The common law did not previously offer equal treatment or protection to similar institutions, regardless of whether such institutions originated from divergent systems of law; this position can, however, no longer prevail. The 1993 Constitution provides for the equality of every person before the law and further that no one shall be unfairly discriminated against, directly or indirectly on the basis of, *inter alia*, race, religion or culture. Our courts are therefore bound to take into account these equality and non-discriminatory provisions in determining the validity of any institution of customary law when this is in issue for the purposes of the common

law. In this manner, customary marriages, which have been denied legal validity in certain respects, will be accorded due recognition. This is based on the assumption that our courts will hold that fundamental rights are applicable both vertically and horizontally (see s 4(1) 7(2) and 35 Act 200 of 1993; *Mandela v Falati* 1995 1 SA 251 (W); cf *De Klerk v Du Plessis* 1995 2 SA 41 (T)).

A similar development may be discerned from the Zimbabwean decision of *Zimnat Insurance Co Ltd v Chawanda* 1991 2 SA 831 (ZS). This decision conferred legal validity on customary marriages in Zimbabwe in that it placed such marriages on an equal footing with civil marriages. The court in this case indicated that the reason why South African courts do not grant these marriages legal validity was that

> "this essentially was a step the Appellate Division was reluctant to take for, in its perception, to have done so would have been to elevate a potentially, if not actually, polygamous marriage to the status of a valid marriage according to common law, and that of a customary law wife to that of a 'lawful' wife" (831I–J).

This perception continued to exist in South Africa despite the enactment of the General Laws Amendment Act 76 of 1963 (s 31). Of particular importance are the court's comments on the interpretation of the law in the light of socio-economic changes:

> "Law in a developing country cannot afford to be static. It must undoubtedly be stable, for otherwise reliance upon it would be rendered impossible. But at the same time if the law is to be a living force it must be dynamic and accommodating to change. It must adapt itself to fluid economic and social norms and values and to altering views of Justice. If it fails to respond to these needs and is not based on human necessities and experience of the actual affairs of men rather than on philosophical notions, it will one day be cast off by the people because it will cease to serve any useful purpose. Therefore the law must be constantly on the move, vigilant and flexible to current economic and social problems" (832C–E; see also *Thibela v Minister van Wet en Orde* 1995 3 SA 147 (T)).

The role of the legislature

It is not only the courts that have a duty to ensure that equality, which is one of the objectives of the Constitution of 1993, is achieved. The legislature also has the task of ensuring that the law is not inconsistent with the spirit, purport and objects of the Constitution (s 35(3)). All discriminatory legislation or practices, or legislation providing for inequality of treatment must be repealed or amended. Therefore, where it is not possible for the courts to grant recognition to a customary marriage, it is the duty of the legislature to enact measures aimed at this eventual recognition.

The South African Law Commission must begin actively to engage in a full-scale investigation relating to the recognition of customary marriages (see South African Law Commission: *Report on marriages and customary unions of black persons* (1985); South African Law Commission: *Report on the rights of a father in respect of his illegitimate child*; see also my concluding remarks). It is not only the position of customary marriages that needs such investigation, but also the possible recognition of all marital relationships not recognised by our law. The path for this eventual recognition has already been cleared by section 14(3) of the Constitution which provides as follows (see also South African Law Commission *Report on Jewish divorces* (1994)):

> "Nothing in this Chapter shall preclude legislation recognising–
>
> (a) a system of personal law and family law adhered to by persons professing a particular religion; and

(b) the validity of marriages concluded under a system of religious law subject to specified procedures."

Concluding remarks

Concerted efforts must be made by both the judiciary and the legislature to give effect to the objects and purport of the 1993 Constitution. When the legislature does not act decisively in implementing law reform, our courts must take the lead in interpreting the law in accordance with the objectives laid down in the Constitution. The law must be interpreted in such a way that the conclusion satisfies the peculiar needs of the society it serves. There is no doubt that customary marriages will still be contracted and our law cannot continue to regard them as valid marriages for certain specified purposes and invalid for other purposes. Customary marriages and indeed, all other marriages not yet fully recognised on the same footing as civil marriages, cannot, in the light of the provisions of the Constitution, continue to be recognised in a piecemeal fashion. I have already indicated in an earlier article that the legal problems faced by partners and children of these marriages can only be resolved by recognising such marriages on the same footing as civil marriages (1986 *De Rebus* 555; see also Dlamini "Claim by widow of customary union for loss of support" 1993 *SALJ* 34).

The South African Law Commission has already proposed that customary marriages deserve to be recognised (see the SALC *Report on marriages and customary unions of black persons* above). In its 1994 report, the Commission recommended that this be brought about by legislation that would, *inter alia*, provide as follows:

> "A customary marriage, whether entered into before or after the commencement of this Act, shall be recognised as a form of marriage which in law has a status equal to that of a common law marriage and in the case of such customary marriage, any child who is born of that marriage or who in terms of customary law is deemed to be a child of that marriage shall have the status of a legitimate child and any statutory rule of law relating to marriage privilege or the competency or compellability of witnesses shall apply to a spouse of that marriage: Provided that subject to the provisions of this Act the coming into existence of a customary marriage, its legal consequences and its termination shall be governed by customary law" (*Report on the rights of a father in respect of his illegitimate child* 29; cf *Samente v Minister of Police* 1978 4 SA 632 (E); *Santam v Fondo* 1960 2 SA 467 (A)).

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SEKSUELE GEORIËNTEERDHEID EN DIE FAMILIEREG: REAKSIE OP PJ VISSER

1 Inleiding

In 'n aantekening oor fundamentele regte en die familiereg maak PJ Visser sekere ongesubstansieerde maar hoogs aanvegbare stellings oor die grondwetlike

beskerming van mense op grond van hul seksuele georiënteerdheid ("Enkele gedagtes oor fundamentele regte en die familiereg" 1995 *THRHR* 702). Die skrywer maak 'n onderskeid tussen "normale" seksuele oriëntasie (wat in sy oë altyd 'n heteroseksuele oriëntasie behels) en "abnormale" seksuele oriëntasie (wat in sy oë alle gevalle van "homoseksuele" oriëntasie insluit). In hierdie konteks spreek hy dan die hoop uit dat

> "gesonde verstand ook regtens sal seëvier sodat die grondwetlike verbod op onbillike diskriminasie teen mense op grond van hul seksuele georiënteerdheid so uitgelê en toegepas sal word dat dit nie die wese van die bestaande huweliksreg aantas nie" (705).

In hierdie bydrae wil ek die uitgangspunt van die skrywer betwis en in die proses enkele punte oor 'n grondwetlike staat en die gelykheidsklousule in die Grondwet (Wet 200 van 1993) uitlig.

2 Die aard van seksuele oriëntasies

Alhoewel die skrywer se siening aangaande "normale" en "abnormale" seksualiteit klaarblyklik gevorm is deur die godsdienstige en morele denkraamwerk waarbinne hy beweeg, is dit lynreg in stryd met die algemeen aanvaarde opvattings op wetenskaplike en regsgebied. Reeds in 1973 het die American Psychological Association 'n mosie aangeneem waarin erken word dat homoseksualiteit 'n natuurlike seksuele variant is wat nie aan enige patologie gekoppel kan word nie (Cameron "Sexual orientation and the Constitution: A test case for human rights" 1993 *SALJ* 458). In 1993 het die Kaapse Provinsiale Afdeling van die hooggeregshof tot dieselfde gevolgtrekking gekom in *S v H* 1993 2 SACR 545 (K) waar regter Ackermann kommentaar gelewer het op vorige hofuitsprake wat na "normale" heteroseksuele verhoudings verwys het deur te sê:

> "In my respectful view the use of the word 'normal' in this context is unfortunate, as it might suggest a prejudgment of much current psychological and sociological opinion which is critical of various conventions and assumptions regarding human sexuality" (548A).

Alhoewel daar meningsverskil heers onder sosiale en natuurwetenskaplikes aangaande die vraag of 'n persoon se seksuele georiënteerdheid op biologiese of fisiologiese faktore gebaseer is en dus veranderlik is al dan nie (Cameron 1993 *SALJ* 460), word wel algemeen aanvaar dat dit in 'n menseregte-konteks 'n diep persoonlike karaktertrek is wat óf onveranderbaar is, óf slegs verander kan word teen onaanvaarbare hoë persoonlike koste (sien bv die siening van die Kanadese hooggeregshof in *Egan v Canada* 124 DLR 4th 609 414; *S v H* 1993 2 SACR 545 (K); die redakteurs van die *Harvard Law Review Sexual orientation and the law* (1990) 7).

Uit bogenoemde behoort duidelik te blyk dat geen kommentator onproblematies in 'n akademiese publikasie oor "abnormale" seksualiteit behoort te skryf nie. Akademici en ander regskommentators wat oor grondwetlike sake uitsprake maak, behoort versigtig te wees oor die aard van die waarde-oordele wat hulle as "feite" voorstel. Die genuanseerdheid van die situasie en die verskeidenheid van menings oor die aangeleentheid behoort ten minste genoem te word. Waar kontroversiële stellings gemaak word (soos dat psigiaters en sielkundiges "persone met abnormale seksuele oriëntasies" suksesvol kan "behandel" (705)), behoort ten minste een of ander vorm van gesag vir die stelling aangebied te word. By 'n gebrek aan gesag kan geen ander gevolgtrekking gemaak word as dat die gegewens ten beste op hoorsê en ten ergste op blote

vooroordeel gegrond is nie. Soos hieronder uiteengesit, loop so 'n kommentator boonop die risiko om te dwaal ten opsigte van die aard en omvang van die grondwetlike beskerming wat aan "gay" mans en lesbiërs verleen word.

3 Die Grondwet en seksuele oriëntasie

Suid-Afrika se oorgangsgrondwet bevat 'n spesifieke verbod op diskriminasie in artikel 8(2) en bepaal soos volg:

> "Daar mag teen niemand onbillik gediskrimineer word nie, hetsy direk of indirek, en, sonder om afbreuk te doen aan die algemeenheid van hierdie bepaling, in die besonder op een of meer van die volgende gronde: ras, geslagtelikheid, geslag, etniese of sosiale herkoms, kleur, seksuele georiënteerdheid, ouderdom, gestremdheid, godsdiens, gewete, geloof, kultuur of taal."

Die neergelegde lys van beskermde gronde is in die Grondwet ingesluit na intensiewe politieke samesprekings by die veelparty onderhandelinge te Kempton Park (sien Du Plessis en Corder *Understanding South Africa's transitional Bill of Rights* (1994) 144). Die lys neergelegde gronde is of onveranderlik (ras, ouderdom), en/of baie moeilik om te verander (geslag, taal, kultuur), en/of inherent deel van die menslike persoonlikheid (geloof, godsdiens, gewete), en in verskeie gevalle onderworpe aan stereotipering en vooroordeel in die gemeenskap (sien Cachalia *Fundamental rights in the new Constitution* (1994) 27). Die gronde verteenwoordig tradisionele vorme van diskriminasie wat in die apartheidsera, voor die aanname van die oorgangsgrondwet, algemeen in die land toegepas en aanvaar is. Elke grond het 'n eie nalatenskap van uitsluiting, vooroordeel en ongeregtigheid – met ras en geslag aan die voorpunt.

Kommentaar rakende die grondwetlikheid al dan nie van selfde-geslag-huwelike wat op argumente rakende die "abnormaliteit" van homoseksualiteit gebaseer is, maak dus nie sin in ons nuwe grondwetlike regsorde nie. Die insluiting van "seksuele georiënteerdheid" in artikel 8(2) van die Grondwet verteenwoordig dan juis 'n erkenning dat die staat nie 'n onderskeid maak tussen verskillende seksuele voorkeure nie. Volgens die Grondwet is homoseksualiteit net so normaal soos heteroseksualiteit.

Die uitgestippelde gronde – insluitende seksuele georiënteerdheid – is juis ingesluit om te verhoed dat vooroordele in die samelewing teenoor 'n spesifieke groep gebruik word om diskriminasie teen daardie groep te regverdig. Om soos Visser te argumenteer dat homoseksualiteit deur die meeste redelike mense as "werklikheidsvreemd" ervaar word en dat huwelike tussen mense van dieselfde geslag daarom nie toegelaat behoort te word nie, maak net so min sin as om te argumenteer dat huwelike tussen mense van verskillende rasse "werklikheidsvreemd" is en dus nie toegelaat behoort te word nie. Wat beide argumente gemeen het, is dat dit steun op die vooroordele van die gemeenskap (teen gemengde huwelike of selfde-geslag-huwelike) ter regverdiging van die verbod. In die VSA het die hooggeregshof in *Palmore v Sidoti* 466 US 429 (1984) in die konteks van rassediskriminasie dit duidelik gestel dat persoonlike vooroordele in die gemeenskap nooit diskriminasie kan regverdig nie. Die hof beslis eenparig (per Burger HR):

> "The question ... is whether the reality of private biases and the possible injury they might inflict are permissible considerations ... We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect" (433).

Ter illustrasie kan verder verwys word na die uitspraak van die Amerikaanse hooggeregshof in *Loving v Virginia* 388 US 1 (1966) waar die hof moes beslis of 'n verbod op 'n huwelik tussen lede van verskillende rasse ongrondwetlik is. Die staat Virginia het die verbod op rasgemengde huwelike verdedig deur te argumenteer dat huwelike deur alle regdenkende mense as huwelike tussen lede van dieselfde ras gesien word en aangevoer:

> "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with this arrangements there would be no cause for such marriages" (3).

Alhoewel die oorgrote meerderheid van die Amerikaanse publiek van mening was dat rasgemengde huwelike werklikheidsvreemd is, het die hooggeregshof nie geskroom om te beslis dat die verbod diskriminerend is nie. Die hof het beslis dat die redes wat vir die verbod aangevoer is, op rassistiese vooroordele gebaseer is en dat die gelykheidsklousule in die Amerikaanse Grondwet juis nodig is om minderhede teen sulke vorme van rassisme te beskerm (11). Dieselfde argument kan gebruik word om argumente teen selfde-geslag-huwelike aan te veg en dit is onlangs suksesvol gedoen in die staat Hawaii (sien *Baehr v Lewin* 852 P2d 44 (Hawaii 1993)). Met ander woorde, die beskerming op grond van seksuele georiënteerdheid is juis in die Grondwet ingevoeg om te verhoed dat die "redelike" mense wat homoseksualiteit as "werklikheidsvreemd" ervaar, toegelaat word om teen homoseksuele te diskrimineer (sien Botha en Cameron "Sexual orientation" in Louw (red) *South African Human Rights Yearbook 1994* (1995) 288).

In hierdie opsig het die beskerming op grond van taal en godsdiens en die beskerming op grond van seksuele georiënteerdheid veel in gemeen. Stel jou voor dat 'n wet aangeneem word wat bepaal dat grond slegs beskikbaar gestel mag word vir die bou van Christelike kerke. Dit is ondenkbaar dat iemand sal argumenteer dat hier nie sprake is van diskriminasie nie omdat dit lede van ander gelowe soos Jode, Moslems of Hindoes vry staan om hul geloof te verander. Net so verregaande sal 'n argument wees dat Jode, Moslems en Hindoes inherent minderwaardig of abnormaal is, en dus in beginsel nie op dieselfde beskerming as Christene geregtig is nie. Die wese van 'n grondwetlike staat waarin 'n afdwingbare handves van menseregte in 'n grondwet verskans is, behels onder andere dat minderhede (ook onpopulêre minderhede wat deur die meerderheid van die bevolking geminag word) dieselfde behandeling as die meerderheid verdien. Mense wat hierteen gekant is, is gekant teen die idee van gelykheid voor die reg en ondersteun in wese 'n bestel waar die staat moet kant kies vir sekere belangegroepe terwyl diskriminasie teen ander belangegroepe aanvaarbaar is. So 'n benadering was juis die wese van apartheid en is dus onversoenbaar met ons nuwe staatsbestel.

'n Pleidooi vir die behoud van die wese van die Suid-Afrikaanse huweliksreg is dus onlogies tensy uitdruklik gepleit word vir 'n bestel waarin die huweliksreg nie aan die gelykheidsklousule in die Grondwet onderworpe is nie, soortgelyk aan die pleidooi dat die inheemse reg van grondwetlike jurisdiksie uitgesluit moet word.

4 Gevolgtrekking

Die insluiting van seksuele georiënteerdheid in die lys waarvolgens diskriminasie verbied word, beteken dat die Grondwet uitdruklik erken dat homoseksualiteit nie abnormaal is nie en dat "gay" mans en lesbiërs in die toekoms op

grondwetlike beskerming teen die vooroordele en homofobie van hul landgenote kan aanspraak maak. Die familiereg is juis een van die gebiede in ons reg waar diskriminasie op grond van seksuele georiënteerdheid (en ook geslag en geslagtelikheid) die meeste effek gehad het en steeds het. Indien ons die Grondwet se belofte van gelykheid ernstig opneem, sal ons moet erken dat die "wese" van die familiereg soos dit deur Visser verstaan word, eenvoudig in die slag sal moet bly. Dit verteenwoordig 'n radikale breuk met die verlede waarin die staat sonder om te skroom teen lede van die gemeenskap kon diskrimineer op grond van hul ras, geslag of seksuele georiënteerdheid. Hopelik sal akademici en ander grondwetlike kommentators in die vervolg hulself daarvan weerhou om uitsprake te maak oor aspekte van die Grondwet waarin hul persoonlike vooroordele hul oordeel in die wiele ry.

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EPILEPSY AND MARRIAGE*

1 Introduction

Epilepsy touches on every aspect of the life of a person suffering from that condition. Of all the aspects, family life is probably the most important as it affects his or her happiness and emotions directly.

2 Historical development

Laws governing the marriage of a person with epilepsy and the validity of court testimony were found as early as 2080 BC in the Code of Hammurabi (Penfield and Jasper *Epilepsy and the functional anatomy of the human brain* (1954) 3–4; Gunn *Epileptics in prison* (1977) 1).

In approximately 1196 AD it was stated that mankind would be better served if only healthy and sound people would enter into marriage. Apparently it had become tradition among the Scots by 1536 to castrate men who had transmissible diseases, including epilepsy. A woman with epilepsy was kept away from the company of men, and if she became pregnant, she and the child were buried alive. During the 16th and 17th century people with epilepsy were castrated, not to prevent diseased progeny, but rather as a therapeutic modality; castration was used as such until the end of the 19th century (Temkin *The falling sickness: A history of epilepsy from the Greeks to the beginnings of modern neurology* (1979) 132–133).

In the late 17th century, theologians in Paris denied a woman her request for divorce against her husband who had epilepsy, even though she feared that he might have fathered children with epilepsy. It is unclear whether it was the no-

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tion that epilepsy was a contagious rather than a hereditary disease that was the reason for the annulment or divorce of the marriage of a person with epilepsy. During the early 18th century the medical faculty of Leipzig still had to bring it to the attention of people that epilepsy was not a contagious disease. However, they did not deny that a marriage to a person with epilepsy might harm the health of the other spouse (Temkin 133). In 1757 Swedish laws prohibited a person with epilepsy from marrying, even though epilepsy was connected to a genius of antiquity such as Julius Caesar (Newmark and Penry *Genetics of epilepsy: A review* (1980) 1; Gunn "Medico-legal aspects of epilepsy" in Reynolds and Trimble (eds) *Epilepsy and psychiatry* (1981) 165).

The first "anti-marriage" laws for persons with epilepsy in America were enacted in 1895, in the state of Connecticut (Lennox *Epilepsy and related disorders* II (1960) 981; Middleton, Attwell and Walsh *Epilepsy* (1981) 185; Masland "Psychosocial aspects of epilepsy" in Porter and Morselli (eds) *The epilepsies* (1985) 371). During the next 44 years, 18 other states followed this example, North Carolina being the last in 1939. The others were Delaware, Indiana, Kansas, Michigan, Minnesota, New Jersey, North Dakota, Ohio, Oregon, Pennsylvania, Missouri, Nebraska, New Hampshire, Utah, Virginia, Washington and Wisconsin (Lennox II 982). The laws of these states were similar in certain respects, namely (*idem* 983): none defined epilepsy; none showed that they were aware that the degree of heredity differed widely among people with epilepsy (eg, if a person contracted epilepsy only after a brain lesion, marrying this person would also be a crime, although heredity was not applicable); and none distinguished cases of syncopy, hysteria, and so on, from epilepsy.

In most states it was a crime to fail to make known your condition as a person with epilepsy at the time of marriage. Most states also obliged doctors to report any patient with epilepsy and required all marriage applicants to be examined for epilepsy before a marriage licence was issued; non-compliance with this requirement constituted a crime punishable with fines or imprisonment. In the state of Washington, until 1951, the punishment was a fine of $1 000 and/or imprisonment of up to three years (Lennox II 984).

Some countries previously had laws for the mandatory sterilisation of all people with epilepsy (Masland in Porter and Morselli (eds) 371; Gunn in Reynolds and Trimble (eds) 165; Burden "Social aspects" in Reynolds and Trimble (eds) 301; Lennox II 985; Middleton, Attwell and Walsh 186). This was based on the concept that epilepsy was a hereditary illness. The Nazi regime also published laws for the compulsory sterilisation of persons with epilepsy (Newmark and Penry 1). Most of these laws were later repealed as contrary to the concept of individual freedom and civil rights. In the USA only the state of Delaware still has involuntary sterilisation legislation for persons with epilepsy. This type of sterilisation is restricted to persons who are incompetent to decide for themselves, persons who would probably become pregnant or cause somebody to fall pregnant, and those who would not be able to care for the child. The Delaware Department of Health and Social Services may, at the recommendation of an investigating panel, authorise the sterilisation of any person with epilepsy.

As recently as 1982 it was still a crime under Missouri law for a person to consummate a marriage if he knew that one of the parties had epilepsy. The reason for this was the belief that children would inherit epilepsy, and that people with epilepsy have a low, subnormal intelligence. Persons with epilepsy were included in laws which prohibited marriages between idiots, feebleminded

persons and imbeciles (Epilepsy Foundation of America *The legal rights of persons with epilepsy* (1985) 24A–25, hereinafter cited as EFA).

Nowadays, if a person with epilepsy marries, there is no reason not to have children, unless the mother experiences frequent uncontrolled seizures. If several members of the family have epilepsy, the hereditary risk will be higher, and it will thus be safer for the couple not to have children (Laidlaw and Laidlaw *Epilepsy explained* (1980) 57–58).

3 Epilepsy and annulment of marriage

A question arising in family law is whether the non-disclosure or misrepresentation of epilepsy could constitute a ground for the termination of marriage through annulment.

3 1 USA

In the USA a marriage could, until 1960, be annulled if a spouse fraudulently concealed his or her epilepsy from the other spouse before the marriage took place (Lennox II 984). Section 208 of the Uniform Marriage and Divorce Act (Bureau of National Affairs, Inc *The Family Law Reporter Reference File* (1987) 201:0002) now lays down the instances when a marriage can be declared invalid, which includes *inter alia* consent by force or duress, or fraud involving the essentials of the marriage.

The question is whether the fraudulent concealment of the condition of epilepsy involves the essentials of the marriage. If it does, the marriage can be annulled. If not, the marriage is valid.

3 2 England

In England, a voidable marriage is regarded as valid until one of the parties has it annulled. Until 1970, it was possible for any person to obtain annulment of a marriage within one year of the ceremony if the other person failed to reveal his or her history of epilepsy (Burden in Reynolds and Trimble (eds) 301–302; Seago and Johnson *Cases and materials on family law* (1976) 21). Section 9(1)(b)(iii) of the Matrimonial Causes Act, 1965 (also see Brown *The new divorce laws consolidated* (1970) 29; Seago and Johnson 51) stated that in addition to any other grounds on which a marriage was by law void or voidable, a marriage was also voidable on the ground that either party to the marriage was subject to recurrent attacks of insanity or epilepsy at the time of the marriage. Section 11 provided that the children born of such a marriage were legitimate.

This reason for annulment was repealed by the Matrimonial Act, 1970 and replaced by the Nullity of Marriage Act, 1971 (Cretney *Principles of family law* (1990) 45). The Nullity of Marriage Act was then consolidated in the Matrimonial Causes Act, 1973 which now regulates the law of nullity of a marriage in section 12.

Section 12 of the Matrimonial Causes Act, 1973 (see Cretney 47; Seago and Johnson 29–52; Stone and Bough *Sweet and Maxwell's Family law statutes* (1981) 344–345; Davidson *Family law in a nutshell* (1980) 10–13; Jackson, Turner, Booth, Maple and Caird *Rayden's law and practice in divorce and family matters in all courts* (2) (1979) 2587; Reekie and Tuddenham *Family law and practice* (1990) 100–102; Hoggett and Pearl *The family law and society* (1987) 17; Bromley and Lowe *Bromley's family law* (1987) 82; Collins *Humphrey's notes on matrimonial causes proceeding in county courts and district registries*

(1976) 30–31; Pinder and Pace *Cases and statutes on family law* (1979) 13–14; Levin *Grant and Levin: Family law* (1982) 80–85; Oldham *Blackstone's Statutes on family law* (1990) 86) provides that a marriage is voidable on the following grounds only:

> "(a) that the marriage has not been consummated owing to the incapacity of either party to consummate it;
>
> (b) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate it;
>
> (c) that either party to the marriage did not validly consent to it, whether in consequence of duress, mistake, unsoundness of mind or otherwise;
>
> (d) that at the time of the marriage either party, though capable of giving a valid consent, was suffering (whether continuously or intermittently) from mental disorder within the meaning of the Mental Health Act 1983, of such a kind or to such an extent as to be unfit for marriage;
>
> (e) that at the time of the marriage the respondent was suffering from venereal disease in a communicable form;
>
> (f) that at the time of the marriage the respondent was pregnant by some person other than the petitioner."

These grounds are exhaustive, in other words, there is no other ground on which a decree of nullity can be obtained.

If a party to the marriage did not validly consent to it in terms of section 12(c) because of a mistake which could be an *error in persona* or an *error in negotio*, the marriage is voidable. Omitting to inform your spouse about your epilepsy is neither an *error in persona* nor an *error in negotio*. Since a fraudulent misrepresentation is not mentioned in section 12, the fraudulent misrepresentation of the absence of epilepsy will not affect the validity of the marriage. If, however, the epilepsy led to unsoundness of mind at the time of the marriage in terms of section 12(c), the person with epilepsy did not validly consent to the marriage, and this renders the marriage voidable (Cretney 73; Bromley and Lowe 87–89). Epilepsy will not render the marriage voidable in terms of section 12(d), if either of the parties at the time of the marriage suffered from a mental disorder within the meaning of the Mental Health Act (of 1983). The epilepsy of the person could, however, accompany the mental disorder (Cretney 80; Bromley and Lowe 92–93; Seago and Johnson 52).

3 3 South Africa

In South Africa the first question asked is whether the misrepresentation of the epilepsy of a fiancee may render the engagement voidable.

Misrepresentation with regard to the engagement will occur when one of the parties to the contract makes a false representation to the other concerning his or her epilepsy which, had the other party known the truth, would have resulted either in the engagement not being concluded at all, or being concluded on different terms. A misrepresentation is regarded as material if the misrepresentation itself, whether express or tacit, is of such proportions that it would seriously jeopardise any possibility of achieving a happy and harmonious marriage (Barnard, Cronjé and Olivier *The South African law of persons and family law* (1994) 160). A misrepresentation about epilepsy will be material for this reason. If the misrepresentation is material, the engagement is voidable at the discretion of the misled party. A misrepresentation may take the form of positive action as well as the failure to remove a misconception when the person responsible for

the misrepresentation is aware of its existence, or not disclosing certain facts in circumstances where there is a duty to speak out (*idem* 165). In *Schnaar v Jansen* 1924 NPD 218 the man wanted to call off the engagement after finding out that one of his fiancee's uncles had murdered his wife, that her brother had served a prison sentence for theft and that her uncle had entered into a mixed marriage. The court held that the circumstances did not justify a unilateral repudiation of the engagement, as a man takes the risk of his fiancee's family being unsatisfactory if he gets engaged without having satisfied himself with regard to her family. According to Van den Heever (*Breach of promise and seduction in South African law* (1954) 26), the decision is incorrect as an engagement to marry is a contract of the utmost good faith and a party with a skeleton in his cupboard is obliged to disclose it.

I agree with Van den Heever, and suggest that a person with epilepsy likewise will always have to disclose the epilepsy to his or her fiancee as it will have a definite effect on the requirement of the utmost good faith (*uberrimae fides*).

The next question is whether a misrepresentation about the epilepsy may cause the marriage entered into to be voidable. A voidable marriage is a valid marriage although grounds are present either before or at the time of contracting the marriage, on the basis of which the court may be requested to dissolve the marriage. It affects the status of the parties because they are legally married. A court order dissolving the voidable marriage has retrospective effect, which means that the position after such an order is made is exactly the same as it would have been if there had never been a marriage, except that the children born of such a marriage remain legitimate (s 6 of the Children's Status Act 82 of 1987; Barnard, Cronjé and Olivier 174; Van der Vyver and Joubert *Persone- en familiereg* (1991) 517; Hahlo *The South African law of husband and wife* (1985) 108).

One of the requirements of a valid marriage is *consensus*. Factors that may influence *consensus* and cause a marriage to be voidable are mistake (*error*), misrepresentation, and so on (Joubert "Law of marriage" in Schäfer (ed) *Family law service* (1989) 26; Hahlo 102). A mistake occurs in the legal sense when the parties labour under a mistaken impression. Operative mistakes are, for instance, mistakes with regard to the identity of the other party, and will affect the validity of the marriage. Inoperative mistakes again are mistakes, for instance, with regard to the state of the other party's health (including epilepsy) and do not affect the validity of the marriage (Joubert in Schäfer (ed) 26–27; Voet 24 2 16; Huber *Prael Iur Civ ad D* 24 2 18; *Masekoameng v Masekoameng* 1919 TPD 405; Hahlo 102).

Where one of the parties has thus been mistaken about certain facts pertaining to the personal attributes (qualities) of the other person, without such a misunderstanding having been caused by misrepresentation on the part of the other party, it is known as an inoperative or non-essential mistake (Barnard, Cronjé and Olivier 160). If, therefore, a person has been mistaken about the other's epilepsy, and such misunderstanding was not caused by misrepresentation on the part of the other person, the marriage will be valid.

It is not certain whether a misrepresentation that one does not have epilepsy, which induces a marriage, affects the validity of the marriage, especially where the misrepresentation affects the conception of only one of the parties of the attributes of the other. According to Hahlo (102) the marriage will be unassailable. Ordinary (not fraudulent) concealment of epilepsy will therefore not have

any effect on the validity of the marriage (Joubert in Schäfer (ed) 27; Hahlo 102).

When one of the parties misleads the other prior to the marriage by making untruthful statements, or gives a false impression to the other party by concealing information which should have been made known, and therefore persuades the latter to contract a marriage, the resulting marriage may be annulled if the misrepresentation was of a serious nature. The question arises whether the concealment of epilepsy falls into this category. Thusfar, in our law, only fraudulent concealment of sterility, impotency or pregnancy at the time of the marriage have been regarded as sufficient grounds for the voidability of the marriage (Barnard, Cronjé and Olivier 160; Hahlo 86 103).

Hunt ("Error in the contract of marriage II" 1963 *SALJ* 107) is of the opinion, with regard to fraudulent concealment of sterility, that fraud should not turn the scales to make the marriage voidable, if ordinary concealment has no effect on the validity of the marriage. He furthermore states that it is true that this concealment seems particularly dishonest, but it is no more dishonest or shocking than fraudulent concealment of cancer, insanity or previous prostitution.

Whether the fraudulent concealment of epilepsy will cause a marriage to be voidable, is uncertain. On the one hand, there are decisions in which it was held that fraudulent misrepresentation of one party's conception of the attributes of the other did not justify the setting aside of the marriage (Joubert in Schäfer (ed) 27; *Stander v Stander* 1929 AD 349; *Leighton v Roos* 1955 4 SA 134 (N)). On the other, there are cases in which it was decided that the law will indeed take cognisance of the fraudulent misrepresentation (*Johnson v McIntyre* (1893) 10 SC 318; *Haupt v Haupt* (1897) 14 SC 39 40; *Venter v Venter* 1949 4 SA 123 (W) 131; Joubert in Schäfer (ed) 27). If the latter view is accepted, the requirements for setting aside a juristic act on the grounds of misrepresentation must be present before the validity of the marriage will be affected. This includes a misrepresentation which induced the juristic act of marriage (Joubert in Schäfer (ed) 27. Joubert is of the opinion that fault is not relevant; according to Van der Vyver and Joubert 497 *all* the requirements for misrepresentation must be complied with, including fault). Should the fraudulent misrepresentation of the non-existence of epilepsy induce the other spouse to marry, and this line of thought is followed, it may therefore be (and in my view should be) a reason to set the marriage aside. Epilepsy influences the day-to-day living of people, and should a spouse have entered into a marriage without any knowledge of the epilepsy of the other spouse, he or she should at least have the choice to have his or her marriage declared void should he or she so wish.

4 Summary

The effect of epilepsy on annulment as a way of terminating a marriage was discussed.

In the USA a marriage may be annulled *inter alia* because of fraud involving the essentials of the marriage or consent by force or duress. If a person with epilepsy fraudulently conceals his or her epilepsy, it may be a cause for the annulment of the marriage if this concealment involves the essentials of the marriage.

In England, a marriage is voidable if a person, at the time of the marriage, was suffering from a mental disorder of such a kind as to be unfit for marriage.

Epilepsy is not *per se* a mental disorder and will therefore not be a reason for the annulment of the marriage. Fraudulent misrepresentation of epilepsy will also not affect the validity of the marriage.

In South Africa, a marriage may be annulled due to the fraudulent misrepresentation of epilepsy before marriage, if the misrepresentation was of a serious nature. In our law, only fraudulent concealment of sterility, impotency or pregnancy at the time of marriage have so far been recognised as sufficient grounds for annulment, but these circumstances do not constitute a *numerus clausus*. Fraudulent misrepresentation of epilepsy should be recognised as a ground for annulment, as epilepsy is a serious illness that may seriously affect and disrupt family life. It is only fair towards the future spouse to inform him or her of the condition beforehand.

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MIDDELLIKE AANSPREEKLIKHEID VAN DIE BESOPE MOTORVOERTUIGEIENAAR VIR DIE DELIKTE VAN DIE MOTORVOERTUIGBESTUURDER

1 Probleemstelling

Ons reg aanvaar dat 'n motorvoertuigeienaar aanspreeklik is waar hy iemand (wat nie sy werknemer is nie) toelaat om sy voertuig te bestuur en laasgenoemde nalatig skade veroorsaak (sien Cooper *Motor law* (1987) 361; Neethling, Potgieter en Visser *Deliktereg* (1996) 369). Die basiese vereistes vir hierdie tipe aanspreeklikheid word soos volg aan die hand van *Roman v Pietersen* 1990 3 SA 350 (K) en *Boucher v Du Toit* 1978 3 SA 965 (O) in Neethling, Potgieter en Scott *Case book on the law of delict/Vonnisbundel oor die deliktereg* (1995) 815 uiteengesit:

> "(i) Normaalweg word vereis dat die eienaar die bestuurder moet *versoek* het om die voertuig te bestuur of *toesien* dat hy dit doen – *in casu* word toestemming van die eienaar voldoende geag.
>
> (ii) Gewoonlik word geverg dat die voertuig in die *eienaar* se belang bestuur word – *in casu* is dit genoegsaam dat 'n byna onbenullige, sosiale belang van die eienaar, ondergeskik aan dié van die bestuurder, gedien word.
>
> (iii) Laastens word gewoonweg vereis dat die eienaar 'n *reg van beheer* moet hê oor die manier waarop die voertuig bestuur word – *in casu* is namens die verweerder aangevoer dat hy slegs sodanige reg kan uitoefen indien die bestuur voortgevloei het uit, en deel gevorm het van, die uitvoering van 'n kontraktuele verpligting deur die bestuurder teenoor die eienaar, wat hier ontbreek het. Die hof bevind egter dat die blote feitelike beheer as gevolg van die eienaar se fisiese teenwoordigheid, voldoende is."

Die vraag wat in hierdie bydrae ondersoek word, is of hierdie tipe aanspreeklikheid behoort te geld waar die bestuurder onder die invloed van drank is (of enige ander stof wat 'n narkotiese uitwerking het). Oorweeg die volgende algemene voorbeeld:

X en sy vriendin Y gaan in X se motor na 'n partytjie. X het vooraf besluit dat hy heelwat gaan drink en versoek Y om hom na die tyd by die huis te besorg. Hy gee die sleutels aan Y voordat hy begin drink. Na afloop van die party is X in 'n besope toestand en raak aan die slaap op die agtersitplek van sy motor. Y het niks gedrink nie maar bestuur X se motor op nalatige wyse. Behoort X aanspreeklik te wees vir die skade wat Y in die proses veroorsaak het?

2 Oorsig van relevante beslissings

(a) In *Manickum v Lupke* 1963 2 SA 344 (N) was die feite kortliks soos volg: Die besope eienaar van 'n vragmotor het ene Crouch toegelaat om die vragmotor te bestuur. Die eienaar-passasier het gedurende die rit aan die slaap geraak en hulle was as gevolg van die bestuurder se nalatigheid in 'n botsing betrokke. In appèl bevind die hof dat die eienaar *in casu* middellik aanspreeklik gehou kan word vir die bestuurder se nalatigheid. Regter Caney formuleer die basis vir sy aanspreeklikheid soos volg:

> "Leaving aside the ordinary relationship of master and servant (car owner and his chauffeur, for instance) the owner of a motor vehicle who authorises another to drive it is liable for damage caused by negligent driving on the part of the latter if he, the owner, has the right of control over the manner of his driving. He *prima facie* does have the right if, having authorised the other to drive, he is himself present in the vehicle; indeed, not only has he the right, but he is also under a duty, as owner of the vehicle, to control the manner of its driving if it is being driven on his behalf or his purpose or for those of himself and the driver jointly" (346H).

Hieruit kan 'n mens aflei dat die regter, wat die eienaar se aanspreeklikheid betref, op twee gedagtes hink en in effek 'n tipe "persoonlik-middellike" aanspreeklikheid konstrueer: enersyds word verwys na die eienaar se teenwoordigheid in die voertuig en sy reg en plig om die bestuur daarvan te beheer (persoonlike aanspreeklikheid) maar andersyds word melding gemaak van die belange wat deur die bestuur daarvan gedien word ('n tipe *ratio* vir middellike aanspreeklikheid). 'n Ooglopende punt van kritiek teen die aangehaalde *dictum* is dat dit werklikheidsvreemd is om 'n reg en plig tot beheer deur 'n eienaar-passasier ten aansien van die bestuurder te bevind waar eersgenoemde se algemene verstandelike vermoë tydelik deur alkoholgebruik belemmer word.

(b) In *Du Plessis v Faul* 1985 2 SA 85 (NK) het die eerste verweerder sy motor se sleutels aan 'n vriend, die tweede verweerder, oorhandig vroeg een aand toe hulle saam op pad was na 'n gemeenskaplike vriend se "ramparty". Die aanvanklike rede waarom die eienaar die sleutels aan die vriend gegee het met die vooruitsig dat hy sou terugbestuur, was dat die eienaar nagblind is en daarom moeilik snags bestuur. Die vriende het te veel te drinke gehad. Na 'n stoeiery het die eienaar in die motor geklim en sy bewussyn op die agtersitplek verloor. Die tweede verweerder het hierna op nog 'n plek stilgehou en verder gedrink terwyl die eerste verweerder steeds rustig op die agtersitplek geslaap het. Die bestuurder het nalatig bestuur en was in 'n botsing betrokke. Dit was gemeensaak dat die ongeluk aan sy nalatigheid te wyte was.

Die hof beslis aangaande die aanspreeklikheidsvereistes wat gestel word vir middellike aanspreeklikheid dat–

(a) die "belang"-vereiste nie 'n vermoënsbelang hoef te wees nie maar dat 'n sosiale belang voldoende is om aanspreeklikheid te vestig. Verder is dit voldoende om die rit gedeeltelik in belang van die eienaar te onderneem en dat

sy belang in die rit selfs ondergeskik aan dié van die bestuurder kan wees (sien Scott "Du Plessis v Faul 1985 2 SA 80 (WK)" 1985 *THRHR* 478);

(b) wat die "reg op beheer"-vereiste betref, is dit om beleidsredes geregverdig om die eienaar van 'n motor middellik aanspreeklik te hou waar hy in sy motor teenwoordig is terwyl dit – minstens gedeeltelik – in sy belang bestuur word, omdat hy 'n reg en 'n verpligting het om beheer uit te oefen oor die manier waarop dit bestuur word. Die regter beslis dat die eienaar nie aanspreeklikheid kan ontkom nie deur vrywillige bedwelming soos drankinname, wat hom in 'n toestand plaas wat hom onbekwaam maak om behoorlik beheer uit te oefen oor die manier waarop die bestuurder bestuur; en dat dié geval op grond van beleidsoorwegings analoog aan die *Manickum*-saak benader moet word, waar die eienaar aanspreeklik gehou is vir die nalatigheid van die bestuurder ondanks die feit dat hy geslaap het. Die hof fundeer egter nie sy uitspraak op persoonlike aanspreeklikheid nie maar suiwer op middellike aanspreeklikheid en kom tot die gevolgtrekking dat die motorvoertuigeienaar middellik aanspreeklik gehou kan word. Cooper (*Motor law* 361) is egter van mening dat

> "in *Du Plessis v Faul* the court should have no qualms about the first defendant's [die eienaar se] liability. The first defendant (it is submitted) was liable both personally and vicariously".

Suiwer *de lege lata* beskou, is daar geen fout te vind met die regters in dié twee sake se benadering tot die vestiging van middellike aanspreeklikheid nie, want in beide gevalle het die eienaar aan al die gebruiklike aanspreeklikheidsvereistes voldoen. Dit is egter jammer dat die regters nie alternatiewe aanspreeklikheidsvereistes kon gestel het vir middellike aanspreeklikheid waar die eienaar nie in staat is om behoorlik beheer oor die bestuurder se optrede uit te oefen nie; ook is dit jammer dat die getuienis onvoldoende was vir die regter om die *Du Plessis-geval* van die *Manickum-saak* te kon onderskei. In die loop van sy uitspraak in *Du Plessis* sê regter-president Jacobs:

> "Daar was 'n suggestie aan tweede verweerder in kruisverhoor dat eerste verweerder se vader voor hulle vertrek aan hulle sou gesê het dat indien hulle probleme sou hê hy, die vader, hulle sou kom haal . . . Indien daar sulke getuienis voorgelê was, sou 'n afleiding moontlik gemaak kon word dat eerste verweerder se versoek aan tweede verweerder om te bestuur onderhewig daaraan was dat, indien tweede verweerder se bestuursvermoë weens die inname van drank ernstig aangetas sou word, die toestemming of versoek om te bestuur beëindig sou word. Nog eerste verweerder nog sy vader is egter geroep om te getuig dat daar wel so 'n versoek was" (94C–E).

Die regter se opmerking hou moontlik in dat hy tot 'n ander gevolgtrekking kon gekom het as daar genoegsame getuienis was om aan te toon dat die versoek aan die bestuurder om te bestuur onderworpe was aan 'n ontbindende voorwaarde. Die gevolg sou wees dat die eienaar nie middellik aanspreeklik gehou sal word as die onsekere toekomstige gebeurtenis wel sou plaasvind nie, soos wanneer die eienaar dermate beskonke of bedwelm is dat hy nie behoorlik beheer oor die bestuurder se optrede kan uitoefen nie.

3 Algemene evaluasie en aanbevelings

Die huidige regsposisie herinner aan iets uit die tydperk van *versari in re illicita*. Die argument dat 'n eienaar nie sy verantwoordelikheid kan ontkom deur te slaap nie (*Du Plessis v Faul supra* 94F met verwysing na *Manickum v Lupke supra*), stel nie 'n aanvaarbare oplossing vir die probleem daar nie. 'n Motoreienaar wat slaap of só besope is dat hy nie kan bestuur nie, is nie in die posisie om vir die bestuurder te sê dat hy die stuur aan hom, die eienaar, moet afstaan

nie. In *Samson v Aitchison* 1912 AC 844 formuleer Lord Atkinson die basis vir middellike aanspreeklikheid soos volg:

> "If an injury happen to the equipage while it is being driven, the owner is the sufferer. In order to protect his own property if, in his opinion, the necessity arises, he must be able to say to the driver, 'Do this' or 'Do not do that'. The driver would have to obey, and if he did not the owner in possession would compel him to give up the reins or the steering wheel" (849).

Dit is duidelik dat die eienaar bewus moet wees dat die bestuurder besig is om onverantwoordelik te bestuur. Die kopstuk van *Ringrose v Hunter* 1933 NPD 442 lui soos volg:

> "When a motorcar is being driven by the owner's friend and the owner is in the car, the owner is in control, and *in the absence of proof that he has abandoned his rights and duties of control by contract or otherwise* he is liable as principal for damage caused by the negligence of the driver" (my kursivering).

En in *Slabbert v Holland* 1936 NPD 238 merk appèlregter Carlisle op:

> "[The owner] necessarily has the power and the right of controlling the manner in which the car was to be driven unless he had in some way contracted himself out of that right or *is shown by conclusive evidence to have in some way abandoned that right*" (243; my kursivering).

Dié aanhalings is vatbaar vir die volgende interpretasie: In geval waar die eienaar uitdruklik of stilswyend afstand gedoen het van sy reg en plig om beheer oor die bestuurder uit te oefen – soos wanneer hy slaap of te besope is om te bestuur of verstandige bestuursaanwysings te kan gee – kan hy nie middellik aanspreeklik gehou word vir die bestuurder se nalatige optrede nie. In so 'n geval is een van die basiese elemente vir "middellike" aanspreeklikheid in derglike gevalle duidelik afwesig. Die positiefregtelike vereiste betreffende die reg om beheer uit te oefen, behoort verstaan te word as 'n reg van beheer deur 'n eienaar-passasier wat *regtens bevoeg is om aldus beheer uit te oefen.* Optrede soos die inname van alkohol (of enige ander middel met 'n soortgelyke uitwerking) of om aan die slaap te raak, is *in casu* aanduidend van 'n afstanddoening van 'n reg tot beheer. Die eienaar-passasier kan natuurlik wel in bepaalde gevalle persoonlik deliktuele aanspreeklikheid opdoen, soos waar hy in die een of ander opsig nalatig opgetree het in sy optrede ten opsigte van die bestuurder en so self blaamwaardig is met betrekking tot die uiteindelike skade.

4 Samevatting en slotgedagtes

Dit is tans (ongelukkig) nog goeie reg dat die eienaar van 'n voertuig (soos X in die voorbeeld in par 1 genoem), wat omrede hyself ongeskik is om te bestuur, die sleutels van sy voertuig aan 'n ander persoon toevertrou, middellik aanspreeklik gehou word vir die bestuurder se nalatigheid. Op grond van vroeëre uitsprake behoort dit egter steeds moontlik te wees om te argumenteer dat die eienaar middellike aanspreeklikheid kan ontkom in 'n geval waar daar genoegsame getuienis is om die afleiding te regverdig dat die eienaar van sy reg op beheer oor die bestuurder se optrede afstand gedoen het – soos waar hy slaap of te besope is om beheer oor die bestuurder uit te oefen. Dié voorstel benadeel ook nie noodwendig die persoon wat skade ly as gevolg van die bestuurder se nalatigheid nie omdat hy steeds die bestuurder deliktueel aanspreeklik kan hou. Die voordeel van die voorgestelde benadering is dat dit bestuurders wat inkompetent is om self te bestuur, sal aanmoedig om iemand anders met die stuur van die voertuig te vertrou wanneer hyself nie kan bestuur nie, terwyl die huidige regsposisie eerder dronk bestuurders aanmoedig om self te bestuur:

(a) In 'n geval waar die eienaar van 'n voertuig die motor sou bestuur terwyl hy onder die invloed van drank is en 'n ongeluk as gevolg van sy nalatigheid veroorsaak, word hy natuurlik deliktueel aanspreeklik gehou vir die benadeelde se skade (sien ook Visser "Vrywillige dronkenskap en deliktuele aanspreeklikheid in die lig van *S v Chretien* 1981 1 SA 1097 (A)" 1981 *THRHR* 423).

(b) Sou die eienaar van 'n voertuig die sleutels daarvan aan 'n ander oorhandig uit vrees dat hyself 'n botsing kan veroorsaak as gevolg van drankinname, word hy middellik aanspreeklik gehou vir die nalatigheid van die bestuurder omdat hy 'n reg en 'n plig het om beheer oor die bestuurder se optrede uit te oefen.

'n Alternatief sou natuurlik wees dat daar ander aanspreeklikheidsvereistes gestel word, soos in die volgende gevalle:

(a) X ly aan 'n siekte. Hy neem medisyne met 'n narkotiese uitwerking. Dit blyk egter dat X desnieteenstaande dringend 'n dokter moet gaan besoek. Net voor X in 'n toestand van semi-bewusteloosheid verval, vra hy sy vriend Y om te bestuur. As gevolg van Y se nalatigheid is hulle in 'n botsing betrokke. Waarom sou X in hierdie geval aanspreeklik gehou moet word? Sy geval het nie die afkeurenswaardigheid van dronkenskap nie.

(b) X is 15 jaar oud en erf 'n antieke sportmotor. X het geen kennis van voertuie nie. X vra haar vriendin Y, 'n ervare bestuurder, om haar na 'n plek te neem met die sportmotor en hulle is as gevolg van Y se nalatigheid in 'n botsing betrokke. Watter reg het X as eienaar om beheer oor Y se optrede uit te oefen? Aangesien X geen kennis van motorvoertuie het nie, sou dit tog belaglik wees om te veronderstel dat sy enige reg van beheer kan hê. Dieselfde redenasie sou ook gevolg kon word in 'n geval waar die eienaar geesteskrank is, en derhalwe ook nie beheer kan uitoefen nie.

Dit is duidelik dat daar op hierdie gebied van ons deliktereg 'n behoefte bestaan aan die invoer van nuwe beginsels ten einde praktiese situasies beter te kan hanteer (vgl ook Gerber "Middellike aanspreeklikheid van die motorvoertuigeienaar: Terugkeer na die tradisionele beskouing?" 1995 *THRHR* 337 ev, veral 340).

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VONNISSE

VERPANDING VAN VORDERINGSREGTE*

Twiggs v Millman 1994 1 SA 458 (K); Millman v Twiggs 1995 3 SA 674 (A)

1 Inleiding

Verpanding van vorderingsregte vind plaas waar 'n hoofskuldenaar 'n vorderingsreg teen sy/haar skuldenaar (ook derdeskuldenaar genoem om hom/haar van die hoofskuldenaar te onderskei) aanwend om betaling van die hoofskuld teenoor die hoofskuldeiser te verseker. Die hoofskuldenaar vestig 'n pandreg (saaklike reg) ten gunste van die hoofskuldeiser met die vorderingsreg as pandobjek. By die vasstelling van die regsbeginsels wat by die verpanding van vorderingsregte moet geld, kan as uitgangspunt die standpunt ingeneem word dat die reëls wat by die verpanding van liggaamlike sake (saakpand) geld sover moontlik ook by die verpanding van vorderingsregte (vorderingspand) toepassing vind. Die andersoortigheid van die pandobjek by 'n vorderingspand noodsaak egter bepaalde aanpassings. Die Duitse wetboek wat die verpanding van vorderingsregte as uitsondering erken (§ 1273–1296 *BGB*), het dit dan ook uitdruklik gestel dat die algemene beginsels van pandreg, sover doenlik, toepassing vind (§ 1273(2)), maar dan ook die spesifieke beginsels wat by die verpanding van vorderingsregte geld uitdruklik in die wetboek vasgelê.

Ten spyte van teoretici se besware teen verpanding van vorderingsregte is sessie *in securitatem debiti* in die Suid-Afrikaanse reg in verskeie sake reeds as 'n verpanding van vorderingsregte geïnterpreteer. Vroeër het die meeste sake oor dié onderwerp oor die regsposisie van die partye tot 'n sekerheidsessie by insolvensie gehandel. Dit het die howe genoodsaak om die aard van sekerheidsessies met spesifieke verwysing na insolvensie te bepaal. Vanweë verskeie oorwegings, wat hoofsaaklik met insolvensie verband hou, is beslis dat sodanige sessies op 'n verpanding neerkom en dat pandregbeginsels die regsfiguur beheer. Gevolglik is beslis dat die pandgewer die *dominium* (eiendomsreg) behou en dat die pandnemer 'n beperkte saaklike reg, te wete 'n saaklike sekerheidsreg verkry. By insolvensie word die partye se regsposisie deur die Insolvensiewet 24 van 1936 gereël. In die meeste uitsprake is gewone saakpand-beginsels direk op 'n vorderingspand toegepas. Aspekte van 'n vorderingspand, soos voldoening aan die publisiteitsvereiste, die rol van pandrypheid en die wyse van tegeldemaking wat

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direkte toepassing bemoeilik, het, vreemd genoeg, nog in baie min sake ter sprake gekom. In die laaste tyd het veral die vraag na wie *locus standi* hangende die bestaan van die pandreg het egter ook in geskil gekom en tot uiteenlopende oplossings aanleiding gegee (sien bv *Ovland Management (Tvl) (Pty) Ltd v Pretprin (Pty) Ltd* 1995 3 SA 276 (N); *Coopers & Lybrand v Bryant* 1995 3 SA 751 (A); *Standard General Insurance Co Ltd v SA Brake CC* 1995 3 SA 806 (A)).

Direkte toepassing van saakpand-beginsels in die pas genoemde gevalle is moeilik en dit noodsaak analoë toepassing van daardie beginsels. Analoë toepassing verg egter vindingryke en soms ingrypende interpretasie van die howe. As gevolg hiervan moet die aangeleentheid na my mening eerder statutêr gereël word, soos wat die Duitsers (§ 1273–1296 *BGB*), die Nederlanders (a 227–258, en in die besonder a 239 *BW*) en die Belge (a 275 *BW*) gedoen het. In die afwesigheid van soortgelyke wetgewing is die Suid-Afrikaanse howe egter op direkte toepassing van saakpand-beginsels aangewese en, waar die aard van die vorderingspand dit noodsaak, op analoë toepassing ten einde die andersoortigheid van die pandobjek by 'n vorderingspand te akkommodeer. Suksesvolle implementering van analoë toepassing verg suiwer begrip van die saakpandregsbeginsels en hulle onderskeie funksies.

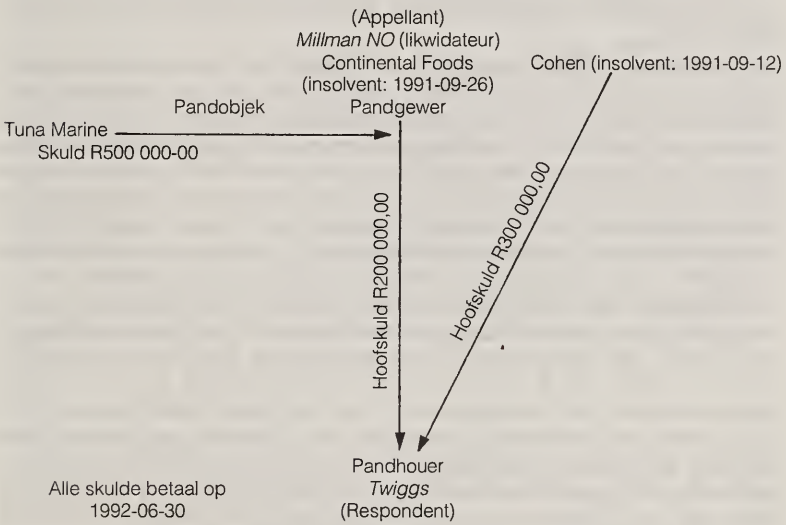
Ek beoog om in hierdie bespreking twee onlangse uitsprake te ontleed, naamlik *Twiggs v Millman* en die daaropvolgende appèlhofuitspraak in *Millman v Twiggs*. In beide uitsprake kom interessante aspekte van sessie, van die verpanding van vorderingsregte, van die reg insake saaklike sekerheid en die insolvensiereg na vore. Beide sake illustreer duidelik die probleme wat kan ontstaan wanneer die beginsels van saakpand en insolvensie, wat op die verpanding van liggaamlike sake afgestem is, sonder meer op die verpanding van vorderingsregte toegepas word. In albei uitsprake kom die hof tot dieselfde korrekte bevinding. Ek sal die twee beslissings egter afsonderlik bespreek omdat elkeen verskillende aspekte van bogenoemde regsfigure aanspreek of na vore bring. Voorts sal ek op die verpandingsaspek van die uitsprake konsentreer.

2 Feite

Die vereenvoudigde feite van die saak is soos volg: Continental Foods (hoofskuldenaar en pandgewer) het R200 000 aan Twiggs (hoofskuldeiser en pandnemer) geskuld en Cohen ('n ander hoofskuldenaar) het R300 000 aan Twiggs geskuld. In Maart 1991 het Continental Foods 'n vorderingsreg van R500 000 teen Tuna Marine (derdeskuldenaar) as sekerheid vir terugbetaling van sy eie skuld en dié van Cohen aan Twiggs "gesedeer". Cohen is op 12 September 1991 finaal gesekwestreer en Continental Foods op 26 September 1991 finaal gelikwideer. Twiggs het 'n versekerde eis van R200 000 ten opsigte van Continental Foods se skuld bewys en Millman (die likwidateur van Continental Foods se boedel) het die vorderingsreg as sodanig aanvaar en 'n versekerde dividend aan Twiggs betaal. Millman weier egter om te erken dat Twiggs geregtig is om op dieselfde wyse ten opsigte van die verdere eis van R300 000 teen Cohen behandel te word.

Twiggs het in die Kaapse Provinsiale Afdeling van die hooggeregshof om 'n verklaring van regte aansoek gedoen. Terwyl die aansoek hangende was, het dit onder Twiggs se aandag gekom dat Tuna Marine die volle skuld aan Millman betaal het. Regter Conradie het in die hof *a quo* bevind dat betaling op 30 Junie 1992 plaasgevind het, die betaaldatum van die skuld, maar appèlregter Hefer

meen dat dit nie uit die stukke blyk op watter datum betaling gemaak is nie en ook nie waarom betaling aan Millman geskied het nie ten spyte van die kennisgewing aan Tuna Marine van die bestaan van die sessie (pandreg). Die hof *a quo* het 'n bevel toegestaan dat Twiggs op betaling van die R300 000 geregtig is vanweë die feit dat hy 'n versekerde skuldeiser was. Hierteen appelleer Millman maar die appèlafdeling van die hooggeregshof bevind by monde van appèlregter Hefer dat die hof *a quo* tereg bevind het dat Twiggs geregtig was om as versekerde skuldeiser beskou te word.



3 Ontleding uitspraak hof *a quo*

3 1 Regspunte aangeroer en bevinding

3 1 1 Verpanding deur pandgewer vir ander se skuld (461G–462A)

Die beginsel dat 'n pandgewer sy saak in pand kan gee om die skuld van iemand anders te dek, word bevestig en op die feite toegepas. Die probleem wat by die toepassing van hierdie beginsel ontstaan, is dat artikels 44 en 83 van die Insolvensiewet 24 van 1936 nie op die pandhouer ten aansien van die R300 000 toepassing vind nie, aangesien hy nie 'n vorderingsreg teen die insolvente boedel het nie en gevolglik nie 'n versekerde skuldeiser van die boedel is nie (sien bespreking hieronder by 3 1 3).

3 1 2 Verdubbeling van vorderingsreg (462B–F)

Dit is 'n beginsel van die sessiereg dat die posisie van die skuldenaar nie deur die sessie verswaar mag word nie. Verdubbeling van eise teen die skuldenaar word as een van die gevalle van sodanige verswaring beskou. Gevolglik word die sessie ongeldig geag behalwe waar die skuldenaar sy toestemming tot die sessie verleen het.

Millman se advokate het aangevoer dat die sessie op 'n verdubbeling van die vorderingsreg neergekom het. Daar is op verdubbeling gesteun aangesien geargumenteer is dat as Cohen sy skuld aan Twiggs sou betaal, sou die R300 000-

gedeelte van die vorderingsreg na Continental Foods terugval en dan sou Tuna Marine (die derdeskuldenaar) teen twee skuldeisers te staan kom.

Die hof aanvaar die advokate se argument dat die geldigheid van sodanige sessies afhang van die vraag of die sessie nadeel vir die skuldenaar inhou, maar bevind dat daar in die betrokke feitestel geen nadeel vir die skuldenaar uit die sessie kon volg nie. Voorts bevind die regter ook dat die skuldenaar in elk geval tot die verdubbeling toegestem het en dat die sessie dus geldig was.

3 1 3 Toepaslikheid van artikels 44(1) en 83 van die Insolvensiewet 24 van 1936 (464F–467E)

Daar is namens Millman aangevoer dat Twiggs nie ingevolge bogenoemde artikels ten opsigte van die R300 000 'n skuldeiser van die insolvente boedel van Continental Foods is nie. In 'n duidelike poging om Twiggs tegemoet te kom, spreek regter Conradie die mening uit dat die enigste manier waarop 'n vorderingsreg vir Twiggs teen die boedel van Continental Foods gekonstrueer kan word, is as daar 'n verpligting aan die kant van Continental Foods bestaan het om nie betaling van Tuna Marine te ontvang nie. Na 'n lang en redelik onduidelike argument waarby die rol van kennisgewing van die sessie aan die skuldenaar ook betrek word, bevind regter Conradie dat Millman die opbrengs van die vorderingsreg in trust hou. Sonder om die grondslag van die trustverhouding te bespreek of aan te dui dat Twiggs op grond daarvan 'n skuldeiser van die insolvente boedel geword het, bevind die regter dan dat "[he] does not hold the proceeds in terms of s 83 of the Act, that is common cause, *but he is holding them nevertheless and something must be done with them*" (466F) (my kursivering). Sonder om dan eintlik die regsgrond vir sy beslissing aan te toon, beslis die regter dat Twiggs op die R300 000 sou kon aanspraak maak indien hy as versekerde skuldeiser behandel was, soos die regter meen moes gebeur het. Hy beslis egter dat Twiggs nie noodwendig op die volle bedrag van R300 000 aanspraak kan maak nie en laat die vasstelling van die kwantum na.

3 2 Evaluering van uitspraak

3 2 1 Rol van kennisgewing van sessie aan skuldenaar (465C–F)

In sy poging om 'n moontlike vorderingsreg ten gunste van Twiggs teen die insolvente boedel te konstrueer, betrek regter Conradie die rol van kennisgewing van die sessie aan die skuldenaar. Hy ontleed die rol wat kennisgewing by algehele sessies speel en maak in die proses uitlatings oor die effek van betaling aan die sedent deur die onkundige skuldenaar wat ernstig onder verdenking staan, maar wat gelukkig *obiter* is en in elk geval nie op die onderhawige feitestel ter sake nie: Dit blyk byvoorbeeld uit appèlregter Hefer se uitspraak dat Tuna Marine wel kennis van die sessie gedra het toe hy aan Millman betaal het (677G–H); dus kon die vraag na die posisie van die onkundige skuldenaar wat aan die sedent betaal nie ter sprake kom nie. Die skuldenaar wat, ten spyte daarvan dat hy van die sessie kennis dra, aan die sedent betaal, word nie deur sodanige betaling bevry nie. Die sessionaris kan dus nog steeds betaling van die skuld van hom eis. Die regter verwerp die gedagte dat die sessionaris op grond van ongeregverdigde verryking van die sedent kan eis (omdat die sedent nie ten koste van die sessionaris nie maar ten koste van die skuldenaar verryk is) (465D–E). Dit wil voorkom of die regter van mening is dat die sessionaris hom in dié omstandigheid slegs tot die skuldenaar kan wend. Hy meen dat die sessionaris, in die afwesigheid van bedrog, nóg 'n vorderingsreg nóg 'n interdik

teen die sedent het (465E–F). Ek stem saam met die regter dat daar nie direkte gesag vir die volgende argument bestaan nie, maar ek sou tog wou argumenteer dat die sedent deur betaling van die skuldenaar te ontvang hom nie alleen aan bedrog nie maar ook aan kontrakbreuk skuldig maak. Is dit nie die bedoeling van die partye in die verbintenisskeppende ooreenkoms wat die sessie voorafgaan, dat die sedent nie verdere handelinge ten opsigte van die oorgedraagde vorderingsreg sal aangaan nie? Is dit nie ten minste bedrog as die sedent, wetende dat hy nie meer skuldeiser is nie, betaling van die skuldenaar ontvang nie? Hierdie argument sal die sessionaris se posisie in die onderhawige feitestel in elk geval nie verbeter nie aangesien betaling aan die likwidateur geskied het en nie aan die sedent self nie. Voorts kan Twiggs ook slegs as versekerde skuldeiser van die insolvente boedel kwalifiseer as die sekuriteit (saaklike sekerheidsreg) aksessoor is aan die eis teen die insolvente boedel. (Sien veral a 83(10): ". . . is die skuldeiser geregtig op betaling, uit daardie opbrengs, van sy preferente vordering as daardie vordering volgens voorskrif van artikel vier en veertig bewys en toegelaat is en die Meester van oordeel is dat die vordering inderdaad deur die aldus tegeldegemaakte goed verseker was". A 44(4) maak dit ook duidelik dat die sekerheid op die betrokke eis betrekking moet hê: ". . . en as die skuldeiser in besit van sekuriteit *daarvoor* is, die aard en besonderhede van daardie sekuriteit . . .".) In die onderhawige geval was dit nooit Continental Foods, Twiggs of Cohen se bedoeling dat die vorderingsreg teen Tuna Marine ter versekering van enige ander skuld as dié van Cohen aan Twiggs sou dien nie. Hierdie argument van Millman se advokate kon hulle dus niks verder bring nie.

3 2 2 Aard van betrokke sessie

Twiggs het toegegee dat hy op advies van sy regsadviseurs aanvaar dat pandregbeginsels op 'n sessie *in securitatem debiti* toegepas moet word en dat die trustee ingevolge die gemenereg beheer oor die eiendom van die insolvent moet neem (466C–D). Terloops kan vermeld word dat Twiggs se advokate na my mening met verwysing na byvoorbeeld *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 1 SA 77 (A) 87G–H en *Incledon (Welkom) (Pty) Ltd v QwaQwa DC Ltd* 1990 4 SA 798 (A) eerder moes geargumenteer het dat hierdie 'n algehele sekerheidsessie was en dat Tuna Marine dus aan Twiggs as sessionaris moes betaal het en nie aan die sedent nie. Tuna Marine het immers kennis van die sessie gedra. Volgens die algehele sekerheidsessie konstruksie sou Twiggs dus reghebbende geword het en sou die vorderingsreg geheel en al buite die boedel van Continental Foods geval het. Al wat Continental Foods (eintlik Millman as likwidateur) dan teen Twiggs sou gehad het, was 'n vorderingsreg (voortspruitend uit die *pactum fiduciae*) vir terugsessie (indien die hoofskuld betaal was) of oorbetaling van die oorskot nadat Twiggs se eis uit die opbrengs van die vorderingsreg teen Tuna Marine bevredig was. Hierdie aspek van die aangeleentheid val egter buite die oogmerk van hierdie bespreking en sal nie hier verder gevoer word nie (sien verder Scott *The law of cession* (1991) par 12.2.2).

In sy behandeling van die rol van kennisgewing, het die regter geen aandag geskenk aan die feit dat die onderhawige "sessie" op 'n verpanding van vorderingsregte neerkom nie en dat kennisgewing in sodanige geval moontlik 'n ander rol speel as in die geval van 'n gewone sessie. Hy ondersoek dus nie die publisiteitsfunksie van kennisgewing by die vestiging van 'n pandreg op vorderingsregte nie (sien bv die hantering van hierdie vereiste in *Sandilands v Sandilands' Trustee and Paul* 1913 CPD 632 635–636). Dit wil voorkom of die regter die mening toegedaan is dat die regsbeginsels wat op volkome sessies toepassing

vind ook hier aanwending vind. Nadat regter Conradie eintlik deurgaans van die "sessie", die "sedent" en die "sessionaris" gepraat het, beslis hy, met verwysing na die toonaangewende sake oor hierdie onderwerp (466D–F), dat die regsadviseurs se advies aan Twiggs korrek was. Hy aanvaar dus dat pandregbeginsels toepassing vind en beskou dan klaarblyklik dat die volgende stelling 'n noodwendige toepassing van daardie beginsels op die onderhawige probleem is:

> "I think, therefore, that it is correct, as Mr *Kuschke* for the applicant (Twiggs) has suggested, that the first respondent (Millman) is holding the proceeds of the payment in trust. He does not hold the proceeds in terms of s 83 of the Act, that is common cause, but he is holding them nevertheless and something must be done with them" (466F–G).

Sonder om dus die regsgrond daarvoor aan te toon, bevind die regter eenvoudig dat Twiggs 'n versekerde skuldeiser is wat moontlik selfs tot die likwidasiekoste moet bydra. Laasgenoemde afleiding maak ek uit die feit dat hy nie die volle bedrag van R300 000 aan hom toeken nie. Hy het aftrekking van Twiggs se bydrae tot dié koste moontlik in gedagte.

3 2 3 Probleme met toepassing van saakpand-beginsels

Hierdie uitspraak is 'n goeie illustrasie van die probleme wat kan ontstaan indien die beginsels wat op 'n bepaalde regsfiguur, naamlik die skepping van 'n saaklike sekerheidsreg ten opsigte van liggaamlike sake (verpanding) van toepassing is, op 'n verpanding van vorderingsregte (onliggaamlike sake) toegepas moet word. Dit illustreer dat die howe nie rekening hou nie met die andersoortigheid van die pandobjek by 'n vorderingspand en die invloed daarvan op die toepaslikheid van saakpand-beginsels. Analoë toepassing van saakpand-beginsels op 'n vorderingspand noodsaak vindingryke regskepping van die howe en die ingrypende aard van sodanige regspreking val waarskynlik buite regters se sienings van wat hulle taak is. Die hantering van die volgende aspekte van die verpanding van vorderingsregte in die uitspraak verdien aandag:

Terminologie Die regter maak feitlik tot aan die einde van die uitspraak van die terme "sessie", "sedent" en "sessionaris" gebruik. Sodanige terminologie moet vermy word waar die aard van die sekerheidstelling 'n verpanding is. Terme soos "verpanding", "pandgewer" en "pandhouer" moet eerder gebruik word. Dit maak die bedoeling van die partye duideliker en laat alle betrokkenes meer bewustelik aandag gee aan die regsbeginsels wat toepassing vind op die regshandeling waarmee hulle besig is.

Vestiging van pandreg In die betrokke saak en in die meeste sake (behalwe *Sandilands v Sandilands' Trustee and Paul supra*) wat oor die verpanding van vorderingsregte handel, word geen melding gemaak van die vereistes wat vir die vestiging van 'n vorderingspand geld nie. By 'n saakpand word 'n sekerheidsooreenkoms en fisiese lewering van die saak vereis. Die fisiese oorhandiging van die saak aan die pandnemer is noodsaaklik in die Suid-Afrikaanse reg aangesien dit neerkom op voldoening aan die publisiteitsvereiste by die vestiging van saaklike regte. By 'n vorderingspand is sodanige fisiese oorhandiging nie moontlik nie maar daar moet nietemin aan die publisiteitsvereiste voldoen word (oor die rol en funksie van die publisiteitsvereiste by die vestiging van saaklike regte en insolvensie, sien Sonnekus "Sekerheidsregte – 'n nuwe rigting?" 1983 *TSAR* 97; "Die notariële verband, 'n bekostigbare figuur teen heimlike sekerheidstelling vir 'n nuwe Suid-Afrika?" 1993 *TSAR* 117). In *Sandilands v Sandilands' Trustee and Paul supra* 635–636 het die hof dan ook kennisgewing as

voldoening aan die vereiste beskou. Dit is in ooreenstemming met die Duitse reg (sien § 1280 *BGB*). Deur middel van die kennisgewing word die skuldenaar ingelig oor die bestaan van die pandreg en die pandgewer se beheer oor die vorderingsreg word in 'n groot mate aan bande gelê (sien Sonnekus 1983 *TSAR* 978 en 1993 *TSAR* 110 se bespreking van die rol van publisiteit).

Effek van pandgewer se insolvensie by pandreg Drie aspekte van die effek van insolvensie by pandreg moet hier onder oë geneem word:

(a) Die effek van die pandgewer se insolvensie op 'n pandhouer waar die pandhouer 'n saak hou as sekerheid vir die nakoming van die pandgewer se skuld teenoor die pandhouer Die trustee (ek verwys na trustee, alhoewel die onderhawige geval met 'n likwidateur te make het) moet die boedelbates in beheer neem. Dit sluit in dat die trustee vorderingsregte van die boedel moet invorder. Die trustee kan dus 'n pandsaak van die pandhouer vorder en dit as boedelbate te gelde maak (met inagneming van die pandhouer se regte as versekerde skuldeiser) of die pandhouer kan self ingevolge artikel 83 die pandsaak realiseer en die opbrengs aan die trustee betaal. Ingevolge artikel 83(10) kan hy dan op betaling van sy voorkeureis aanspraak maak mits hy sy eis ingevolge artikel 44 van die Insolvensiewet 24 van 1936 teen die insolvente boedel bewys het. Die normale beginsels van die saaklike sekerheidsreg en insolvensie vind dus toepassing.

(b) Die effek van die pandgewer se insolvensie op die pandhouer waar die pandhouer 'n saak van die pandgewer as sekerheid hou vir die nakoming van iemand anders se skuld teenoor die pandhouer Uit bogenoemde bespreking behoort dit duidelik te wees dat die pandhouer hier nie van artikel 83 gebruik kan maak nie aangesien hy nie 'n skuldeiser van die boedel is nie. As gevolg van die bepalings van artikels 44(4) en 83(10) kan hy nie self ingevolge artikel 83(1) die pandsaak realiseer nie. Die gemenereg moet dus toepassing vind (sien die bespreking hieronder).

(c) Die effek van die pandgewer se insolvensie op die pandhouer waar die pandhouer 'n vorderingsreg (vorderingspand) van die pandgewer as sekerheid hou vir die nakoming van die pandgewer se skuld teenoor die pandhouer Indien die effek van die vestiging van 'n vorderingspand bepaal moet word, blyk dit al gou dat die posisie hier meer kompleks is as by 'n saakpand omdat die realisasie van 'n saakpand nie aan prestasie deur 'n derde (die derdeskuldenaar) gekoppel is nie.

By 'n vorderingspand is "eiendomsreg" in die insolvente boedel en *quasi*-beheer van die pandobjek by die pandhouer. Die aard van die pandobjek noop 'n mens onmiddellik tot die besef dat die normale prosedure wat in die insolvensiereg vir tegeldemaking voorgeskryf word alleen deur analoë toepassing van die beginsels in hierdie geval gevolg kan word. Waar die pandhouer self die pandobjek wil realiseer, behoort daar nie probleme te wees nie. Hy kan hom op artikel 83(8)(c) en 83(10) van die Insolvensiewet 24 van 1936 beroep. Die trustee moet sy toestemming tot die wyse van realisasie verleen wat myns insiens inhou dat die pandhouer die vorderingsreg op 'n eksekusieverkoping kan verkoop of, 'n geskikter wyse van realisering by vorderingsregte, deur betaling van die skuldenaar te verg.

Probleme kan egter ontstaan waar die trustee van sy vindikasiebevoegdheid wil gebruik maak ten einde hom in staat te stel om self die bate te gelde te maak. Die skuldenaar weet dat daar 'n pandreg ten opsigte van die vorderingsreg

bestaan en dat hy terwyl die pandreg bestaan nie aan die pandgewer (of die trustee) kan betaal nie. Die "*quasi*"-beheer is immers by die pandhouer en die pandhouer moet dit eers aan die trustee oordra ten einde hom in staat te stel om die pandobjek te realiseer. Dit wil my dus voorkom of die pandhouer sy medewerking (byvoorbeeld deur kennis of opdrag aan die skuldenaar te gee dat hy aan die trustee moet betaal) sal moet verleen voordat die skuldenaar verplig sal wees om aan die trustee te betaal. Daar sou moontlik geargumenteer kan word dat dit wel 'n vorm van realisasie is wat nie uitdruklik deur die wet vermeld word nie maar wat by wyse van analoë toepassing by 'n vorderingspand toepassing vind. Dit kan egter nie beoordeel word met verwysing na die gewone sessiebeginsels wat by betaling deur die skuldenaar aan die sedent geld nie aangesien dit hier nie oor die vraag na bevrydende betaling aan die skuldeiser gaan nie, maar eerder oor die vraag of die skuldenaar wat weet van die bestaan van die pandreg 'n betaling aan die trustee kan maak sonder dat hy deur die pandhouer daartoe gemagtig is en dat dit nog as realisasie van 'n boedelbate ingevolge die insolvensiereg beskou kan word. Die antwoord is nóg in saakpandbeginsels nóg in die insolvensiereg te vind.

Uit bogenoemde blyk die valstrikke waarin 'n mens kan beland as saakpandbeginsels op 'n vorderingspand toegepas moet word. Die effek van die verdere kompliserende faktor in die onderhawige feitestel, naamlik die feit dat die pandgewer 'n saaklike sekerheidsreg ten gunste van die pandhouer geskep het vir iemand anders se skuld sal hieronder by die bespreking van die appèlhofuitspraak aandag geniet. Die effek van die feit dat die skuldenaar in die onderhawige feitestel ook reeds sonder medewerking van die pandhouer aan die trustee betaal het, sal ook later aangespreek word.

4 Ontleding appèlhofuitspraak

4 1 Regspunte aangeroer en bevinding

4 1 1 Aard van sekerheidsessie (676H–I)

Met verwysing na die toonaangewende sake waarin sekerheidsessies as 'n verpanding gekonstrueer word, bevind appèlregter Hefer dat saakpand-beginsels ook hier toegepas moet word. Die hof skakel 'n vorderingspand volkome aan 'n saakpand gelyk en beslis soos volg:

> "By the act of cession the right to receiving payment from Tuna Marine was pledged to him as effectively as if a corporeal movable asset of the company had been delivered to him in pledge ... That he thus acquired a *ius in re aliena*, equally effective against creditors as against the owner in respect of both debts, is beyond dispute" (678C–D).

4 1 2 Die effek van die pandgewer se insolvensie op die pandhouer waar die pandhouer 'n vorderingsreg (vorderingspand) van die pandgewer as sekerheid hou vir die nakoming van iemand anders se skuld teenoor die pandhouer (677J–680B)

Die aspek van die onderhawige saak wat veral probleme geskep het, is die vraag of die pandhouer (Twiggs) ten opsigte van die derde (Cohen) se skuld ook as versekerde skuldeiser van die insolvente boedel behandel moet word. Vanweë appèlregter Hefer se volkome gelykskakeling van 'n vorderingspand met 'n saakpand bevind hy dat aangesien 'n pandgewer sy goedere ("property") geldig kan verpand om 'n ander se skuld te verseker, "[t]here are accordingly no conceivable logical or legal grounds for applying the established principles to the one but not to the other" (678G).

Ten einde die konsekwensies van hierdie onvermydelike gevolgtrekking te probeer omseil, het die advokate vir Millman myns insiens tereg aangevoer dat die bepalings van artikel 391 van die Maatskappywet 61 van 1973 aan die een kant, en artikel 44 van die Insolvensiewet 24 van 1936 aan die ander kant, Twiggs as versekerde skuldeiser van die insolvente boedel uitskakel. Hulle het voorts aangevoer dat Millman geregtig was om betaling van die R300 000 te ontvang en om die opbrengs as deel van die vrye oorskot aan te wend ten einde die eise van konkurrente skuldeisers te bevredig. Die argument lui dus dat Twiggs se aanspraak as saaklik geregtigde verval omdat hy nie ingevolge artikel 44 van die Insolvensiewet 24 van 1936 kan bewys dat hy skuldeiser van die insolvente boedel is nie en dat hy dus ook nie ingevolge artikel 83 op voorkeurbehandeling aanspraak kan maak nie.

Die regter toon aan dat aanvaarding van hierdie argument daarop sou neerkom dat bogenoemde artikels die effek het dat 'n pandhouer in Twiggs se posisie nie alleen die objek van sy pandreg sou moes prysgee nie maar ook dat hy enige voordeel wat uit die pandreg vloei ten gunste van konkurrente skuldeisers moet verbeur. Die hof bevind gevolglik:

> "I am by no means convinced that such a pledgee is indeed obliged to surrender the object of his pledge; but, even if he is, what we have been urged to do is to deprive the pledgee of his lawful rights and to grant to concurrent creditors a benefit to which they are not entitled" (679A–B).

Die regter bevind dat, afgesien van die vermoedè teen die afstanddoening van regte wat by die uitleg van wette bestaan, sekere bepalings in die Insolvensiewet 24 van 1936 en die Maatskappywet 61 van 1973 juis daarop gerig is om die posisie van die pandhouer te versterk. Gevolglik weier hy om te aanvaar dat daar enige logiese of regsgronde is waarop hierdie tipe pandhouer (Twiggs tov die R300 000) so wesenlik anders behandel moet word as die normale pandhouer (Twiggs tov die R200 000).

Vervolgens keer appèlregter Hefer terug na die wesenlike probleem waarvoor die pandhouer in hierdie omstandighede te staan kom en dit is die feit dat hy nie 'n skuldeiser van die insolvente boedel van die pandgewer ingevolge artikel 44 van die Insolvensiewet 24 van 1936 is nie en gevolglik ook van die werking van artikel 83 van die wet uitgesluit is. Die regter vind die oplossing van hierdie probleem in die gemenereg. Hy bevind dat aangesien die wet nie vir hierdie omstandigheid voorsiening maak nie, die gemenereg nog steeds geld en dat die pandhouer wat 'n saak van die pandgewer ontvang het ter versekering van iemand anders as die pandgewer se skuld, 'n versekerde skuldeiser ingevolge die gemenereg is en dat Twiggs gevolglik op die R300 000 aanspraak kan maak (679G–680B).

4 2 Evaluering van uitspraak

4 2 1 Aard van sekerheidstelling

Dit is interessant om daarop te let dat appèlregter Hefer slegs verwys na daardie sake waarin sekerheidstelling deur middel van vorderingsregte as 'n verpanding gekonstrueer word en nie na sake soos *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd supra* en *Incledon (Welkom) (Pty) Ltd v QwaQwa DC Ltd supra* nie waarin algehele sessiebeginsels op sodanige sessies toegepas is. Die regter pas dan ook suiwer saakpand-beginsels toe sonder om hoegenaamd aandag te gee aan die andersoortigheid van die pandobjek wat hy, interessant genoeg, as

"the right to receive payment" (678C) beskryf. Hy verwys ook deurgaans, myns insiens tereg, na Twiggs as die pandhouer en Continental Foods as die pandgewer.

Appèlregter Hefer gee geen aandag aan die andersoortigheid van die pandobjek nie en hou hom slegs besig met die vasstelling van die normale pandregbeginsels. Hy ag die feit dat Tuna Marine aan die likwidateur betaal het, ten spyte daarvan dat hy kennis van die sessie gedra het, skynbaar ook nie van wesenlike belang nie. In die geval van 'n normale saakpand sou die onderhawige probleem ook nie opgeduik het nie want die pandhouer sou in besit van die saak gewees het. By die verpanding van vorderingsregte het hy slegs *quasi*-besit van die pandobjek en daarom is kennisgewing as voldoening aan die publisiteitsvereiste van uiterste belang. Dit stel die skuldenaar in kennis van die bestaan van die pandreg asook van die feit dat slegs die pandhouer betaling mag ontvang. Vanweë die kennis wat die skuldenaar van die pandreg gedra het, sou die medewerking van die pandhouer nodig gewees het voordat die skuldenaar aan die pandgewer (of die likwidateur) kon betaal het. Die regter oorweeg egter nie eers die moontlikheid dat die normale beginsels van pandreg nie sonder meer hier toegepas kan word nie en gevolglik kom analoë toepassing glad nie eers ter sprake nie.

4 2 2 Regsposisie van die trustee (likwidateur)

By insolvensie is dit een van die basiese pligte van die trustee om die bates van die boedel te administreer en te realiseer (*National Bank of SA Ltd v Cohen's Trustee* 1911 AD 235 248). In *De Hart v Virginia Land & Estate Co Ltd* 1957 4 SA 501 (O) is die gemeenregtelike posisie van die trustee soos volg uiteengesit: Daar word aanvaar dat hy gesedeerde of verpande eiendom moet administreer onderworpe aan die regte van sessionarisse en pandhouers om betaling van hulle versekerde eise uit die opbrengs van die verpande sake te ontvang. In die *De Hart* saak meld regter Botha ook dat artikel 83 nie hierdie bevoegdheid van die trustee aangetas het nie, maar eerder aan die versekerde skuldeiser van die insolvente boedel die bevoegdheid gegee het om ook in die voorgeskrewe omstandighede van daardie artikel self sy sekuriteit te realiseer (505E–G).

Appèlregter Hefer het self ook in *Leyds v Noord-Westelike Koöperatiewe Landboumaatskappy* 1985 2 SA 769 (A) 780A–G beslis dat

> "die kurator in die insolvente boedel van die sedent van 'n vordering *in securitatem debiti* geregtig was om dit in te vorder en as 'n bate van die boedel te administreer op die basis dat die *dominium* van die reg in die sedent bly" (780B).

In die onderhawige saak spreek hy egter twyfel uit oor die vraag of die pandhouer die pandobjek aan die trustee moet oorhandig (679A–B), terwyl hy uitdruklik in *Leyds* bevind dat hy dit moet doen. Gebruikmaking van die woorde "such a pledgee" kan egter daarop slaan dat die regter twyfel het in 'n geval waar die pandhouer 'n vorderingsreg hou ter versekering van iemand anders as die pandgewer se skuld.

4 2 3 Die effek van die pandgewer se insolvensie op die pandhouer waar die pandgewer vir betaling van iemand anders se skuld sekerheid stel

As uitgangspunt aanvaar die regter dat daar geen regverdiging is om die pandhouer in hierdie omstandighede van sy pandregte te ontneem nie en aan konkurrente skuldeisers 'n voordeel te gee waarop hulle nie geregtig is nie (679A–C).

Hy bevind dan ook dat die pandhouer nie sy sekuriteit verloor nadat hy die pandobjek aan die trustee oorhandig het nie maar dat hy geregtig bly om as versekerde skuldeiser behandel te word (679D). Na my mening is die bevinding reg maar ek stem nie saam met die rede wat die regter gee waarom die pandhouer wel op voorkeurbehandeling geregtig is nie. Hy meen dat daar geen logiese of regsgronde is waarom Twiggs verskillend ten opsigte van die twee eise behandel moet word nie. Hy oorweeg dan die invloed van die feit dat Twiggs nie ingevolge artikel 44 van die Insolvensiewet 24 van 1936 as skuldeiser van die boedel beskou kan word nie. Volgens hom beïnvloed hierdie feit nie sy aanspraak op voorkeurbehandeling nie aangesien "his right to preferential treatment does not derive from s 83; it derives from the common law" (679H). Hy toon voorts aan dat die insolvensiereg nie in sy geheel gekodifiseer is nie en dat die gemenereg nog geld waar die Insolvensiewet oor 'n aangeleentheid swyg. Die onderhawige geval is volgens hom een van daardie gevalle en daarom is Twiggs "entitled to be treated as secured creditor" (680B).

Alhoewel ek met die regter se bevinding saamstem, is ek nie seker of ek hom goed verstaan oor wat hy met die gemenereg of die toepassing daarvan bedoel nie. Ek weet ook nie of hy hom slegs onnoukeurig uitdruk deur na Twiggs as 'n "versekerde skuldeiser" te verwys nie. Dit kan wees dat hy bedoel dat Twiggs ingevolge die insolvensiebeginsels van die gemenereg 'n versekerde skuldeiser van die insolvente boedel is, maar dit kan ook wees dat hy bedoel dat Twiggs ingevolge die gemeenregtelike pandbeginsels 'n beperk saaklike geregtigde is. Na my mening is laasgenoemde die korrekte benadering. Die pandhouer is in hierdie omstandighede dus nie 'n versekerde skuldeiser van die insolvente boedel nie maar hy het 'n beperkte saaklike reg op een van die bates van die insolvente boedel. Daardie bate kan dus net onderworpe aan die beperkte saaklike reg te gelde gemaak word. Die posisie is analoog aan dié van 'n serwituuthouer (soos 'n vruggebruiker) ten aansien van 'n plaas in 'n insolvente boedel: die serwituut plaas 'n beperking op die eiendomsreg self en die tegeldemaking van die plaas sal onderworpe aan die serwituut moet geskied. Die insolvensie van die eienaar van die plaas kan tog nie die beperkte saaklike regte van derdes affekteer nie en hulle geen aanspraak gee omdat hulle nie skuldeisers van die boedel is nie. Die bestaan van die serwituut verminder die inherente realisasiewaarde van die plaas. So beïnvloed die bestaan van die pandreg ook die realisasiewaarde van die pandobjek. Die bestaan van die saaklike sekerheidsreg kan moontlik op Vorm B, Aanhangsel V van die Eerste Skedule gereflekteer word. In die onderhawige geval is die pandhouer se vorderingsreg teen die derde toevallig dieselfde as die waarde van die vorderingsreg, maar meestal sal die waarde van die pandobjek (vorderingsreg) hoër wees as die pandhouer se eis teen die derde en dan val die balans in die insolvente boedel, waarskynlik in die vrye oorskot. Die pandobjek word in bogenoemde omstandighede dus as boedelbate te gelde gemaak met inagneming van die beperkte saaklike reg wat daarop rus.

5 Gevolgtrekking

Na my mening is die uiteindelike bevinding in albei hierdie uitsprake korrek. Beide bevredig 'n mens se regsgevoel nie alleen wat die toepassing van die regsbeginsels op die tersaaklike feite betref nie, maar ook wat die uiteensetting van die regsposisie in die breë betref. Alhoewel dit nie heeltemal duidelik is nie, verkies ek die wyse waarop appèlregter Hefer die pandhouer se aanspraak op die R300 000 fundeer bo die ietwat vae wyse waarop die verhoorregter dit gedoen

het. Appèlregter Hefer se uitspraak is ook een van die suiwerste toepassings van die beginsels van pandreg op 'n sekerheidsessie wat in die afgelope tien jaar gegee is.

Ek vind dit jammer dat appèlregter Hefer geensins toon dat hy bewus is van die probleme wat die andersoortigheid van die pandobjek in bepaalde omstandighede kan veroorsaak en inderdaad in die betrokke geval geskep het nie. Dit was waarskynlik nie vir hom nodig nie vanweë die wyse waarop die advokate die saak beredeneer het. Voorts was die feite relatief ongekompliseerd: al die skulde was byvoorbeeld op dieselfde dag betaalbaar en albei hoofskuldenaars (Continental Foods en Cohen) was in daardie stadium reeds insolvent. Wat sou die posisie byvoorbeeld gewees het as Cohen nog nie insolvent was nie of die eis teen hom nog nie opeisbaar nie? Vanweë die benadering wat hy gevolg het, was regter Conradie in 'n beter posisie om hom oor die andersoortigheid van die pandobjek en die effek daarvan op die toepassing van saakpand-beginsels uit te laat, soos ek hierbo aangetoon het, maar het dit tog ook nie gedoen nie.

Alhoewel ek van mening is dat die regters in die betrokke saak met groot vrug saakpand-beginsels op 'n vorderingspand toegepas het en hulle bevindings in die betrokke geval in ooreenstemming is met die idee dat saakpand-beginsels vir sover dit moontlik is op 'n vorderingspand toegepas moet word, dui die uitsprake tog daarop dat die howe moontlik nie genoegsaam bedag is nie op die andersoortigheid van die pandobjek by 'n vorderingspand wat direkte toepassing van saakpand-beginsels bemoeilik en analoë toepassing van daardie beginsels noop.

'n Besonder interessante aspek van die uitspraak is die feit dat 'n saak wat oor 'n vorderingspand handel die probleme en vaagheid beklemtoon wat die regsposisie omhul waar die pandgewer sy saak in pand gee ten einde iemand anders se skuld teenoor die pandhouer te verseker. Daar is geen gesag oor die effek van sodanige pandgewing nie behalwe die verwysings in *Wille's Law of mortgage and pledge in South Africa* (1987) 7 vn 46 waaruit 'n mens niks verder oor die aangeleentheid wys word nie, selfs nie eers as die bronne tot by die *Digesta* (sien *D* 20 1 5 2) nagegaan word nie.

Selfs na hierdie bemoedigende uitspraak van die appèlafdeling van die hooggeregshof, is ek nog van mening dat wetgewing die aangewese wyse is om die probleme in die sessiereg in die algemeen, maar in die besonder ten aansien van sekerheidsessies uit die weg te ruim. Vrae wat my nog steeds kwel, is die volgende: wat sal die howe doen in gevalle waar analoë toepassing van saakpandbeginsels op 'n vorderingspand onvermydelik en ingewikkeld is; sluit hierdie appèlhofuitspraak algehele sekerheidsessies uit of dui die afwesigheid van verwysings na die bekende uitsprake waarin dit erken word, op die moontlikheid dat dit in bepaalde gevalle tog nog toepassing kan vind? Sal die howe hulle weg oopsien om die netelige vraagstukke, soos wie *locus standi* by sekerheidsessies het, die aard van fidusiêre regshandelinge en die toelaatbaarheid van invorderingsessies, deur 'n proses van vindingryke interpretasie van die gemenereg aan te spreek?

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TO WHICH CATEGORY OF PROVISIONS OF A CONTRACT DO PROVISIONS ORIGINATING IN TRADE USAGE BELONG? PROBLEMS IN REGARD TO QUASI-MUTUAL ASSENT

ABSA Bank Ltd v Blumberg and Wilkinson 1995 4 SA 403 (W)

In this case the court (Cameron J) held (409H–I):

> "For a term to be implied [in a contract] by trade usage, the implication must be made 'not by law but from the presumed common intention of the parties to include a term customarily included to the knowledge of both of them' (Christie *The Law of Contract in South Africa* 2nd ed (1991) at 187). The requirements for the implication of such a term are, amongst others, that it must be universally and uniformly observed within the trade concerned; established; well known; reasonable; certain; and not in conflict with the law or with the clear provisions of the contract (*Christie* at 188–94)."

When one refers to what Professor Christie says, it appears that the court has attributed a statement he makes about one category of terms to a different category which he seeks to distinguish from the first. He proposes a threefold classification of unexpressed provisions of a contract: (1) "terms implied by law" (184–187); (2) "terms implied by trade usage" (187–194); and (3) "tacit terms, or terms implied from the facts" (194–202). The first comprises those provisions which the law provides in the absence of express or implied provisions (using the word "implied" in its strict sense to describe provisions which pass the hypothetical bystander test: see my *The principles of the law of contract* (1989) 256–258 283–292 (*Contract*)). The third comprises those which pass the hypothetical bystander test.

The sentence immediately preceding the one from which the court drew its quotation reads:

> "If the trade usage is known to both parties their knowledge will be one of the surrounding circumstances indicating that the trade usage ought to be incorporated in their contract as a term *implied from the facts*" (emphasis added).

Hence the statement concerning the implication being made not by law "but from the presumed common intention of the parties" refers to a term which would pass the hypothetical bystander test, that is, a term in Professor Christie's third category. However, the requirements which the court listed are those for provisions originating in trade usage, which requirements Professor Christie gives for his second category which he regards as occupying an "intermediate position" (187), but which it is better to consider in relation to his first category (terms *implied by law*).

There is a more fundamental difficulty. Did the court intend to approve Professor Christie's approach to what he describes as "terms implied by trade usage", and is that approach correct? Of such terms Professor Christie (187) says:

> "But if one party cannot prove that the other knew of the trade usage it will nonetheless be incorporated as an implied term in the contract if, in addition to other requirements, it is so universal and notorious that *the party's knowledge and intention to be bound by it can be presumed.* The proper inquiry must be whether

> the party professing ignorance has so conducted himself that the other party, on the principle of quasi-mutual assent, is *entitled to assume that he knew* of the trade usage and intended to incorporate it tacitly in the contract" (emphasis added).

With respect, the doctrine of quasi-mutual assent is concerned, not with what the party sought to be bound *knew* but, *inter alia*, with whether *he conducted himself* in such a way that "a reasonable man would believe that he was assenting *to the terms proposed* by the other party" (per Blackburn J in *Smith v Hughes* (1871) LR 6 QB 597 607 (emphasis added), adopted and re-affirmed many times by the Appellate Division: *Contract* 10; Christie 14–16, to which may be added *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* 1992 3 SA 234 (A) 239H and *Steyn v LSA Motors Ltd* 1994 1 SA 49 (A) 61E).

As in Professor Christie's proposition it cannot be proved that the other party knew of the trade usage, the situation is one in which the person who does know it makes an offer *without mentioning the trade usage*. In the words of Innes JA (*I Pieters & Co v Salomon* 1911 AD 121 137, re-affirmed in later cases: *Contract* 60 and Christie 14):

> "He [an offeror who makes an offer in plain and unambiguous language] cannot be heard to say that he meant his promise to be subject to a condition which he omitted to mention, and of which the other party was unaware."

That being so, in such circumstances the trade usage is neither an express nor an implied term in the strict sense. In these circumstances, unless Professor Christie's second category is different in kind from his first, which I suggest it is not (*Contract* 292), there is only one way in which it can become part of the contract between two such parties and that is if the parties do not deal with the subject matter expressly or impliedly (in the strict sense) and the trade usage is in the contract as a residual provision.

Problems with Professor Christie's approach go deeper than just trade usage. Trade usage is only one of a number of methods by which residual provisions (terms "implied *by law*") originate: *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A) 531F–H. If Professor Christie's approach is adopted for trade usage, it holds also for statute, precedent, custom and the old authorities. This would mean that contracting parties would be presumed to know all the law, or at least all the law relating to any contract into which they may be contemplating entering. One has only to consider the complexities and controversial points both on the general principles of the law of contract and on special contracts to see that such a proposition is unrealistic and would lead to injustice (see eg the *Alfred McAlpine* case above *loc cit*).

What force as a precedent has the reference by the court in the *ABSA Bank* case to Professor Christie's views? With respect, the answer is "very little, if any". The court held that the term for which the plaintiff argued was not part of the contract because it "appears to conflict with the contractual arrangements that in fact existed between the parties" (409J–410J). A provision (or term) will not be implied in the strict sense as one which passes the hypothetical bystander test if it conflicts with express provisions of the contract (*Contract* 279). Nor will an alleged residual provision (in Professor Christie's proposed classification, one "implied by law") be part of the contract if it conflicts with express provisions, because such provisions (express ones) take precedence over residual ones (*Contract* 283). Hence the fact that the court in the *ABSA Bank* case found that the alleged provision conflicted with the express provisions of the contract, does not tell us whether the court was dealing with the provision as an alleged implied

one (in the strict sense) or an alleged residual one. This brings us back to the difficulty in the passage with which this note began: the court quoted a statement which Professor Christie makes of terms "implied from the facts" but then goes on to list requirements to which Professor Christie refers (187) after saying: "But if one party cannot prove that the other knew of the trade usage . . ." Normally, requirements so introduced indicate those for residual provisions, namely those "implied by law" in the older terminology. This would normally be what one would understand from the following statement by Cameron J (411A):

> "There is a second obstacle in the way of inferring that there was an implied term permitting the plaintiff in all circumstances to reverse a credit made in respect of an uncleared effect. This consists in *a line of authority* which tends to show the opposite" (emphasis added).

However, bearing in mind the statement with which this note opened, one cannot be sure which category the learned judge had in mind, especially as Professor Christie has three categories of unexpressed provisions, not two (see the second paragraph of this note above). With respect, the opinion in the case illustrates the obscurities and the attendant confusion that are likely to result from the use of the word "implied" in many different senses.

The question at issue in the case was stated by Cameron J (407H) as follows:

> "The plaintiff asks the court to hold that a bank is invariably free to reverse a credit entry it has made in a customer's account, regardless of the customer's good faith, no matter how negligently the bank acted in making the entry, and regardless of whether the customer, in the interim, has acted to his or her disadvantage on the strength of the credit."

Clearly, if the hypothetical bystander had asked a question incorporating this proposition, the defendant would not have replied "we did not trouble to say that; it is too clear". There was therefore no implied provision (in the strict sense) to that effect in the contract. The court found too that the proposition did not pass the tests for a residual provision based on trade usage (410H–412C). Hence there was no residual provision to that effect in the contract either. It follows that the statement quoted in the first paragraph of this note above is *obiter* and, with respect, ought not to be followed.

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REGSPLIG VAN POLISIE OM SUIWER EKONOMIESE VERLIES TE VOORKOM?

Minister of Law and Order v Kadir 1995 1 SA 303 (A)

Die feite in hierdie saak was kortliks die volgende (sien Scott "Die regsplig by 'n late en die veroorsaking van suiwer ekonomiese verlies: Beleidsoorwegings gee die deurslag" 1995 *De Jure* 158 en Burchell "The role of the police: Public protector or criminal investigator?" 1995 *SALJ* 211 vir besprekings van hierdie saak; sien ook Neethling en Potgieter "Aspekte van aanspreeklikheid weens 'n

late en suiwer ekonomiese verlies" 1993 *TSAR* 525 en Van der Walt "Regsplig: die moeilike vraag" 1991 *TSAR* 691 vir besprekings van die uitspraak in die hof *a quo*: *Kadir v Minister of Law and Order* 1992 3 SA 737 (K); vgl ook Dendy 1992 *Annual Survey* 433–435; Burchell *Principles of delict* (1993) 40 vn 5; Neethling, Potgieter en Visser *Deliktereg* (1996) 64–65 vn 140 287 vn 104): Terwyl die eiser met sy voertuig agter 'n ander motor gery het, het 'n bondel klere van die voorste voertuig afgeval. Dit het veroorsaak dat die eiser noodgedwonge moes uitswaai. Sy motor het die pad verlaat en die eiser is in die proses ernstig beseer. Kort na die ongeluk het twee polisiemanne op die toneel aangekom en terwyl hulle daar was, het die bestuurder van die voorste voertuig teruggekeer ten einde die bondel klere wat afgeval het, weer op te laai. Die konstabels het versuim om inligting omtrent die identiteit van laasgenoemde bestuurder in te win ten spyte daarvan dat hulle deur 'n ooggetuie van die ongeluk op die toneel verwittig is van die omstandighede waarin die ongeluk plaasgevind het. Die eiser stel 'n eis vir vergoeding teen die verweerder in op grond daarvan dat daar 'n plig op die konstabels gerus het – wel wetende dat die eiser beseer was en nie in staat was om self op te tree nie – om bedoelde inligting in te win, en dat hulle behoort te voorsien het dat hulle versuim in hierdie verband die eiser skade kon berokken. Die rede waarom gepoog word om die verweerder aanspreeklik te stel, is dat die eiser weens die konstabels se versuim nie die betrokke voertuig kon identifiseer nie en daarom, ingevolge die bepalings van die Motorvoertuigongelukkefondswet 93 van 1989, verhoed is om die eis teen die fonds in te stel. Die verweerder teken eksepsie aan onder andere omdat daar volgens hom in die bepaalde omstandighede nie 'n regsplig op die konstabels gerus het om die betrokke inligting te bekom nie. In die hof *a quo* wys regter Conradie die eksepsie van die hand maar die appèl teen dié afwysing word deur appèlregter Hefer gehandhaaf.

Die hof *a quo* gee in verband met die regsplig eerstens aandag aan aanspreeklikheid weens 'n late, en tweedens aan aanspreeklikheid weens suiwer ekonomiese verlies. Wat eersgenoemde betref, beslis regter Conradie dat daar wel 'n regsplig op die konstabels gerus het om die inligting in te win. Dié deliktuele regsplig blyk nie net uit artikel 5 van die Polisiewet 7 van 1958 ingevolge waarvan die polisie onder meer verplig is om enige misdaad of beweerde misdaad te ondersoek nie, maar ook uit ander faktore:

> "We all know that it is not all the police do. They help people escape from swollen rivers, they pluck stranded mountaineers off mountain tops, they search for the bodies of drowned sailors on the seashore, and they notify parents if they happen to come across their runaway children. In short, in spheres determined, one supposes, largely by police standing orders and regulations, they, in general, seek to promote order and stability in the community" (739I–740A).

Kortom, die pligte van die polisie word sowel statutêr as nie-statutêr neergelê. Die nie-statutêre pligte hang volgens die regter af van die opvattinge van die gemeenskap op 'n bepaalde tydstip (740G–H). Regter Conradie aanvaar tereg dat statutêre bepalings nie sonder meer genoegsaam is om 'n deliktuele regsplig te skep nie maar dat 'n statutêre plig wel sterk op die aanwesigheid van 'n deliktuele regsplig kan dui. In gevalle soos *in casu* moet die gemeenskapsopvatting of *boni mores* (of, soos hy dit stel, "public expectations"), as 't ware dus die statutêre plig tot deliktuele plig aanvul (sien ook Neethling, Potgieter en Visser 53–55 63–64; vgl 69–71).

Tweedens, wat die regsplig by suiwer ekonomiese verlies betref, aanvaar die hof *a quo* dat aanspreeklikheid weens sodanige verlies in beginsel verhaalbaar is. In die onderhawige geval speel veral twee faktore 'n rol by die bepaling van so 'n regsplig: in die eerste plek lê die hof klem op veral die feit dat die verweerder *geweet* het of *subjektief voorsien* het dat nalatige optrede aan sy kant die eiser gaan benadeel. In die tweede plek benadruk die hof die feit dat aanspreeklikheid *in casu* nie tot onbeperkte aanspreeklikheid sal lei nie (742I–743A).

In teenstelling met die hof *a quo*, vind die appèlhof dit nie nodig om te onderskei tussen die bepaling van 'n regsplig by 'n late en dié by suiwer ekonomiese verlies nie. Met verwysing na die standpunt in *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 597 oor die bepaling van die regsplig by 'n late aan die hand van die regsoortuigings van die gemeenskap, verklaar appèlregter Hefer bloot:

> "This has since become the accepted norm for determining the wrongfulness of omissions in delictual actions for the recovery of economic loss" (317F).

Hiermee word in beginsel saamgestem aangesien die faktore wat aanduidend is van die regsplig by sowel 'n late (sien Neethling, Potgieter en Visser 54 ev) as suiwer ekonomiese verlies (*idem* 289 ev) sekerlik nie in waterdigte kompartemente beoordeel hoef te word nie en soms selfs kan oorvleuel.

Net soos die hof *a quo*, aanvaar die appèlhof sonder meer dat die skade *in casu* in die vorm van suiwer ekonomiese verlies bestaan. 'n Mens het met sodanige verlies te make enersyds waar die verlies *hoegenaamd nie* uit saakbeskadiging of persoonlikheidskrenking resulteer nie; andersyds waar dit wel die geval is, is dit nogtans suiwer ekonomiese verlies óf omdat dit nie die *eiser* se saak of persoonlikheid is wat betrokke is nie, óf omdat die *verweerder* – soos in hierdie geval – nie die skade of krenking veroorsaak het nie (sien Neethling, Potgieter en Visser 286–287). In die lig van die appèlhof se handhawing van die eksepsie, verklaar Scott 1995 *De Jure* 164 met verwysing na die tweede uitgawe (1992) van Neethling, Potgieter en Visser se *Deliktereg*:

> "En dan sal die volgende uitgawe van die pas vermelde skrywers se *Deliktereg* beslis nou aangesuiwer moet word deur die skrapping van die derde geval van suiwer ekonomiese verlies wat hulle juis in die nuutste (1994, Engelse) uitgawe van hul handboek na aanleiding van die hof *a quo* se uitspraak geformuleer het."

Hiermee kan egter nie saamgestem word nie. 'n Mens moet 'n duidelike onderskeid maak tussen die verskillende tipes suiwer ekonomiese verlies wat kan voorkom en die onregmatigheidsvraag of daar in 'n bepaalde geval 'n regsplig was om die betrokke tipe ekonomiese verlies te vermy. Daar kan gevolglik steeds in die toekoms in 'n analoë geval – dit wil sê waar die verweerder wel die ekonomiese verlies maar nie die betrokke saakbeskadiging of persoonlikheidskrenking veroorsaak het nie, en moet 'n mens byvoeg, die polisie nie betrokke is nie – 'n regsplig om die verlies te vermy, gekonstrueer word. 'n Voorbeeld waar sodanige regsplig wel kan bestaan, is die volgende: A word as gevolg van B se nalatigheid so ernstig beseer dat hy permanent bewusteloos is. A se vrou gee opdrag aan 'n prokureur om 'n eis weens mediese onkoste en pyn en lyding in te stel. Laasgenoemde laat die eis teen die MMF egter verjaar weens sy versuim om dit betyds in te dien, met gevolglike ekonomiese verlies vir A. Daar bestaan min twyfel dat as gevolg van sy professionele betrokkenheid daar 'n regsplig op die prokureur was om skade vir A te vermy.

Die appèlhof gaan tereg van die standpunt uit dat daar nie 'n algemene regsplig bestaan om suiwer ekonomiese verlies te vermy nie; anders gestel, die feitelike benadeling van 'n persoon in hierdie gevalle is nie *prima facie* onregmatig

nie. Daarom moet daar in elke besondere geval bepaal word of daar 'n regsplig was om suiwer ekonomiese verlies te vermy (sien ook *Knop v Johannesburg City Council* 1995 2 SA 1 (A) 26; Neethling en Potgieter "Deliktuele onregmatigheid by die nie-nakoming van 'n statutêre voorskrif" 1995 *THRHR* 530–531). Anders as die hof *a quo*, bevind appèlregter Hefer dat daar *in casu* nie 'n regsplig op die polisie gerus het om die suiwer ekonomiese verlies te vermy nie. Hoewel regter Hefer bevestig dat die statutêre ondersoekplig ingevolge artikel 5 van die Polisiewet ook hier 'n relevante oorweging was (319C–D), is hy van mening dat dit in die omstandighede van die saak nie dieselfde gewig as in die *Ewels*-saak *supra* dra nie. In *Ewels* het dit naamlik gegaan om 'n regsplig om te voorkom dat die eiser aangerand word, terwyl dit hier bloot gehandel het oor die versuim om besonderhede aangaande die bestuurder en sy voertuig neer te skryf. Regter Hefer motiveer sy standpunt soos volg:

> "Compared to that [die skokkende versuim in *Ewels*], the omission in the present case pales into insignificance despite its consequences to the plaintiff. The complaint is not that the policemen failed to investigate the incident . . . or to gather information about the offending driver and his vehicle: their only shortcoming was that they neglected to record it. Plaintiff's counsel argued that they should have conducted a proper investigation into an alleged traffic offence committed by the driver, but, assuming that they did not properly perform their duty to investigate crimes in terms of the Police Act by failing to record relevant information, their omission did not constitute a breach of a duty owed under the Act to the plaintiff. The police force is first and foremost an agency employed by the State for the maintenance of law and order and the prevention, protection and investigation of crime with a view of bringing criminals to justice. In the course of the performance of their duties in this regard its members often collect information relevant to the issues in civil proceedings. But the aim of the investigations is obviously not to provide the parties to such proceedings with useful information; nor does a prospective litigant have the right to demand a police investigation for the sole purpose of providing him with evidence. The fact of the matter is simply that, whereas parties or prospective parties to civil litigation often make use of information gathered by the police, they must make do with whatever the police have available and cannot insist on anything better.
>
> Can it in these circumstances be said that the policemen owed the plaintiff a legal duty to record the information relating to the driver or his vehicle? In my view not. Viewing the matter objectively, society will take account of the fact that the functions of the police relate in terms of the Act to criminal matters and were not designed for the purpose of assisting civil litigants . . . Bearing this in mind society will baulk at the idea of holding policemen personally liable for damages arising from what was a relatively insignificant dereliction of duty."

Hierdie *dictum* verg nadere beskouing en kommentaar.

(a) Eerstens kom die hof se woorde dat die betrokke late van die twee polisiemanne in vergelyking met *Ewels* "pales into insignificance" en "a relatively insignificant dereliction of duty" uitmaak omdat hulle enigste tekortkoming was dat hulle versuim het om die inligting *aan te teken*, neer op 'n geringskatting van die verweerder se plig en van die waarde van die eiser se belange. Die polisiemanne se verwyt was nie bloot dat hulle versuim het om besonderhede neer te skryf nie, maar dat hulle sodoende voorsienbare finansiële verlies (wat uit ernstige liggaamlike besering voortgevloei het) vir die eiser veroorsaak het. Soos Burchell 1995 *SALJ* 216 dit stel:

> "The plaintiff's loss could have been immense, including even his death. The extent of the harm must be considered in determining whether the dereliction of duty was insignificant or substantial."

Indien appèlregter Hefer die versuim na waarde geskat het, kon dit sy beoordeling van die regsplig *in casu* beïnvloed het.

(b) Tweedens lê die hof in die huidige geval na ons mening te veel klem op die werksaamhede van die polisie om wet en orde te handhaaf en om misdaad te voorkom, op te spoor en te ondersoek ten koste van die algemene funksie van die polisie om die belange van die gemeenskap te beskerm (vgl *Ewels supra* 33). Trouens, in die nuwe konstitusionele bedeling het daar klaarblyklik 'n klemverskuiwing ten aansien van die taak van die polisie plaasgevind. Anders as onder die ou bedeling waar die polisie nog as 'n *mag* tipeer is, word nou van die Suid-Afrikaanse Polisie*diens* gepraat (vgl a 214 215 236(7)(*a*), (*b*) van die Grondwet van die Republiek van Suid-Afrika 200 van 1993). Die fokus verskuif dus nou na dienslewering aan die gemeenskap wat beslis meer behels as suiwer misdaadswerksaamhede – 'n faktor wat sekerlik 'n invloed sal hê op die verwagtinge van die Suid-Afrikaanse gemeenskap ten opsigte van die polisie, en daarom die regspligbeoordeling behoort te beïnvloed. Die rol van die verwagtinge van die gemeenskap word reeds in die hof *a quo* deur regter Conradie soos volg verwoord:

> "This case [*Ewels*] highlighted what one might call the principle of public expectation, which had been rather less clearly perceived before, and held, in effect, that the duty of a policeman towards an individual citizen is what the community expects it to be. His private-law duties are shaped by the community's expectation of him. Of course, this expectation is not just a wistful hope that the policeman will act as desired. It is a conviction that he ought so to act sufficiently firm to offend the community if he does not act as desired. Policemen are creatures of the public's perception of them . . . If the community would be so offended by a policeman's failure to live up to its expectations (which are based partly on statute and partly on what people see policemen doing every day) that it would demand compensation for a victim who suffered a loss because of such failure, then the policeman is liable" (740G–H).

(c) In die derde plek, ten spyte van die hof se beklemtoning van die polisie se misdaadwerksaamhede, oorweeg die hof glad nie die moontlikheid dat daar *in casu* inderdaad 'n misdaad (soos roekelose of nalatige bestuur of selfs potensiële strafbare manslag) aanwesig kon wees nie, in welke geval daar beslis 'n statutêre plig op die polisie gerus het om inligting – wat uiteraard in eerste instansie die identiteit van 'n moontlike verdagte sou insluit – betreffende die voorval in te win en aan te teken. Die versaking van hierdie plig kom onses insiens nie net op pligsversuim ingevolge die Polisiewet neer nie, maar is ook aanduidend van die nie-nakoming van 'n regsplig *ex delicto*. Soos Burchell 1995 *SALJ* 215 tereg aandui, is dit in elk geval onprakties en ondoenlik om in 'n geval soos hierdie tussen misdaad en delik te onderskei:

> "The distinction drawn by the Appellate Division in *Kadir* between investigation in criminal matters and recording of material for the purpose of civil litigation is unworkable and undesirable. All crimes against person and property are also delicts and the confluence of both civil and criminal remedies is a common feature of legal practice . . . Can one realistically expect a policeman arriving on the scene of an accident to assess immediately whether criminal or civil liability will arise from the event?"

(d) Vierdens moet ag geslaan word op Scott 1995 *De Jure* 163 se waarskuwing dat

> "die uitligting van die primêre misdaadvoorkomingsfunksie van die polisie as 'n faktor in die proses van beoordeling of 'n regsplig teenwoordig is, al dan nie, ander belangrike(r) faktore in die beoordelingsproses ten onregte sal oorskadu",

soos, volgens Scott, dalk reeds *in casu* gebeur het. Trouens, naas die rol van statutêre voorskriftelikheid waarna hierbo verwys is, is die enigste ander faktor wat die hof vermeld, moontlike "prior conduct" aan die kant van die polisie. Aangesien *omissio per commissionem* egter nie in die pleitstukke geopper is nie, is dit nie verder oorweeg nie (319F–H; vgl Burchell 1995 *SALJ* 213).

Ander faktore wat 'n rol kon gespeel het, is die volgende (sien ook Scott 1995 *De Jure* 160–161; Neethling, Potgieter en Visser 289–293; Neethling en Potgieter 1993 *TSAR* 528–530):

(i) Die *wete of kennis* van die polisiemanne dat nalatige optrede aan hulle kant die eiser gaan benadeel (sien ook *supra* tav die hof *a quo*). In hierdie verband moet Burchell 1995 *SALJ* 215 se gelykstelling van die wete of subjektiewe voorsienbaarheid met *dolus eventualis* bevraagteken word. Hy stel dit soos volg:

> "Moreover, the police in *Kadir foresaw* the possibility that the driver of the vehicle from which the parcel fell may well have been responsible for the accident. Through their being told this by a witness, there was arguably fault in the form of dolus eventualis on their part. The presence of dolus eventualis is a factor which can affect a finding on unlawfulness."

Na ons mening moet die wete of kennis as sogenaamde dadersubjektiewe faktor (Neethling, Potgieter en Visser 42) by die vraag na die regsplig by onregmatigheid onderskei word van die vraag na opset. Onregmatigheidsbewussyn as element van opset speel naamlik geen rol by die bepaling van die wete of kennis in verband met die regsplig by 'n late of suiwer ekonomiese verlies nie – sodanige rol kan ook geensins uit die regspraak afgelei word nie (vgl *idem* 289–290). Daarom is 'n verwysing na *dolus eventualis* in hierdie stadium waar dit nog bloot om onregmatigheid gaan, regstegnies ontoepaslik. Opset kom logies tog eers ter sprake wanneer onregmatigheid reeds vasstaan. Gevolglik is dit onjuis om soos Burchell te kenne te gee dat die dader se opset 'n faktor is wat die onregmatigheid van sy optrede kan medebepaal. Daar kan immers nie van onregmatigheidsbewussyn sprake wees alvorens onregmatigheid vasstaan nie – onregmatigheid moet eers vasstaan voordat 'n mens daarvan bewus kan wees (vgl Neethling en Potgieter "Die rol van opset by onregmatige mededinging" 1991 *SALJ* 33 ev).

(ii) Die feit dat aanspreeklikheid *in casu* nie tot onbeperkte aanspreeklikheid sou lei nie (sien ook *supra* tav die hof *a quo* 742I–743A).

(iii) Die bestaan al dan nie van praktiese stappe wat die verweerder kon gedoen het om die ekonomiese verlies te vermy, die waarskynlike sukses van sodanige stappe, die redelikheid al dan nie van die koste verbonde aan sodanige stappe in verhouding tot die skade wat die eiser gely het, en die relatiewe gemaklikheid waarmee die stappe gedoen kon word.

(iv) Die feit dat die verweerder 'n sekere beroep beoefen en daardeur oor besondere vaardigheid, bekwaamheid en kennis beskik of voorgee dat hy daaroor beskik.

(v) Die graad of omvang van die risiko dat die eiser ekonomiese verlies sal ly (sien ook die opmerkings by (a) *supra*).

(vi) Ander faktore wat ook hier relevant kan wees (sien Scott 1995 *De Jure* 160–161), is die eiser se onvermoë om hom teen die betrokke ekonomiese verlies te beskerm, en die omvang van die regsplig wat op ander persone geplaas sou word wat hulle in dieselfde posisie as dié van die verweerder bevind.

(e) Laastens kan hoegenaamd nie aanvaar word dat "society will baulk at the idea" om 'n regsplig op die polisie in die onderhawige omstandighede te lê nie. Trouens, in die menseregtelike bedeling ingevolge die nuwe Grondwet sal die gemeenskap waarskynlik eerder groter verwagtinge van die polisiediens koester as in die verlede. Hierbenewens is daar, afgesien van regter Conradie in die hof *a quo*, ook geen enkele akademiese kommentator waarvan ons weet wat teen die oplê van sodanige regsplig gekant is nie (sien bv Burchell 1995 *SALJ* 211; Van der Walt 1991 *TSAR* 691; Neethling en Potgieter 1993 *TSAR* 525; Neethling, Potgieter en Scott *Casebook on the law of delict/Vonnisbundel oor die deliktereg* (1995) 491–492; vgl Scott 1995 *De Jure* 158; Dendy 1992 *Annual Survey* 433).

Ons vertrou dat die appèlhof in die toekoms, soos reeds in die *Ewels*-saak gebeur het, alle toepaslike faktore sal oorweeg by die bepaling van die regsplig wat op lede van die Suid-Afrikaanse Polisiediens geplaas behoort te word ten einde benadeling, suiwer ekonomies en andersins, deur positiewe optrede te voorkom. Voorts word gehoop dat Scott 1995 *De Jure* 164 se voorspelling dat dit in die lig van die *Kadir*-appèlhofbeslissing al hoe onwaarskynliker word dat persone soos die geykte "kampioenswemmer" (Neethling, Potgieter en Visser 69) ooit delik-tuele aanspreeklikheid sal opdoen, insgelyks nie sonder deeglike besinning van al die vermelde faktore bewaarheid sal word nie.

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MATERIALITY IN INSURANCE LAW: THE CONFUSION PERSISTS

Theron v AA Life Insurance Association Ltd 1995 4 SA 361 (A)

1 Introduction

South African courts are frequently called upon to decide the materiality of representations and non-disclosures made by an insured in his or her proposal for insurance cover (see Havenga "The materiality of representations and non-disclosures in insurance contracts" 1995 *SA Merc LJ* 90 where some of the cases reported over the last eight years are noted). The frequency with which the issue of materiality is raised in court, is to my mind indicative of the uncertainty surrounding this issue. It is by no means clear exactly which facts are material and how materiality must be determined. It will also not be untrue to say that the question of materiality is perhaps the topic that has elicited the most comments from commentators on insurance law. (See, eg, Blackbeard "Is there an obligation to disclose epilepsy when entering into a (insurance) contract?" 1995 *THRHR* 121; Boberg "Insurance warranties are trumps" 1966 *SALJ* 220; Boberg "Trumping an insurance warranty" 1969 *SALJ* 335; Davids "Disclosure and insurance warranties" 1994 *Juta's Business Law* 12; Davis "The Roman-Dutch mist over the duty of disclosure" 1985 *SAILJ* 12; Davis "The duty of disclosure and the AD: A return to the charge" 1985 *SAILJ* 43; Havenga 1995 *SA Merc LJ* 90;

Havenga "The financial position of an insured and serious threats of physical attack on insured property as material facts" 1995 *SA Merc LJ* 110; Havenga "The test of materiality in insurance law: Another look at *Qilingele v South African Mutual Life Assurance Society*" 1995 *SA Merc LJ* 251; Kerr "The duty to disclose in a pre-contractual context – good faith and the role of the reasonable man" 1985 *SALJ* 611; Madhuku "The up-and-down fortunes of the insured: Is there a distinction between misrepresentation and non-disclosure?" 1994 *SALJ* 477; Oelofse "Die omvang van die versekerde se voorkontraktuele openbaringsplig" 1985 *Modern Business Law* 94; Reinecke "Wesenlikheid by versekeringswaarborge en voorstellings" 1993 *TSAR* 771; Reinecke and Becker "Die openbaringsplig by versekering: Uberrima fides oorboord" 1985 *TSAR* 86; Reinecke and Van der Merwe "Openbaarmaking van wesenlike inligting: Die inhoud van Pandora se kissie" 1989 *TSAR* 693; Scholtz "Materiality of a misrepresentation or non-disclosure. 'Material' differences between South African and English Law" 1995 *De Rebus* 304; Van der Merwe "Uberrima fides en die beraming van die risiko voor sluiting van 'n kontrak" 1977 *THRHR* 1; Van Niekerk "Enkele opmerkings oor die openbaringsplig by versekeringskontrakte" 1989 *SA Merc LJ* 87; Visser "Misrepresentations in insurance applications" 1994 *Juta's Business Law* 184; Van der Merwe "Insurance and good faith: Exit uberrima fides – enter what?" 1985 *THRHR* 456.)

At the risk of oversimplification, the present legal position may be stated very briefly. Three Appellate Division decisions serve as a point of departure, namely, *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A), *President Versekeringsmaatskappy Bpk v Trust Bank van Afrika Bpk* 1989 1 SA 208 (A) 216D–F and *Qilingele v South African Mutual Life Assurance Society* 1993 1 SA 69 (A). In the *Oudtshoorn Municipality* case the court held that the materiality of a non-disclosure must be determined by applying the reasonable man test. In *President Versekeringsmaatskappy Bpk v Trust Bank van Afrika Bpk supra* 216D–F the court explained further that the test was whether the reasonable man would consider that the information should be conveyed to the prospective insurer so that the insurer itself could decide whether to accept the risk or to charge a higher premium than usual. In essence this test is an objective test.

In *Qilingele v South African Mutual Life Assurance Society supra* the court limited the application of the reasonable man test to instances of non-disclosure. The court held that where the materiality of a representation, whether warranted or not, must be determined, section 63(3) of the Insurance Act 27 of 1943 applies. In terms of this section a court must determine whether the representation is such that it probably affected the assessment of the risk undertaken by the particular insurer when it concluded the insurance contract. A simple comparison was made between two assessments of the risk: The first assessment is that made by the insurer on the basis of the facts incorrectly represented by the insured; in the second place one determines how the insurer would have assessed the risk had the facts been correctly stated. If a significant disparity between the two assessments exists, the requirement of materiality as stated in section 63(3) is satisfied. In contrast to the test in *President Versekeringsmaatskappy Bpk v Trust Bank van Afrika Bpk supra*, this test is subjective.

In *Theron v AA Life Insurance Association Ltd* the Appellate Division was, once again, called upon to decide whether certain representations and non-disclosures were material.

2 The facts

Theron was the nominated beneficiary under a life insurance policy issued by the AA Life Assurance Association on the life of one Robert Geoffrey Fortuin. Fortuin was born in 1961 and first attended school at the age of seven. At the age of fifteen years he had not progressed beyond the level of standard two (365G) and at one time he had attended a so-called adaptation class for mentally handicapped children (365J–366A). The policy provided for basic life cover of R100 000 and an additional accidental death benefit of R100 000. Fortuin died as a result of multiple injuries sustained when he was run over by a motor vehicle. Theron claimed the amount of R200 000 in terms of the policy but the insurer repudiated liability. The following grounds were raised:

(i) The proposal form contained certain material misrepresentations.

(ii) Fortuin failed to disclose a material fact, namely that he was severely mentally retarded.

(iii) Fortuin lacked the necessary mental capacity to conclude the contract of insurance.

The court *a quo* found that Fortuin was severely mentally retarded and consequently lacked the necessary mental capacity. It was therefore unnecessary to deal with the first two grounds and the action was dismissed with costs (see *Theron v AA Life Assurance Association Ltd* 1993 1 SA 737 (C)).

3 The decision of the court

On appeal, the question whether the insured had the necessary mental capacity to conclude the contract of insurance was once again dealt with extensively (365I–375H 378F–382G). For the present discussion it is sufficient to say that the majority of the court (Vivier JA with whom Hefer JA concurred) found that the insurer had not proved that the insured lacked the required mental capacity to conclude the contract. In other words, it was not proved that the insured was severely mentally retarded. In a minority judgment, Schutz JA held that the insurer had indeed proved that Fortuin was severely mentally retarded and therefore did not have the necessary mental capacity to conclude the insurance contract. In view of this finding Schutz JA did not consider it necessary to deal with the further defences based on misrepresentation and non-disclosure.

In the present discussion I shall examine only the issues of misrepresentation and non-disclosure as dealt with in the majority judgment. The insurer argued that the proposal form contained the following misrepresentations (375I–J):

> "1. There were no circumstances not disclosed in the proposal form relating to the insured's health which may affect the risk of assurance on his life;
>
> 2. He was self-employed and was in receipt of earnings exceeding R650 per month;
>
> 3. He had attained a standard 8 qualification;
>
> 4. He had one brother who was in good health."

It was alleged in the pleadings that these statements were false because, first, the fact that Fortuin was severely mentally retarded may have affected the risk; secondly, he was unemployed and was not in receipt of earnings exceeding R650 per month; thirdly, Fortuin had not attained a standard eight qualification; and fourthly, his brother, although in good health, was also mentally retarded (376A–B). The court observed that the statements were warranted to be true and that they formed the basis of the insurance contract.

The court distinguished between the test to determine the materiality of a non-disclosure and the test to determine the materiality of a representation whether warranted or not (376E–F). The court was accordingly of the opinion that the *Qilingele* test had to be applied to determine the materiality of the statements in (1)–(4) above. The court found that the first representation was not proved, as Fortuin was not severely mentally retarded (376I–J). In the alternative, the insurer contended that the statement was false in that Fortuin had attended a special class at school. The court declined to make a finding on this contention, since it was never canvassed at the trial and it was not possible to say what effect this might have had in the assessment of the risk (377A). The court furthermore found that the second and fourth statements were also not shown to be false (377B–C).

It was only the third statement which was proved to be false. Richter, the insurer's branch manager, attested that even if Fortuin had indicated that he had passed only standard two or that he had no schooling at all, it would not have affected the assessment of the risk (377D). According to Richter in the type of insurance under discussion, a person's academic qualifications were not regarded as material (377E). In view of this, the court held that the insurer could not repudiate the contract on the ground of misrepresentation.

The court finally dealt with the defence based on the failure of the duty to disclose material facts. The insurer alleged that Fortuin had failed to disclose that he was severely mentally retarded. This allegation the court had already found was not proved. In the alternative the insurer contended that Fortuin should have disclosed that he had been placed in a special class at school (377G).

The court applied the reasonable man test as formulated in *President Versekeringsmaatskappy Bpk v Trust Bank van Afrika Bpk supra* to determine the materiality of the fact that Fortuin had been placed in a special class at school (377G–H). The court held that a reasonable man would have considered the information entirely irrelevant. In view of this finding, the court found for Theron and ordered the insurer to pay him the sum insured.

4 Some comments on the judgment

4 1 The distinction between misrepresentations and non-disclosures

The judgment in the *Theron* case perpetuates the distinction made in *Qilingele* between misrepresentations and non-disclosures. Numerous commentators have indicated that this distinction is not sound (see Reinecke 1993 *TSAR* 773–774; Visser 1994 *Juta's Business Law* 185; Madhuku 1994 *SALJ* 480; Havenga 1995 *SA Merc LJ* 92). The *Theron* case provides further support for the contention that a distinction between misrepresentations and non-disclosures is unsound and merely superficial.

The first defence raised by the insurer was that "[t]here were no circumstances not disclosed in the proposal form relating to the insured's health which may affect the risk of assurance on his life" (375I). The exact implication of this defence is not clear. Did the insurer allege that Fortuin misrepresented material facts or that he failed to disclose such facts? It seems that the insurer itself was not too certain exactly what it alleged. The insurer argued that the insured made a misrepresentation with regard to his mental health (376A) and, in the alternative, to his attending a special class at school (377A). However, the insurer also argued that these exact facts were not disclosed (377F–G). The insurer therefore

argued that the same set of facts amounted to a misrepresentation and a non-disclosure. On this score, the insurer was of course correct since a fact incorrectly stated is at the same time a non-disclosure of the true position. However, it is uncertain which test must be applied, namely the objective reasonable man test (*President Versekeringsmaatskappy Bpk v Trust Bank van Afrika Bpk supra*) or the subjective particular insurer test (*Qilingele v South African Mutual Life Assurance Society supra*).

Perhaps the best option is similar to that followed by the insurer in the *Theron* case: In the proposal form a general question must be included asking the insured to state that there is nothing else that should have been disclosed that may affect the assessment of the risk. An incorrect answer would technically be a misrepresentation and would require the subjective *Qilingele* test to be applied (see Havenga 1995 *SA Merc LJ* 93 where I first raised this possibility). However, in the event that the insurer may fail to prove the materiality of the misrepresentation, the insurer should keep a back door open and plead that the same facts were also not disclosed. This would prompt the court to apply the reasonable man test.

This is exactly what happened in the *Theron* case. In his defence based on misrepresentation, the insurer failed to prove that Fortuin was severely mentally retarded and the alternative argument that the insured attended a special class at school, was not properly canvassed (377A). The defence founded on non-disclosure depended on the same facts. Strangely enough, the fact that the insurer did not properly canvass the issue of the attendance at a special class at school in his misrepresentation defence, did not prevent the court from applying the reasonable man test to determine whether it was a material non-disclosure (377G–377I). The fact that two different tests apply to determine materiality raises the interesting possibility that the same fact may be considered to be material or not depending on the test used. For example, had the insurer properly canvassed the issue of attendance at a special class at school in his defence of misrepresentation the court, by applying the particular insurer test, may have held that it was material. But on applying the reasonable man test, it was found not to be material. Exactly what the outcome of a case would be where the same fact is held to be material in the case of misrepresentation but not material in the case of a non-disclosure, is not clear.

4 2 The true defence

In the end, the court had to determine the materiality of only two facts: first, the academic qualification of Fortuin (377D–E); and secondly, the attendance of Fortuin at a special class at school (377G–J). Not surprisingly, the court found that both these facts were not material. It must be remembered that the insurance contract was a life insurance contract and that the risk is, in the first place, determined by taking into account those facts that have a bearing on the life expectancy of the insured (see Havenga "Die openbaringsplig by lewensversekeringskontrakte" 1990 *SA Merc LJ* 86). Clearly these facts were not relevant to determine the life expectancy of the insured. But why was the insurer clutching at these straws? The answer is, I submit, to be found in the following remarks of Vivier JA (368G–I):

> "It was suggested that a conspiracy had been formed between, amongst others, Williams, Mr Spencer James Whiting ('Whiting'), who was the insurance agent who sold the policy in question to the insured and the appellant. The suggested plot entailed putting the insured in William's house and paying his rent, taking out the policy in his name, murdering him and claiming the benefits due under the

> policy on the basis of fraudulent evidence that there was nothing wrong with him. In my view, there is no factual basis whatsoever for the submission."

Schutz JA also alluded to the conspiracy theory and was on the whole more impressed with it. He declared (381G–H):

> "I find the facts surrounding the claim to be generally suspicious. The suspicion in short is that a gullible moron was prevailed upon to take out insurance on his life appointing a 'friend' as the beneficiary, and was thereafter murdered. That was not pleaded. No doubt if it could have been proved, a plea equivalent to 'de bloedige hand erft niet' would have been raised. But the suspicion remains."

The question is how to determine the validity of an insurance contract, concluded by an insured on his own life on the inducement of the ultimate beneficiary, to enable the latter to obtain the advantage of insurance without himself insuring the insured's life in which he may have had no interest? (See also 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) 303 where this issue is raised). In South African law the courts have not yet had an opportunity to answer the question. However, in English and American law there are numerous cases decided on this point (see Havenga thesis 85–88 146). The reason why the insurer did not rely on this line of defence is not clear, but perhaps it would have been more successful.

5 Conclusion

In the end the impression that the issue of materiality is shrouded in uncertainty and controversy remains. The almost clinical precision with which the court in *Theron v AA Life Insurance Association Ltd supra* attempted to apply the law as stated in *Qilingele v South African Mutual Life Assurance Society supra* does not stand up to closer scrutiny.

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THE APPLICATION OF CHOICE OF LAW RULES IN A SUCCESSION DISPUTE ARISING OUT OF THE TRANSKEIAN MARRIAGE ACT 21 OF 1978

Makhohliso v Makhohliso case no 1364/93 (TkSC)

After the abolition of the Commissioners' Courts on the attainment of independence in Transkei in 1976, it was indeed rare to come across an instance in Supreme Court litigation, in this part of the world, where the outcome of a case in a given situation would largely be influenced by the choice of a system of law the court applied to the facts before it. Such was the nature of the pleadings and the cause of action in the recent unreported decision of the Transkei Supreme Court in *Makhohliso v Makhohliso*. The circumstances of the case clearly demonstrated that the aspects of the Transkeian Marriage Act 21 of 1978 dealing with polygamy – an issue that was thought to be central to the whole enactment – was not

only not fully comprehended by the ordinary man in the street, let alone the ordinary man in the rural homestead, but that the same provisions are not even clearly understood by those who have to administer them. It is also curious that the judgment of the court was delivered two months before the national general election which led to the demise of the Republic of Transkei. This fact alone put the future of the whole Transkeian Marriage Act in the balance. (On the compatability of the Act with the human rights norms, see the present writer "The Transkeian Marriage Act of 1978 and the interim Constitution" 1995 *SALJ* 347.)

The final judgment in this very complex internal conflicts situation is both juridically sound and just in the circumstances. The entire approach of Mr Justice Pickering seems to have been guided, albeit subconsciously, by the classic formulation of Schreiner JA in the leading case of *Ex parte Minister of Native Affairs: In re Yako v Beyi* 1948 1 SA 388 (A) 397 where the latter, referring to the general choice of law provision then governing internal conflicts between common law and what was then known as native law, said:

> "Parliament, in enacting sec 11(1) appears to have used a device which may have been expected to permit of some elasticity and provide scope for development, so as to achieve the primary *desideratum* of an equitable decision between the parties without laying down any hard and fast rules as to the system of law to be used to attain that end."

Quite often the judge spoke of a need to establish a fairer balance between the parties.

Section 53(1) of the Transkei Independence Constitution Act 15 of 1976 empowers any court in the territory, including the Supreme Court, to apply customary law in a proper case.

The dispute in the *Makhohliso* case concerned two sets of surviving children who are offspring of a marriage in community of property and a customary marriage, respectively. The children of the common law marriage, six in all, were the applicants and those of the customary marriage respondents.

The applicants sought an order declaring, *inter alia*, the first marriage to have been one in community of property, also declaring the estate of Webster Makhohliso (the deceased polygamous husband) to devolve according to the principles of the South African common law as well as declaring the applicants to be intestate heirs to the estate of the said Webster in terms of the principles of the South African common law.

From the record it appeared that the first marriage was entered into in 1939 and subsisted until the death of the wife in July 1989. The marriage was in community of property and of profit and loss, contracted in accordance with the provisions of the Black Administration Act 38 of 1927. Since 1958, Webster had lived as husband and wife with one Dideka Ntloko whom he later married in accordance with customary law on 26 July 1979, after the coming into operation of the Transkeian Marriage Act. The second marriage was purportedly contracted in terms of section 3(1)(a) of this Act. It also appeared that the second wife died in 1986, followed by the death of Webster himself in 1990.

It was common cause that both Webster and his first wife died intestate. It was also common cause that Webster's children from the second wife were all born during the subsistence of the first marriage. The customary marriage produced five children.

The applicants contended that the customary marriage was invalid because it was contracted during the subsistence of a marriage in community of property. From this premise they argued that the estate of Webster should devolve in accordance with the principles of South African common law, in terms of which they were the only intestate heirs to the estate. The applicants were of the view that the children of the second marriage were illegitimate.

On the other hand, the respondents contended that there was nothing contained in the Transkeian Marriage Act prohibiting a man from contracting a customary marriage with other women during the subsistence of his civil marriage in community of property. In their view the customary marriage contracted between their late mother and Webster was a valid marriage. In their counterclaim they sought an order:

(a) declaring that the civil marriage between Webster and his first wife had ended on the death of the latter;

(b) ordering the estate of the first wife to be wound up first;

(c) declaring the first wife as constituting a house and therefore be regarded as the Great Wife in the African polygamous marriage structure;

(d) declaring the estate of Webster to devolve according to the principles of African customary law;

(e) declaring the second respondent (the first born male of the second wife) to be the intestate heir of the estate of Webster; and

(f) declaring that the costs of the application be borne by the estate of the late Webster Makhohliso and his first wife.

Pickering J observed that before the promulgation of the Transkeian Marriage Act the law regarding polygamy in Transkei was similar to the legal situation for the whole of South Africa. (See *Seedat's Executors v The Master (Natal)* 1917 AD 302 309. The court regarded polygamy as being contrary to public policy. This was as seen from the perspective of white morality.) A civil marriage was a bar to a subsequent customary marriage; in effect a customary marriage could not stand in the face of a civil marriage, as the contracting of the latter during the subsistence of a customary union would lead to an automatic dissolution of the customary union (see *Nkambula v Linda* 1951 1 SA 277 (A) 38). The Transkeian Marriage Act reversed the travesty of justice by putting the two marriages on par. It even created an impression that the customary marriage was now stronger than the civil marriage. Section 3(1) of the Act reads:

> "Nothing in this Act or any other law contained shall be construed as prohibiting–
>
> (a) any male person from contracting–
>
> (i) a civil marriage which produces the legal consequences of a marriage out of community of property with any female person during the subsistence of any customary marriage between such male person and such female person or any other female person; or
>
> (ii) a civil marriage which does not produce the legal consequences of marriage out of community of property with any female person during the subsistence of customary marriage between such male person and such female person; or
>
> (iii) a customary marriage with any female person during the subsistence of any civil marriage which produces the legal consequences of a marriage out of community of property or any customary marriage between such male person and any other female person; or

(b) a marriage officer from solemnizing any civil marriage referred to in paragraph (a)(i) and (ii); or

(c) a magistrate from registering any customary marriage referred to in paragraph (a)(iii)."

The judge also noted that in terms of the Act, a male person wishing to enter into a polygamous union during the subsistence of his existing marriage does not have to obtain the consent of his spouse before doing so. He expressed the view that the wording of section 3(1)(a) was clear and unambiguous as was evident from the commentaries thereon by Bekker *Seymour's customary law in Southern Africa* (1989) 255 *et seq* and Bennett *A source book of African customary law for Southern Africa* (1991) 459–460. Both writers agree that in terms of section 3(1)(a) a man may enter into a subsequent customary marriage only if his civil marriage is out of community of property.

The present writer does not share the same view as the judge to the effect that the section is clear and unambiguous; if it were, the magistrate who caused the registration of the customary union during the subsistence of the civil marriage in community of property could not have done so. This is reinforced by the general impression created in the mind of the general public that the Transkeian Marriage Act sought to bring together "two institutions drawn from vastly different cultures" (see Van Loggerenberg "The Transkeian Marriage Act of 1978 – a new blend of family law" 1981 *Obiter* 1) – one founded on the notion of the nuclear family and the other on the extended family system. Further, section 39 of the Act creates the impression that marriages in Transkei were henceforth to be out of community of property and that marriages in community of property would be exceptions only. (See the marginal notes on s 39 as well as Bennett *Application of customary law* (1985) 186.)

In the event of the parties opting for the latter, the Act created a special procedure that was too sophisticated for the bulk of the population with a low literacy rate. Section 3(1)(a) does not make a clear distinction between two forms of marriage regarding the prohibition of polygamy even though the minister clearly did so in the second reading of the Marriage Bill. (See the Republic of Transkei Debates of the National Assembly, Third Session First Assembly 1978-03-15 to 1978-06-16 386.) In the writer's opinion, such an explicit distinction was called for if one has regard to the level of sophistication of the bulk of the Transkeian population. The fact that even a magistrate allowed the registration of the customary marriage meant that the presumption of regularity should apply.

Another curious aspect of the case was the conduct of the first wife, who seemed to have tolerated the second marriage until death without raising any objection. Section 3 makes provision for objection to the registration of a customary marriage with a magistrate. Once an objection to the proposed registration is lodged, the magistrate is bound to hold an inquiry into the matter.

It seems to me to be contrary to public policy for children to seek to persuade the court to bastardise their half brothers and sisters soon after the demise of their common parent.

After examining a number of authorities on matters of succession, including those relating to the internal conflicts situations, the court concluded that the subsequent purported marriage entered into during the subsistence of a marriage in community of property was null and void *ab initio*. From that it therefore followed that the estates of both Florence Makhohliso (the first wife) and

Webster Makhohliso should devolve according to the principles of the common law in terms of section 2(c) of Government Notice 1664 of 1929.

Counsel for the respondents raised in the alternative the argument of a putative marriage, that the purported customary marriage between Webster and Dideka Ntloko was a putative marriage and that the respondents, being born of such marriage were legitimate for all purposes, including the right to succeed to the estate of Webster. They relied on the judgment of Gordon J in *Ngubane v Ngubane* 1983 2 SA 770 (T) where the court expressed the view that a court, in an appropriate case, was not precluded from determining issues of a putative marriage and legitimacy – merely because the party applying for an order was not a *bona fide* party to the marriage – particularly where it was clearly in the interests of children to do so.

Pickering J found that in the case before him where both parties to the marriage were deceased and the children of such marriage wished the issues of putative marriage and their legitimacy to be determined, it was clearly in the interests of the children that the court determined such issues. In the judge's view, the second marriage was in fact a putative marriage. He found that not only had the pre-marital formalities relevant to customary marriages, such as the payment of lobola been complied with, but the marriage was also duly registered in terms of the Act. The court also noted that the parties who had cohabited since 1958 purported to enter into their customary marriage on 26 July 1979 soon after the Act came into operation on 2 July 1979:

> "They thus lost no time in taking advantage of the provisions of the Act in order to regularise their situation ... I have no doubt, therefore, that they bona fide believed that they were entitled to contract their marriage in accordance with the provisions of the Act and that Section 3 thereof, far from being an impediment to their marriage, in fact authorised it ... the circumstances, where both parties to the marriage were bona fide and the formalities prescribed by the Act in relation to the registration of the marriage were complied with, the marriage was putative."

Although the court declared the second marriage to be a putative one, it found certain complications in relation to the two children that were born prior to the dates when the marriage was regularised (so to speak). It found the two affected children to have been adulterine. The court further considered the question whether adulterine children could not be legitimated by subsequent marriage of their mother and natural father. Having found that adulterine children can in fact be legitimated by a subsequent marriage (including a putative one) the court held that even those children born prior to the date of the marriage were in fact legitimate.

In the end the court declared that the estate of Webster Makhohliso should devolve as if he had been a European, in other words according to the principles of the common law as modified by statute. The fact that the children of the second union were the offspring of a putative marriage did not exclude them from succeeding *ab intestato* to his estate. All the disputants were each to receive a child's share in the estate.

Equity played a major role in the final decision of the case. In my view it did not matter to the children of the second union whether their parents' marriage could be regarded as putative, since the results are the same as if both were equal in the eyes of the law.

In retrospect, it seems that something ought to be done about the Transkeian Marriage Act: either that the public be made sufficiently aware of the distinction

between the two forms of marriage or that all cases that are on all fours with *Makhohliso*'s case be similarly dealt with even if the issue of putative marriage is not specifically pleaded. From the judgment, it would seem that the issue of putative marriage would not have arisen, had it not been specifically pleaded. As long as the two systems of law continue to exist side by side, the internal conflicts situation will continue to arise. The very fact that customary law is largely undocumented, calls for a sympathetic understanding on the part of those called upon to administer justice in this country.

Again one is here reminded of Schreiner JA's observation in *Yako*'s case *supra*, namely:

> "No doubt when colonisation takes place among a people having their own customary law, and when the law of the colonists becomes the law of the land, difficult questions of policy are likely to arise as to the proper extent of recognition and use, at any particular period, of the customary law of the native inhabitants . . ."

With such understanding on the part of the courts, the two systems of law can indeed co-exist in harmony.

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SUCCESSION OF CHIEFTAINCY: HEREDITARY, BY APPOINTMENT OR BY COMMON CONSENT?

Chief Pilane v Chief Linchwe 1995 4 SA 686 (B)

1 Introduction

The position of traditional authorities in South Africa is a contentious issue. The Constitution of the Republic of South Africa Act 200 of 1993 recognises traditional authorities which observe a system of indigenous law (s 181(1)). This recognition is, however, subject to any amendment or repeal of such laws and customs by a competent authority. A traditional leader is *ex officio* member of a local government in his area (s 182). The Constitution also provides for the establishment of Provincial Houses of Traditional Leaders as well as a national Council of Traditional Leaders (s 183–184). The provinces are empowered to legislate on traditional authorities (s 126 read with schedule 6). According to legislation in force before 27 April 1994, traditional authorities have to be formally recognised by the then RSA president or presidents/leaders of the TBVC countries (Transkei, Bophuthatswana, Venda and Ciskei). In both the RSA and the TBVC countries, these powers were sometimes abused to appoint persons other than hereditary leaders in order to silence opposition to the government of the day (cf *Molotlegi v President of Bophuthatswana* 1992 2 SA 480 (BA)).

In *Chief Pilane v Chief Linchwe* the question of the appointment of a traditional leader in Bophuthatswana was discussed. In this case note the historical background of the Bakgatla-ba-ga-Kgafela *morafe* ("tribe"), the court's decision,

the appointment of *dikgosi* according to customary law and the legal position in the North West province will be discussed.

2 Historical background

The court referred to the history of the Bakgatla-ba-ga-Kgafela *morafe* (688I–689B). The *morafe* established itself in the nineteenth century in the Pilanesberg area with their capital at Moruleng Saulspoort (688I). Because of the differences the then government under Paul Kruger and the Bakgatla-ba-ga-Kgafela had a section of the *morafe* seceded to the now Republic of Botswana (Protectorate of Bechuanaland) and settled in Kgatleng with the capital at Mochudi (688I–689A). The Paramount Chief of the Bakgatla-ba-ga-Kgafela *morafe* was and still is based at Mochudi (689B).

3 Facts

Kgosi Pilane (applicant) of the Bakgatla-ba-ga-Pilane (sub-*morafe* of the Bakgatla-ba-ga-Kgafela) at Moruleng (Pilanesberg) (South Africa) has been a representative of the Paramount *Kgosi* Lenchwe (correctly spelt as Lencwe) (Moshudi, Botswana) (689B–C). During 1993 *Kgosi* Pilane announced his intention to retire because of ill-health. He further proposed that his son Molefe Ramono Pilane (MR) should succeed him (689C).

Paramount *Kgosi* Linchwe (from Botswana – first respondent) accepted the proposal of *Kgosi* Pilane (South Africa) to retire but the fact that his son should succeed him was not accepted as more complicated questions arose (689D–E 689E–F):

(1) Would MR be paramount *kgosi* of Bakgatla at Moruleng;

(2) would he act in his father's place until his father dies; and

(3) would he be subject to the powers of the Paramount *Kgosi* Lencwe?

The initial intentions (retirement and replacement) of *Kgosi* Pilane were communicated to the paramount *kgosi* Lencwe by a delegation of 32 people sent by *Kgosi* Pilane from Moruleng (689D–E). Because of the complex nature of *Kgosi* Pilane's request, the paramount *Kgosi* sent the delegation back to seek clarity (689F). A second delegation of five persons was sent to the paramount chief to convey *Kgosi* Pilane's request again (689G). Paramount *Kgosi* Lencwe then initiated a meeting with the applicant, saying that the *morafe* has to be consulted (689G–H). A meeting was convened at Moruleng on 20 November 1993 where both respondent and applicant were present (689H).

At this meeting a report was made to the whole *morafe* by the first respondent regarding the request of the applicant and regarding what the *morafe* at Mochudi had decided on this issue (689H):

> "1. The tribe at Saulspoort and Mochudi were one and would remain one.
>
> 2. The tribe always had one Paramount Chief and this should continue.
>
> 3. The practice that the Paramount Chief appoints a chief to represent him at Saulspoort was to continue.
>
> 4. If the tribe at Saulspoort wished to secede, and become separate, no one would stop them."

It seems that the vast majority of the *morafe* were of the opinion that the applicant should retire because of his tyrannical rule (690A). They also supported the decisions taken by the *morafe* at Mochudi and were not in favour of MR (690B – only two people were in favour of MR as successor). The applicant was of the

view that chieftainship was a family matter and saw no reason to invite the whole *morafe* to discuss that issue (690C).

On 8 February 1994 another *morafe* meeting was called where ex-President Mangope was present and applicant failed to turn up (690D). However, all the *morafe* headmen were there and Nyalala Molefe Pilane (second respondent) was subsequently supposed to be introduced to the *morafe* as the new representative of the paramount *kgosi* at Moruleng on 12 February 1994 (690E). This meeting never took place, owing to the urgent application brought by applicant (690G).

The *morafe* became unsettled because of the dispute and another *morafe* meeting was called on 3 April 1994. Applicant chose not to attend and first respondent informed the *morafe* that after due consultation he had decided to replace the applicant and that this appointment was unanimously accepted by the tribe (690H). As the tribe was not prepared to accept applicant as interim administrator, they appointed an interim committee to conduct the affairs of the *morafe* (690H–J). (Because of the pending court case, second respondent could not be installed.)

President Mandela met applicant and first respondent after receiving a written complaint from applicant during April 1994. The complaint was with regard to the situation of a chief in Botswana also being a chief in South Africa (691A). President Mandela requested the parties to settle the dispute in private with the elders of the *morafe*. He also requested applicant to withdraw the court case, apologise to the *morafe* and "to retire with dignity" (691B). On 17 April, applicant apologised and it was agreed in his presence that second respondent be installed as *kgosi*. No opposition was lodged at this stage. Second respondent was however not installed because of the urgent application of applicant (691B–D).

4 Application and counter application

The applicant (697E–G) sought in the notice of motion the relief that –

(a) the matter be heard as one of urgency;

(b) an interdict and restraining order be issued that he not be deposed as chief of the Bakgatla tribe;

(c) an interdict and restraining order be issued that the second respondent not be accepted and appointed as chief of the Bakgatla tribe; and

(d) the respondents pay the rest of this application.

A counter-application was made by the respondents (692A–G) that –

(a) Chief Lencwe (first respondent) is paramount chief of the Bakgatla tribe resident in Botswana, and that he is entitled to rule his tribe either directly or indirectly through the appointment of any subject of the royal family;

(b) applicant is not chief of the tribe;

(c) second respondent's appointment is valid and effective;

(d) chieftainship in the Bakgatla tribe is hereditary;

(e) applicant be suspended from chieftainship duties;

(f) only first respondent, second respondent and the interim committee have the power to call meetings of the Bakgatla tribe, using assets, properties and resources of the tribe; and

(g) the first respondent also may employ, discipline and dismiss employees of the tribe and so could the second respondent or the interim committee as directed by the first respondent.

The applicant sought further relief (689A–J 693A–J 694A–C) giving notice of his point *in limine* that –

(a) the Constitution of the Republic of South Africa came into operation on 27 April 1994;

(b) all laws in force in any area forming part of the National Territory continue in force in such area unless they are repealed or amended (s 229 of the Constitution);

(c) in terms of the Constitution the area of the former Bophuthatswana falls within the area of the North West Province;

(d) the Bophuthatswana Traditional Authorities Act is still operative in that area since it has not been repealed, amended or substituted;

(e) in terms of the Constitution where reference is made to the president of any territory and the administration of such law is allocated or assigned to a government of a province, it should be construed that reference is made to the premier of such province acting in terms of the Constitution;

(f) the functional area of traditional authorities is therefore in terms of Schedule 6 of the Constitution within the legislative competence of the province of the North-West and within the executive authority of the premier of the province;

(g) in 1994 the Administration of Bophuthatswana Decree was recorded whereby the joint administrators of Bophuthatswana were appointed to administer the laws of the former Republic of Bophuthatswana;

(h) in terms of the decree all laws which were applicable in Bophuthatswana on 11 March 1994, save the Republic of Bophuthatswana Constitution Act 18 of 1977, continued to apply until repealed, amended or substituted and the Traditional Authorities Act was one such law;

(i) before the coming into force of the decree only the president of Bophuthatswana had the authority to recognise any person as chief or acting chief with due observance of the law and customs of the tribe concerned and recognition had to be in writing;

(j) in March 1994 such authority was vested in the joint administrators and with the coming into operation of the Constitution such authority was vested in the premier of the North-West Province;

(k) there was no recognition as required by the Traditional Authorities Act of the second respondent as chief of the Bakgatla-ba-ga-Kgafela tribe at Moruleng either by the former Bophuthatswanan president, the joint administrators or by the North-West premier;

(l) there was also no commission of inquiry set up by the former Bophuthatswanan president to enquire into the dispute in regard to the recognition of a chief in this instance; and

(m) the first respondent should not therefore depose the applicant as chief of the tribe at Moruleng nor appoint second respondent as chief of the tribe.

5 Finding

The court found that the suspension of the Bophuthatswanan Constitution could not be done retrospectively and had no influence on the facts of the case before the court (694F).

The requirement of writing in section 36 of the Bophuthatswana Traditional Authorities Act is only a formality and non-compliance does not invalidate the designation, appointment or recognition of the *kgosi*. No mention was made of writing in the Bophuthatswanan Constitution that at that stage was the supreme law of the land (694I–695A–B). The court referred to the minutes of the meeting at Saulspoort between the ex-president and members of the *morafe* (695D–696D) and derived that the ex-president intended to recognise and designate second respondent although not all the formalities were complied with. The court also found that the recognition and appointment could only be done in accordance with the laws and customs of the *morafe* and that the ex-president acted in accordance with these (696E–G). The premier of the province only had to formalise the appointment in writing (696H). With regard to factual disputes, the court ordered that, should applicant proceed with the action, oral evidence would be needed in accordance with *Chief Molotlegi v President of Bophuthatswana* 1992 2 SA 480 (BA) (cf 696J–697C; Du Plessis and Olivier "*Chief Molotlegi v President of Bophuthatswana* 1992 2 SA 480 (BA); *Mantanzima v Holomisa* 1992 3 SA 876 (Tk)" 1993 *De Jure* 185–191).

6 Discussion

6 1 Procedure according to customary law

In terms of customary law and procedures, chieftainship is hereditary. The eldest living son of the chief by his first wife should be the successor to his father. In a case where there is no son by the first wife, a son by the second wife should succeed his father, and so on (cf also Olivier *Privaatreg van die Suid-Afrikaanse bantoetaalsprekendes* (1989) 497; Myburgh and Prinsloo *Indigenous public law in KwaNdebele* (1985) 6). This, however, is done with due regard to the customs and practices of the *morafe* (696F–G). It is also important that, in deciding matters relating to chieftainship, the *morafe* is consulted at all times (689G).

If there is no hereditary successor in terms of customary practices, the appointment is within the discretionary powers of the *kgosi* or the paramount chief (as the case may be) in consultation with the *morafe*. Once the above procedure has been followed, the appointed *kgosi* will formally be introduced to the *morafe* and installed – normally by a traditional ceremony whereby he will be recognised *kgosi* of that *morafe*.

Where there is a division among the *morafe* as to who should succeed the *kgosi*, the *morafe* is divided and the section of the *morafe* in that area or *motse* will remain in that *motse* where they are in the majority. The minority section of the *morafe* will normally secede and form their own settlement somewhere else with the person they want as chief. The paramount chiefs of these two *morafe* always remain chiefs, regardless of the circumstances.

It is accepted custom that under normal circumstances, that is where there is a direct successor to the chieftainship, there will be no problems and therefore harmony within the *morafe*. It is only where there is no direct successor that the *morafe* is often divided with regard to chieftaincy issues.

6 2 Legislative position

6 2 1 *Ante* 1994-04-27

Bophuthatswana became independent on 10 March 1978 (Status of Bophuthatswana Act 89 of 1977). Being a so-called independent state, legislation could have been adopted which departs from South African law.

The Republic of Bophuthatswana Constitution Act 18 of 1977 provided for the designation of chiefs, acting chiefs, headmen and acting headmen by the president of Bophuthatswana (s 57(1)). The creation of new chieftainships or sub-chieftainships could only be confirmed by the president after consultation with his executive council (s 57(2)). The executive council consisted of the president and ministers of state (s 32).

The boundaries of regional authorities could only be altered by Parliament after consultation with every affected regional authority (s 58). According to the Bophuthatswana Traditional Authorities Act 23 of 1978 – which is still applicable (see par 6 2 2) – the president may, subject to the provisions of the Act and the Constitution and with due observance of the law and customs of the tribe concerned, recognise any person as chief or acting chief of a tribe (s 36(1)). The recognition of the chief must be in writing and directed to the person and tribal authority concerned (s 36(2)). A chief may subject to prior confirmation by the president, appoint any person designated for the purpose in accordance with the law and customs of the tribe concerned a headman, acting headman, sub-headman or acting sub-headman (s 36(3)). The president may also appoint or discharge any person designated for that purpose (in accordance with the law and customs of the community concerned as such (s 36(5)). In the case of disputes regarding chieftaincy the president may appoint a commission of inquiry (s 37(1)). After receiving the findings and recommendations of the commission, the president may settle or decide the matter in the manner he deems fair and equitable or revoke the recognition of a chief or terminate the appointment of a headman (s 37(2)).

6 2 2 *Post* 1994-04-27

Decree 1 of 1994 suspended some sections of the Bophuthatswana Constitution Act of 1977, including sections 57 and 58 – the executive power was taken over by the two joint administrators.

Section 229 of the South African Constitution provides that all laws continue to be in force subject to the repeal or amendment of such laws by a competent authority. According to section 232(1)(a)(ii) regional authority is that part of the national territory in which the law was in force immediately before commencement. As only certain sections of the Bophuthatswanan Constitution was suspended, the Traditional Authorities Act 23 of 1978 still applies. The references in this Act to section 57 of the Constitution must be construed as *pro non scripto*.

6 2 3 Assignment of powers

The executive authority of the Bophuthatswanan joint administrators vested in the South African president after he assumed office in May 1995 (s 235(s)). This executive authority, including that relating to traditional authorities, had to be assigned by the president to a relevant authority.

In terms of section 126(1) of the Constitution (read with Schedule 6), traditional authorities and customary law are a provincial matter. In 1995 the Traditional

Authorities Act 23 of 1978 was assigned to the North West province. The provincial legislature is authorised to promulgate legislation only after referral to the House of Traditional Leaders (s 183(1)(b) of the Constitution).

6 2 4 Writing

The court decided that section 36(2), which provides that the recognition of a chief must be in writing, is merely a formality. The facts of this case relate to the position before April 1994 when the Bophuthatswanan Constitution was still in force. The Traditional Authorities Act is now the only Act regulating the recognition of chiefs. In the light of this it can be argued that appointment in writing is now not purely a formality but a substantive requirement. If, after assignment, new chiefs are recognised without the requirement of writing being met, the recognition may be regarded as null and void.

7 Conclusion

Formal or informal recognition of a *kgosi* should always be done in accordance with the customs of the *morafe* concerned. It is vital that consultation with all interested parties should take place even if the succession is hereditary. If legislation is adopted relating to traditional authorities this should be taken into account. In 1995 a Draft Bill on Traditional Authorities in the province of the North West was drawn up in which the role of custom is observed. Unfortunately the Bill has not been taken further because of political considerations.

It seems that traditions are affected by colonial boundaries and practice. In this case the paramount *kgosi* is from Botswana. He appoints his representatives according to the custom of the *morafe*. In Bophuthatswana (and in South Africa) the recognition of *dikgosi* has to be done in accordance with the relevant legislation. The application of this legislation was sometimes used to get rid of opponents and not to give effect to the customs of the relevant *morafe*. It seems, therefore, that a *kgosi* residing in one country may appoint a *kgosi* in another, but this has to be done in accordance with the laws of the particular country. The question may be asked whether it is viable for *dikgosi* to be appointed across national borders. On the other hand, the colonial boundaries were forced on the *morafe* and were not placed there in accordance to custom. It may create legal uncertainty in certain cases, as is apparent from the *Pilane* decision.

Kgosi Nyalala Pilane was subsequently formally appointed in 1995. His appointment was again confirmed in a court decision during February 1996. (The court's decision was not available at the completion of this note and it seems that this decision will go an appeal.) The history of the *Pilane* case indicates the uncertainty that is created when boundaries and legislation interfere with custom. If legislation is drawn up, it should be done in accordance with custom. Formal recognition of traditional authorities is needed especially with regard to the role they could play in the implementation of the RDP and with regard to their judicial duties.

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GENNA-WAE PROPERTIES – *STATUS QUO ANTE* IS RESTORED

Genna-Wae Properties (Pty) Ltd v Medio Tronics (Natal) (Pty) Ltd
1995 2 SA 93 (A)

The controversy about the possible existence of a right of election, available to a lessee, to terminate the tenancy upon a change in the ownership of the leased property, has recently been settled by the Appellate Division. The fact that the new owner/lessor is bound to recognise the lease in such circumstances has been recognised as an indisputable principle in our law (*Scrooby v Gordon & Co* 1904 TS 937 945; *De Jager v Sisana* 1930 AD 71 82). This principle, known as the *huur gaat voor koop* doctrine, was received into our law from Roman-Dutch law. The effect of the rule is that when a sale of leased property is concluded, an *ex lege* transfer of rights takes place between the seller and the purchaser, to the extent that the purchaser "steps into the shoes of the seller" as lessor, without the need for any cession or assignment of obligations (*Kessoopersadh v Essop* 1970 1 SA 265 (A); *Mignoel Properties (Pty) Ltd v Kneebone* 1989 4 SA 1042 (A) 1049F). An issue which had not arisen previously, and upon which no authoritative statement had been made, was whether the lessee could choose not to continue with the tenancy in this situation where the purchaser was clearly bound to the material terms of the lease.

The decision of the Appellate Division in the *Genna-Wae* case has resolved the conflicting views taken by the Natal Supreme Court (1994 1 SA 106 (D)) in the same matter, and by the Transvaal Division, in a judgment of Heher J in *One Nought Three Craighall Park (Pty) Ltd v Jayber (Pty) Ltd* 1994 4 SA 320 (W).

The arguments in favour of recognising a lessee's right of election following upon a change in the ownership of the property were based upon a statement of Voet 19 2 17, discussed by Professor JC de Wet in a three-part series of articles in the 1944 *THRHR* 74 ff 166 ff 226 ff, and accepted, albeit *obiter*, in *Kessoopersadh's* case *supra* and *Mignoel Properties v Kneebone supra*. The comments made in these two cases suggested that there may be a choice open to the lessee if he or she does not wish to continue with a lease when a purchaser replaces the original lessor. Squires J held (109C–D): "It seems as though there was an election open to the lessee to leave . . ."

Some months later, when substantially the same issue came before the Transvaal Provincial Division, Heher J (325I) rejected these arguments as being an incorrect interpretation which did not seem a correct reflection of the law as it has developed. Heher J's view was given weight by the absence of any mention of such a right of election, in both Roman-Dutch (Nelissen, Bodenstein) and by modern academic writers, as well as in the reported cases, and by considerations of commercial practice, where uncertainty would result in regard to calculating the purchase prices of tenanted properties. In addition, the rights and obligations of the parties would be unclear during the intervening period between the date of the transfer of the property and the date when the lessee made his or her election whether to continue with the lease or not.

The basis of the decision in the first instance in the *Genna-Wae* case, was the following quotation from Voet 19 2 17 in his observations on the doctrine of *huur gaat voor koop*:

> "Thus also the lessee enjoys a right of retention if he prefers to continue with the hiring, rather than to take judicial proceedings for damages after being untimeously put out."

The critical phrase which sparked off this controversy was "*if he prefers*", a phrase which suggests that a choice is available to the lessee. In *Kessoopersadh's* case *supra*, Rabie AJA remarked, *obiter* (284): "Die bewering dat die huurder verplig kan word om die grond te bewerk, is strydig met Voet 19.2.17, wat sê dat die huurder die reg het om die grond te verlaat."

In the *Mignoel* case *supra* 1047J–1049C, in which the court was required to determine whether a new lessor/purchaser can enforce ancillary obligations under a previously existing lease (in this case, a suretyship agreement) against the surety, in the absence of an express cession of the seller's rights, Friedman AJA reviewed the relevant authorities, in an effort to determine the scope of the maxim *huur gaat voor koop*. Tracing the position of the lessee through Roman law, where he or she had no *jus in re* in the leased property, and the purchaser of the property was not bound to recognise the lease, the modifications introduced into Roman-Dutch law were seen as an attempt to alleviate the tenant's position. The maxim was regarded as an amalgamation of local customs and legislation. The judge referred to the series of articles by De Wet in the 1944 *THRHR*, concluding that De Wet's understanding of the effect of the maxim is that

> "a lessee acquires a real right in respect of the leased property . . . the relationship created between the lessee, purchaser and seller . . . [is such that] a purchaser may not evict a lessee and that, according to Voet, the lessee may vacate the property and sue the lessor/seller for damages. However, if the lessee elects to remain in the property, the question arises as to whether the purchaser becomes the lessor and the seller disappears from the scene" (1048G–H).

The difficulty which immediately arises in De Wet's interpretation of Voet, in regard to the phrase "if the lessee prefers to continue with the hiring", is that it does not make sense to permit the lessee to recover damages from the lessor/seller, in circumstances where the lessee has elected of his or her own accord not to continue with the lease, a point which was raised specifically in the judgment of the Appellate Division by Corbett CJ (935F).

In a case note (1994 *SALJ* 226) Kritzinger suggests three possible scenarios which Voet could have envisaged in his statement:

(1) The purchaser of leased property had a choice whether to attempt to eject the lessee before the expiry of the lease term or to stand by the lease. (Note that this would presumably be in contravention of the *huur gaat voor koop* rule – my comment.)

(2) If the purchaser preferred to allow the tenancy to continue, the lessee was obliged to continue with it (with the purchaser substituted for the seller).

(3) If the purchaser preferred not to stand by the lease, but rather to attempt to eject the lessee, then the lessee was given a right to resist the ejectment and continue with the hiring, in place of the Roman-law remedy of suing the lessor for damages.

With respect, this seems to make far more sense of the quotation, and to place it in the context of changes that were made to the law of lease in the province of

Holland. It is precisely this point that is made by the Chief Justice (935F–G) where he suggested that Voet 19 2 17 "contemplates an ejectment, or attempted ejectment, of the lessee by the new owner contrary to the term of the lease".

The election referred to is the choice open to the lessee, in circumstances where the purchaser is refusing to recognise the existing lease, contrary to the *huur gaat voor koop* doctrine, either to enjoy his or her right of retention and continue with the hiring, or to take judicial proceedings for damages as a result of having been untimeously evicted. This view was also succinctly suggested in a case note by Wunsh 1990 *SALJ* 386.

After a review of the case law, Friedman AJA arrived at a contrary opinion to De Wet, namely that the effect of the *huur gaat voor koop* rule on the purchaser is that he or she "*steps into the shoes of the lessor*" (1049F). The judge added, (*obiter* 1050I–J):

> "From the aforegoing it follows, in my view, that once the lessee elects to remain in the leased premises after a sale, the seller ex lege falls out of the picture and his place as lessor is taken by the purchaser."

In the original *Genna-Wae* case, Squires J (110I) appeared to rely heavily upon this *obiter* statement of Friedman AJA, as it seemed to accept the existence of a choice open to the lessee, although in order to arrive at his conclusion, the case did not require Friedman AJA to "venture any opinion about the choice open to the lessee on becoming aware of the sale or transfer of the leased property" (*One Nought Three Craighall Park* case *supra* 324G). Squires J thus concluded (108F–G) that there was an election open to the lessee. Further areas of potential difficulty arise out of the interpretation of the Natal court: the uncertainty that would arise if this were to be the law, particularly with regard to sales of property where the purchase price is materially affected by the fact that the building or property is occupied by a tenant on a medium- to long-term lease at a rental that is favourable to the landlord (*One Nought Three Craighall Park* case *supra* 326H). In the same case Heher J (326J–327B) also raised the problems inhering in the question of the rights and obligations of the parties between the date of transfer and the date when the lessee becomes aware of the transfer to a new owner; the position of a surety during this period of "limbo"; and the possibility of a lessee wishing to recover past rental payments made in ignorance, during the time when he or she was not aware of the change in ownership (327B). Other issues to consider are the requirement that the lessee ought to acquire knowledge of this right of election prior to being able to exercise it; the period that would be permissible for acquiring such knowledge; the inequity of allowing the lessee a unilateral right to cancel the lease, without a consideration of a *quid pro quo* for the purchaser who is invariably bound to the terms of the lease; and possibly even the issue of a representation being created by the lessee, remaining in occupation subsequent to the transfer of the property, but prior to his or her acquiring knowledge of the right of election, a factor which might be construed as creating an estoppel in favour of the new lessor/purchaser.

Kritzinger (1994 *SALJ* 228) also points out that the other earlier *dicta* from which the Natal court sought to infer a recognition of a right of election in the lessee, were all from cases in which a purchaser had been unwilling to be bound by an existing lease, rather than the somewhat unique (in our case law, anyway) situation of *Genna-Wae* where the lessee was unwilling to continue with the lease, a factor which perhaps suggests that the perspective of such comments was not in all cases transposable.

The basis for the Transvaal court's decision is essentially a different reading of Voet 19 2 17. Heher J concluded that it is clear from the context that Voet did not intend to say that the lessee has an option whether to remain in the property or to vacate it – the election arose specifically in circumstances where the purchaser was seeking to eject the lessee. Another factor which apparently influenced Heher J was the acceptance by our courts (*Kessoopersadh's* case *supra*; *Boshoff's* case *supra*) of the "*automatic transfer of rights*" from the seller to the new owner, without any requirement of consent, in terms of the *huur gaat voor koop* doctrine:

> "In any event, and assuming that Professor De Wet's understanding of 19.2.17 is correct, it would seem that the development of the law in the intervening 290 years and the express recognition by the highest Court in the land of an *ex lege* transfer of rights and obligations leaves little room for the recognition of such an election" (326G).

The crisp issue which faced the Appellate Division was therefore whether our law recognises a right of a lessee to elect whether to continue with an existing lease, following upon a transfer of ownership from the lessor/seller to a new lessor/purchaser or to elect not to continue with the lease. The court decided (939C):

> "The lessee, in turn, is also bound by the lease and, provided that the new owner recognises his rights, does not have any option, or right of election, to resile from the contract."

This decision is to be welcomed because it lays to rest many vexatious issues that could possibly have arisen, had the decision of the court *a quo* been followed. A major anxiety that arose in the business community, as an immediate result of the Natal decision, was that particularly in the case of a property purchased as an investment, a significant factor in calculating the commercial value of the property was an assessment of the rental income value of such property, based upon the identity of the existing tenant and the remaining duration of the current lease. Such a calculation presupposed that the existing lessee was obliged to continue in occupation, despite any change in the ownership of the property.

Corbett CJ's judgment interestingly focuses on the tracing through of the lessee's position, from Roman law (932B–E), to the gradual adoption of the *huur gaat voor koop* doctrine in Roman-Dutch law (932E). The Chief Justice confirmed that it is the established view of the Appellate Division that the new owner is in law (*ex lege*) substituted for, and takes the place of, the original lessor (932H); and that the new owner acquires all the rights of the original lessor under the lease, a view which is contrary to the one expressed by De Wet. Further, the court commented, any remarks of Friedman AJA in the *Mignoel* case *supra* which appear to approve of De Wet's view, must be regarded as *obiter*, as they were not in fact essential to the decision in that case.

After examining four available translations of Voet 19 2 17, Corbett CJ, in a very careful examination of two of the Latin texts, including a translation of *impestivus* of his own, came to the conclusion (934H–935D) that from the context of the passage, the election of the lessee referred to applied only to the particular situation where the new lessor/purchaser sought to disregard the existing lease, in violation of the *huur gaat voor koop* doctrine. To render any other meaning would not make sense of the alternative choice to sue for damages. He held as follows:

> "Thus the election which is here referred to is, and is confined to, one relating to the remedies open to the lessee if, contrary to the lease and contrary to the rule of *huur gaat voor koop*, the new owner seeks to eject him."

The judgment continued to make the point that the general absence of comment by other Roman-Dutch writers on the possibility of such a right of election confirms the soundness of such an interpretation. In addition, the court (936J–937C) referred to comments by Groenewegen and Gaius which tend to reinforce the view that in areas where the *huur gaat voor koop* doctrine applied, both the new owner and the lessee were bound by the terms of the lease. Mattheus in *De actionibus* 1 7 20 also comments that where a house is sold or otherwise alienated, the lessee must continue to exercise his rights under the lease for the duration of the lease despite the sale. Although the court observed that the emphasis may certainly have been on the rights of the lessee *vis-à-vis* the purchaser, mention of an available right to resile from the lease would undoubtedly have been made.

After a most detailed scrutiny of the relevant sources, the Chief Justice concluded (939B–C) that the lessee is bound by an existing lease when there has been an alienation of the leased property, in pursuance of a contract of sale. Further, provided that the new owner recognises his or her rights, the lessee does not have any option, or right of election, to resile from the contract.

Conclusion

It is noteworthy that, despite a substantial weight of practical, commercial considerations that could have persuaded the court to come to the same conclusion, from a pragmatic point of view the judgment reflects a somewhat legalistic, historical process to achieve the desired contemporary reflection of the law on lease. In order to arrive at an acceptable modern statement of the law, the Appellate Division has chosen the route of a scholarly analysis of old texts. In effect, this restores the common law position as it was thought to exist prior to the raising of a possible right of election of the lessee in the *Genna-Wae* case. Two issues are worthy of comment as a result. First of all, the commercial sector must collectively be breathing a sigh of relief that the nature and duration of existing leases over properties will continue to be a substantial factor in calculating a prospective return and realistic purchase price on an income-generating property purchase. Secondly, lessees would be well advised to bear in mind that, should a change in the identity of the lessor be a potentially problematic prospect, they should be cautious about entering into a lease agreement that would hold them to a lengthy term. Both of these considerations arise as a consequence of the *status quo ante* having been restored.

LESLEY A GREENBAUM
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[D]ie vertolker moet nie die Grondwet soos 'n buikspreker se pop gebruik om die deuntjie te sing wat hy graag wil hoor nie (per McLaren R in *Potgieter v Kilian* 1995 11 BCLR 1498 (N) 1514).

BOEKE

UNLAWFUL COMPETITION

by HJO VAN HEERDEN and J NEETHLING

Butterworths Durban 1995; xi and 377 pp

Price R149,00 (plus VAT) (soft cover)

This work is a translated, revised and expanded version of the well-known textbook *Die reg aangaande onregmatige mededinging*. Since the publication of the latter work in 1983, there have been a number of important developments in this branch of the law, especially as regards case law (see Neethling "Die reg aangaande onregmatige mededinging sedert 1983" 1991 *THRHR* 201) and an up to date text is therefore to be welcomed.

The work commences with a general introduction to the law of competition. It provides an historical overview of the regulation of competition and explains the basic concepts encountered in this field of the law. A new section dealing with the law of competition and the Constitution has also been included. The fundamental human rights entrenched in our Constitution will have to be taken into account in any future development of our law of competition. The competition laws of the United States of America and Germany have developed on the basis of fundamental rights entrenched in their constitutions and can provide valuable guidance in this regard. For comparative purposes, therefore, references to both American and German law and to a lesser extent to Dutch law, have been included in this work.

The law of competition embraces two legal spheres: the law relating to the maintenance and promotion of competition (conveniently termed the public law of competition, because the state is involved in regulating restrictions on competition) and the law of unlawful competition (also known as the private law of competition, because it regulates the relationship between trade rivals *inter se*). The public law of competition interfaces with the private law of competition. First of all, the private law of competition presupposes the existence of competition in the economy. Secondly, the rules of public competition law may in certain circumstances influence the application of the private law of competition. Accordingly, the inclusion of a review of the public law of competition in chapter 2 of this work is to be welcomed. Particular emphasis is placed on the doctrine of restraint of trade and the Maintenance and Promotion of Competition Act 76 of 1979.

Chapters 3 to 6 deal with the general principles of the South African law of unlawful competition. This section of the work provides a sound theoretical basis for the future development of our law. Unlawful competition is a unique

species of delict and is characterised by an infringement of a rival's right to the goodwill of his enterprise. To delimit this right (ie to determine the wrongfulness of a competitive act) our courts have adopted the objective test of public policy, that is the general sense of justice of the community – the *boni mores*. As an alternative standard for determining the wrongfulness of a competitive act, the authors propose the application of the so-called competition principle, which they view as a concretisation of the *boni mores* test. The competition principle is based on performance (merit) competition. A rival who renders the best or most reasonable performance must achieve victory in the competitive struggle, while the one rendering the weakest performance must suffer defeat. The competition principle may be supplemented by the *boni mores* test in the application of the so-called doctrine of abuse of right. The competition principle was expressly recognised and applied in *Van der Westhuizen v Scholtz* 1992 4 SA 866 (O). However, in *Payen Components SA Ltd v Bovic Gaskets CC* 1994 2 SA 464 (W) the court preferred to regard the competition principle as one of the policy considerations underlying the *boni mores* test.

Chapters 7 to 13 are devoted to a discussion of the various forms of unlawful competition. These are classified into direct and indirect infringements of a rival's right to goodwill. Particular attention is devoted to those forms of unlawful competition which have been recognised by South African case law. In each case, the general principles involved are discussed followed by a critical evaluation of the relevant case law. Guidance is also given as to the future development of our law.

Unlawful competition provides a comprehensive, clear and systematic exposition of the South African law of competition and may be recommended unreservedly to students, academics and practitioners.

BR RUTHERFORD
University of South Africa

INCOME TAX: CASES AND MATERIALS

by TS EMSLIE, DM DAVIS and SJ HUTTON

The Taxpayer Cape Town 1995; xxviii and 1216 pp

Price R215,00 (soft cover: R140,00 for *bona fide* students); R240,00 (hard cover) (plus VAT)

Since I may be described as a case book (based on extracts) sceptic, this review may be considered an exercise in restraint. Nevertheless please allow me a few comments, before switching to objective mode. In the preface to the work the authors recognise the need to read the *ipsissima verba* of the judgments and in fact advance cogent reasons why cases should be "analysed and pondered upon". I am left with the uneasy feeling that case books based on extracts with good, cryptic summaries, like this one, may have just the opposite effect. Students may be tempted to use only these prepared summaries (and will quite possibly not even read the extracts) and would thus never learn to extract the essence of a

case on their own. This unease is aggravated by the fact that a book like this one is intended to play ball in the field of post-graduate students and perhaps even practitioners. However, one cannot deny the existence of a definite demand (the authors refer to it as a "need") for case books like these and a healthy dose of salt should thus be added to my "mixture" of scepticism.

Technically speaking, the book consists of 317 extracts of a good selection of income tax related cases and materials, ordered into 25 chapters on different topics. The phrase "and materials" refers to the inclusion of extracts from Adam Smith's *Wealth of the nations* and some of the Meade and Margo Commissions' findings. I am sure that extracts from the recent Katz Commission's report will find their way into a future edition.

The book has a detailed content section and the applicable content lay-out is repeated at the beginning of each chapter. The alphabetical table of cases ensures easy reference. The work does not contain an index, but this lack is to some extent alleviated by the detailed content section.

The cases referred to include reports from the *Law Reports, South African Tax Cases* and the *The Taxpayer*. Reference to the page number of the original reports are cited within each extract. "This enables readers to quote passages from judgments without having to consult the report itself"(!). The topics dealt with provide as extensive a coverage as possible on a broad spectrum of tax issues, within the restraint of providing a book which is of a still usable size.

Each chapter is initiated by an introduction which serves as background to the extracts of cases provided, and stating the principles necessitating some of the inclusions. The fact that not all cases are referred to and placed in context within the introductions to some chapters, somehow detracts from the perceived purpose of the introductions, namely to provide a link and to place in context.

Considering my scepticism regarding case books, a pleasing aspect of this book is that it provides longer extracts of the original records. It also provides a summary of the facts and decisions (including minority judgments). The summaries are concise, well formulated and easy to read, although not all aspects of the judgments as indicated in the summaries are always corroborated by the extracts provided thereafter. This is possibly because of the nature of the choice of the extracts and their relevance to a specific topic. The summaries are not merely reprints of the head notes found in the *Law Reports*, but original works which students may even consider to be original works of art – considering their lessened burden.

The book was written as "companion to the leading commentaries on South African Income Tax Law" but contains no reference to any of these works, possibly because inclusion of one would mean a severing of the "companionship" with the others. According to the preface of the work, the authors specifically refrained from "intruding" their own views by means of notes in most of cases. An amendment to this uncharacteristic approach would be welcomed as those instances of present intrusion are thought-provoking and topical (see eg 43 122 132 137 274).

Because of the extent of the work, not all extracts were minutely studied for purposes of this review. As regards those which did not escape close scrutiny, the following may be noted: the *obiter dicta* relating to the meaning of accrual were not included in the headnote of the *Delfos* case (43), but were included in the *Herzov* case (47); in *Ochberg* (55) no mention is made of Watermeyer's

qualification of the entitlement principle, namely that a taxpayer has to be unconditionally entitled before accrual takes place. Both of the above comments underline the hidden hazards of a case book.

A few comments on the vague and unsatisfactory area of the cession of a right to income (par 1.3 at 85 ff) would be of assistance. Perhaps *Jalc Holdings* 54 *SATC* 7 could have been included as well?

The section on Capital and Revenue (Gross Income) (167) *inter alia* contains cases exemplifying a "host of nuances" of the general principles. It would have been very helpful for purposes of quicker reference if the cases could have been grouped or classified together under a short heading indicative of a specific nuance, or better still, if all the cases in the introduction to this specific section could have been referred to within the context of their particular nuance. Instead, the introduction merely refers to three of the twenty three extracts provided, leaving it to the stressed, overworked and uninformed reader to sort through them all.

The last chapter, aptly titled "Miscellaneous", contains such a random selection of cases that it runs the risk of concluding (incorrectly) that it was added as an afterthought. Perhaps some cases could have been included in more logical places than this random category at the end. Some may even warrant a separate chapter. For instance, the section on sham transactions could have been grouped with the chapter on tax avoidance (ch 19). Though the section on partnerships consists of only one case, I can think of no reason why it has to be clustered together with other unrelated matters, while the taxation of trusts, for instance, has been allocated its own separate chapter.

The *WF Johnstone* case (1171) was based on the old section 23(g), and the summary of the case also specifically mentions the fact that the expense in question was not "wholly and exclusively expended for purposes of trade". Perhaps a note to the effect that this section has since been amended, would not have been out of order.

That was the good news and the bad news. And now for the best news (for the authors and publishers). It is considered that this almost comprehensive work will be in great demand among students and even practitioners in the tax field as a quick reference to relevant issues.

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DIE WET OP DIE HOOGGEREGSHOF 59 VAN 1959 EN DIE WET OP LANDDROSHOWE 32 VAN 1994

deur HJ ERASMUS en OJ BARROW

Negende uitgawe; Juta Kaapstad 1995; 538 bl

Prys R109,50 (BTW ingesluit) (sagteband)

Hierdie staatmakerpublikasie bevat, soos in die verlede, die volledige tekste van die Wet op die Hooggeregshof 59 van 1959 en die Wet op Landdroshowe 32 van 1994, asook die reëls wat daarkragtens uitgevaardig is.

Soos voorheen bevat die werk 'n volledige inhoudsopgawe, sake- en woordregisters asook 'n kumulatiewe vonnisregister van besliste sake ten aansien van die onderskeie wette en reëls. Deel C bevat steeds 'n opsomming van wysigings van wetgewing en reëls gedurende 1994 asook 'n tydtafel van die voorgeskrewe tydperke wat ter sprake is in sowel die hooggeregshof as die landdroshof. Hierdie tydtafel dien as 'n gids wat vinnige toegang verskaf tot die verskeie tydsperiodes waarvoor daar in die wetgewing voorsiening gemaak word en behoort selfs vir praktisyns nuttig te wees.

Hierdie werk is ook in Engels beskikbaar.

E HURTER
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Does the restraint on transfer provision in the Sectional Titles Act accord sufficient preference to the body corporate for outstanding levies?

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OPSOMMING

Verskaf die artikel in die Wet op Deeltitels wat die oordrag van eenhede beperk voldoende voorkeur aan die regspersoon met betrekking tot uitstaande skulde?

Ingevolge artikel 15B(3)(a)(i)(aa) van die Wet op Deeltitels mag die Registrateur van Aktes geen oordrag van 'n deeltiteleenheid registreer nie tensy die regspersoon gesertifiseer het dat alle agterstallige skulde op die eenheid betaal is. Die trefwydte van hierdie bepaling en sy voorganger is oorweeg in twee onlangse uitsprake in die Transvaalse en Kaapse Provinsiale Afdelings van die Hooggeregshof. In hierdie uitsprake is veral gesteun op regspraak wat oor die effek van soortgelyke embargo-klousules in provinsiale wetgewing gehandel het, naamlik dat oordrag van erwe geweier is tensy 'n sogenaamde uitklaringsertifikaat (wat spesifiseer dat uitstaande erfbelasting en ander verskuldigde bedrae betaal is), aan die Registrateur van Aktes oorhandig is. Die skrywer kom tot die gevolgtrekking dat die embargo-klousule as sodanig wel voorkeur aan die regspersoon verleen in die gewone gevalle waar 'n eenheid oorgedra word en selfs in gevalle waar die oordraggewer insolvent is maar dat die regspersoon nie as 'n voorkeurskuldeiser ("preferent creditor") ingevolge die bepalings van die Insolvensiewet 24 van 1936 en die Wet op Landdroshowe 32 van 1944 beskou word nie. Daar word dus aanbeveel dat die Wet op Deeltitels gewysig word om aan die regspersoon 'n statutêre voorkeurreg te verskaf ten opsigte van agterstallige skulde op 'n eenheid tot 'n maksimum van ses maande, met 'n hoër rangorde as verbande wat vroeër geregistreer is.

1 INTRODUCTION

Before amendment, section 15(4)(b) of the Sectional Titles Act 95 of 1986 read as follows:

> "No transfer of a unit ... can be registered unless all money due to the body corporate by the transferor in respect of the unit has been paid, or satisfactory arrangements have been made for payment thereof."

This section was amended by the insertion of section 15A by section 10 of the Sectional Titles Amendment Act 63 of 1991 and the corresponding section 15B(3)(a)(i)(aa) now reads as follows:

> "The registrar shall not register a transfer of a unit ... unless there is produced to him–
>
> (a) a conveyancer's certificate confirming–

(i) (aa) that, if the body corporate is deemed to be established in terms of s 36(1), that body corporate has certified that all moneys due to the body corporate by the transferor in respect of the said unit have been paid, or that provision has been made to the satisfaction of the body corporate for the payment thereof."

These two corresponding sections of the Sectional Titles Act have been the subject of two recent court decisions, namely the unreported decision of the Transvaal Provincial Division *The South African Permanent Building Society v The Messenger of the Court, Pretoria and The Body Corporate of Solitaire Building No 224/1984*,[1] and a decision of the Cape Provincial Division *Nel NO v Body Corporate of the Seaways Building*.[2]

The crucial question for decision in both these cases was: what kind of preference was created in favour of the body corporate by virtue of the veto or embargo on registration of transfer until proof that all moneys due to the body corporate have been paid? In order to decide this matter, reliance was placed on decisions dealing with statutory provisions which prevent transfer of landed property unless rates and charges due to a local authority have been paid or a so-called clearance certificate for such payments is furnished to the registrar.[3] Before examining the two recent decisions on sectional titles, the decisions concerning the recovery of rates and taxes by local authorities referred to in the sectional title decisions and other leading decisions on the subject-matter will first be discussed in chronological order.

2 CASES ON STATUTORY EMBARGOS IN FAVOUR OF LOCAL AUTHORITIES

The *locus classicus* for the decisions on the nature and content of embargo clauses in favour of local authorities in statutory enactments is an early decision of the Transvaal full bench, *Johannesburg Municipality v Cohen's Trustees*.[4] This case concerned the interpretation of section 26 of the Local Authorities Rating Ordinance 43 of 1903 which provided as follows:

> "No transfer or cession of any rateable property shall be passed before any Registrar of Deeds or Registrar of Mining Rights or other Government Official until a receipt of certificate signed by the town clerk . . . shall be produced to such official for payment of the rates imposed on such property."

In casu the trustees of the insolvent estate wanted to dispose of certain landed property in the insolvent estate. In compliance with section 26 they tendered the sum owing for rates but refused to tender the interest on the ground that the words "rates imposed" did not include interest. The municipal council declined to deliver a receipt for portion only of its claim. The court decided on appeal from the High Court that the words "rates imposed" meant rates together with interest.[5]

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1 Case no 611 1989-04-07.
2 1995 1 SA 130 (C).
3 See eg s 47 of Ord 9 of 1912 (T); s 49 of Ord 11 of 1926 (T); s 50(1) of Ord 17 of 1939 (T); s 119(1) of Ord 8 of 1962(a); s 173 of the Local Authorities Ordinance 25 of 1974 (N); s 88 and 96 of the Municipal Ordinance 20 of 1974 (C); s 88 and 96 of the Divisional Council's Ordinance 18 of 1976 (C).
4 1909 TS 811.
5 Voet 46 3 11 and Grotius 3 39 9 were cited in support of this decision.

The importance of this decision does not, however, lie in the finding of the court as such but in the remarks on section 26 made by Innes CJ and Solomon J,[6] which remarks were commented upon in several subsequent decisions including the two most recent ones on the effect of the embargo provision in the Sectional Titles Act. The relevant passage from the judgment of Innes CJ reads as follows:

> "Now reading that section in connection with other provisions of the statute, the intention seems to have been to give to the local authority a right to veto the transfer of property until its claims in respect of rates should be satisfied. The result, of course, was to create, in effect, a very real and extensive preference over the proceeds of rateable property realised in insolvency; and to compel payment of the burden thus imposed before a sale of such property could be carried through, even in cases where insolvency had not supervened. The hold over the property thus given to the local authority is entirely the creation of a statute; its object was to ensure payment of the liabilities due by the ratepayers as such, and one would therefore think that it was intended to continue until all liabilities arising out of rates had been discharged."

And: "It is true that this section confers a very special privilege upon the council . . ."

The relevant passage from the judgment of Solomon J is the following:

> "The consequence is that the council obtains a species of lien upon all rateable property, and in case of the insolvency of the owner secures a preference over other creditors."

The following two decisions in chronological order are *Bosman's Trustee v Land and Agricultural Bank of SA and Registrar of Deeds, Vryburg*[7] and *Brakpan Municipality v Chalmers*.[8] These decisions are of importance because they were authoritatively discussed in the pivotal case *Rabie NO v Rand Townships Registrar*.[9]

The *Bosman's Trustee* case dealt with the effect of section 3 of Act 20 of 1911, which provided that a charge was created on property for advances made by the Land Bank and that any transfer of the property was prohibited until the advance and interest had been repaid. The relevant part of the judgment paraphrasing these provisions reads as follows:[10]

> "Sec 3 of the Dipping Tanks (Advances) Act 20 of 1911 provides that when the Department of Agriculture makes an advance for the erection of a dipping tank, it shall transmit to the Registrar of Deeds information stating the date and the amount of the advance, the person to whom, and the holding in respect of which the advance is made. The Registrar has then to make a note of this information in his registers in respect of the holding. Under subsec 2 the making of such note has the effect of creating in favour of the Department a charge upon the holding until the amount of the advance and all interest due thereon have been paid. Under subsec 4 no transfer of a holding in respect of which any such note has been made shall be passed until a receipt or certificate issued by the Department has been produced to the Registrar for the interest or instalments payable in respect of the holding. This Act did not restrict the power of making advances in respect of holdings to unmortgaged land."

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6 817 818 821.
7 1916 CPD 47.
8 1922 WL 98.
9 1926 TPD 286.
10 51–52.

The trustee in insolvency of Bosman's estate applied to the court upon notice to the Land Bank and to the Registrar for an order authorising the applicant to pass transfer of the farm to the purchaser and authorising the trustee in insolvency (applicant) to proceed with the liquidation of the estate and filing of the accounts therein without providing for the claims of the Land Bank. The court had to consider whether the Land Bank could, in terms of section 3 of Act 20 of 1911, claim preference for its advance over a prior mortgage bond and whether it could veto a transfer in insolvency until the amount of its advance and interest had been paid.[11] Gardiner J remarked that if section 3(2) had merely created a charge, the bank's charge would have had to come after a prior mortgage. He, however, pointed out that section 3(4) went much further and prohibited any transfer until the advance and interest had been repaid. In reply to the contention that the prohibition did not apply to insolvency and that in the *concursus creditorum* the Land Bank had to hand over the subject of its "pledge" to the trustee for realisation, retaining in the process a right of preference after the claims of prior mortgagees had been satisfied,[12] Gardiner J quoted the remarks of Innes CJ and Solomon J in the *Cohen's Trustee* case with approval and concluded that there was no good reason to come to a contrary opinion.[13] He pointed out that section 3(4) of Act 20 of 1911 was imperative and that no exception was made for the case of insolvency. Gardiner J therefore concluded that the amount advanced by the Land Bank and noted as a charge against a holding is payable to the bank before the holding can be transferred, after a sale in insolvency, to the purchaser, even if such charge is noted subsequently to the registration of a mortgage bond in favour of a member of the public. Gardiner J concluded that the bank had a preference over all mortgages for the amount of its advance, and that until these advances and interest were repaid, the Registrar should not pass transfer of the holding. He remarked that if the bank came into court as an applicant seeking to make the trustee in insolvency do something, it had to show that it had *locus standi* as a proved (preferent) creditor.[14] However, the fact that it had not been proved, did not prevent it from maintaining its hold upon the landed property.[15] Although Gardiner J was not inclined to accord the Land Bank a preferential right, he was of the opinion that the effect of section 3(2), which compelled the Registrar to note a charge on the property together with the embargo against transfer until repayment, created a (passive) hold (preference) with regard to the property in favour of the Land Bank for repayment which could be enforced even against previously registered mortgages.

In *Brakpan Municipality v Chalmers*[16] the relationship between section 47(b) of the Local Government Ordinance 9 of 1912 (T) – a typical embargo provision in favour of a local authority – and section 55 of the Magistrates Court's Act 32 of 1917 was considered.[17] Gregorowski J decided that where a municipality had

11 See 51 54.
12 55.
13 *Ibid.*
14 56–57.
15 57.
16 1922 WLD 98.
17 S 55(2) provides: "Where it is required that immovable property subject to any claim ranking in priority to that of the judgment creditor be sold in execution, such property shall be sold only through the sheriff after process in aid to that end shall have been granted by a superior court having jurisdiction."

taken judgment for, *inter alia*, assessment rates and other amounts over several properties which had been mortgaged, section 88(4) of the Insolvency Act[18] did not make such judgment a preferent claim within the meaning of section 55(2) of the Magistrates' Courts Act.[19] Although Gregorowski J conceded that a small amount of the judgment debt might be said to be preferent in a sense, because the payment of arrear rates would have to be made before transfer could be given to the purchaser, he concluded that these stands could only have been sold by the sheriff after process in aid had been granted.[20]

The importance of the next decision, *Rabie NO v Rand Townships Registrar*,[21] lies in the fact that the remarks of Innes CJ and Solomon J in the *Cohen's Trustee* case were discussed and that this case was considered in the two recent decisions on the embargo provision in the Sectional Titles Act. This decision was handed down by the full bench of the Transvaal Provincial Division consisting of Curlewis JP, Greenberg J and Gey van Pittius J. In that case a warrant had been issued in the magistrate's court in respect of outstanding assessment rates on two plots of land. The applicant (messenger of the court) attached the plots in terms of this warrant and subsequently sold one of these plots in execution to a certain Parrack. When the applicant lodged an application with the Rand Townships Registrar, it appeared that the lot was encumbered with a mortgage and the registrar refused to register the transfer unless the mortgage bond was cancelled or alternatively process in aid was obtained from a superior court. The registrar based his refusal on section 55(2) of the Magistrates' Courts Act 32 of 1917 which reads:

> "Where it is required that immovable property subject to any claim ranking in priority to that of the judgment creditor be sold in execution, such property shall be sold only through the sheriff after process in aid to that end shall have been granted by a superior court having jurisdiction."

Counsel for the applicant (messenger of the court) contended that this section did not apply in the present case. He rested his case on section 47(b) of the Government Ordinance 9 of 1912 (T) which provided that

> "no transfer of any premises within a municipality shall be passed or registered before any registration officer until a written statement in a prescribed form signed and certified by the town clerk . . . shall be produced to such registration officer, nor unless such statement shows that all charges, if any, for a period of two years immediately preceding the date of application for transfer due in respect of such premises on account of rates . . . or for erf tax, have been paid to the council".

The applicant contended that the claim of the municipal council ranked in terms of section 47(b) prior to the mortgage bond on the property concerned, thus entitling him to sell the property in execution. He based this contention on the extracts from the judgments of Innes CJ and Solomon J in the *Cohen's Trustees* decision[22] quoted above.

Greenberg J, who delivered the judgment, considered these extracts and concluded:[23]

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18 32 of 1916.
19 32 of 1917.
20 100.
21 1926 TPD 286.
22 1909 TS 811 817 821.
23 289–290.

> "It should be borne in mind that in the case of *Johannesburg Municipality v Cohen's Trustees* ... the question before the court was whether the privilege conferred on municipal councils in respect of rates extended to interest on rates, and the learned judges were only concerned to illustrate the effect of treating these two items on a different basis. The extracts quoted, in terms, deal only with the practical result of the section, and in my opinion do not show that the section creates a lien in the strict legal sense or, in the words of sec 55(2), 'a claim ranking in priority' to other claims."

Greenberg J then considered the *Bosman's Trustee* decision and pointed out that the defendant (Land Bank) in the latter case relied passively on its right conferred by a similar embargo provision, whereas the applicant in the present case sought an order in breach of this passive right. He concluded:[24]

> "Indeed, if any reference can be drawn from a comparison of sec 47(b) of Ordinance 9 of 1912 and sec 3 of Act 20 of 1911, then it may well be argued that when the Legislature intends to create a charge, it does so in specific language – vide sec 3(2) – and does not leave such charge to be inferred from the mere existence of an embargo on transfer as contained in sec 3(4)."

It was further submitted on behalf of the applicant that his right to prevent transfer of the property until outstanding rates had been paid, no matter what other claims existed against the property, was not distinguishable from a *ius retentionis*. In the light of *United Building Society v Smookler's Trustees & Golombicks Trustee*[25] such a right of retention created a claim ranking in priority to a mortgage bond.

Greenberg J, however, illustrated that the acceptance of such a submission would lead to certain extraordinary results. First, he pointed out that if such claims rank in priority above the claims of ordinary and mortgage creditors, this prior ranking would prevent execution being levied in the magistrate's court on immovables in favour of mortgage creditors. The result could be that the benefit sought to be introduced by the Magistrates' Courts Act of providing an inexpensive form of execution would not be available. However small the claim for rates and however valuable the property, there could not be an execution under section 55(2) as long as the rates remained unpaid. Secondly, he indicated that the security afforded by mortgage investments would be materially decreased if immovable property were liable to be sold in execution for a trifling preferent claim for rates without notice to the mortgagee.[26] Having mentioned these and other extraordinary results, Greenberg J concluded:[27]

> "It does not of course follow from these unexpected results that the applicant's contention is not correct, but one is loth to give a construction to the section which would produce these results unless the words point clearly and unambiguously to that construction."

Greenberg J questioned whether the passive privilege of preventing transfer of the property until the rates are paid constituted a claim like that of a mortgage creditor ranking in priority to other debts:[28]

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24 290.
25 1906 TS 623.
26 290–291.
27 292.
28 *Ibid.*

> "But is it clear from the fact that the privilege of preventing transfer is given to municipal councils that this right constitutes a claim ranking in priority to other debts? These words ordinarily convey the idea of a right in a person making such claim to have the property sold which is subject to the claim and to be paid first out of the proceeds, or a right, when the property is sold in execution by another creditor to be so paid and not merely a right to resist any dealing with the property unless the claim is paid."

Greenberg J conceded that in the case of a *ius retentionis* where there is no debtor and creditor relationship between the person in possession and the owner of the property held in possession, the possessor has a claim on the property ranking in priority, although the possessor's right is merely passive. He concluded, however, that the analogy between such a right and the right of the municipal council to prevent transfer unless outstanding rates are paid is not a close one:[29]

> "There is a wide difference between the two rights. In the former, the possessor is entitled to withhold all the rights of ownership except the bare right to pass transfer; in the latter, the council can only veto the transfer, leaving the full enjoyment of the property intact. It does not appear to me that any analogy must be drawn in two cases so widely dissimilar: even if the case of a *ius retentionis* is a claim ranking in priority, it does not follow that the same applies to a claim for rates."

In conclusion, Greenberg J accepted the formulation of Curlewis J in the High Court decision *Johannesburg Municipality v Cohen's Trustee*[30] that the result of the council's right to prevent transfer unless outstanding rates were paid was "in effect to create a preference" or "something not wholly in the nature of a lien or a hypothec but sui generis". He accordingly found that the council's claim was not ranking in priority to the existing mortgage within the meaning of section 47(b) of Ordinance 9 of 1912. The refusal of the respondent (Rand Townships Registrar) to register the transfer unless the mortgage bond was cancelled or alternatively process in aid was obtained from a superior court, was upheld. The application that the council's claim ranked in priority to the mortgage bond and that he was therefore entitled to sell the property in execution was dismissed.

The practical effect of this decision is that a mere statutory embargo on the transfer of property unless outstanding rights are paid, does not create a charge on the land in the nature of a mortgage but merely a passive right on the part of the council to prevent transfer of the property. If the legislature intends to create a statutory mortgage ranking in priority to existing mortgages, this must be done expressly.

The next decision in chronological order, *Bloemfontein Town Council v Estate Holzman*,[31] confirmed the formulation of Greenberg J as to the nature of the right created by the embargo on transfer, but reached the opposite conclusion about the preference of the council's claim to that of a mortgagee on account of the unambiguous wording of the relevant statutory enactment. In this case the petitioners (Bloemfontein Town council) were creditors in the assigned estate of Holzman. It was submitted that the claim for rates due in respect of a municipal erf was a preferent claim under article 6 of Chapter 87 of the Law Book (OFS).

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29 *Ibid.*
30 1909 TH 134.
31 1936 OPD 134.

A debt secured by a mortgage bond was proved and the erf was bought in by the bondholders. In the distribution account, the amount paid by the bondholders figured as an asset in the distribution account filed by the assignee, and the bondholders' claim which figured in the distribution account as a preference over the claim of the Municipality was awarded the whole amount. An objection to the account on this score was lodged with the Master under the Insolvency Act[32] and an application was made to the court to overrule the Master's decision.

Article 6 of chapter 87 of the Law Book was part of an Ordinance[33] which provided, *inter alia*, for (1) a restraint on transfer of erven until all arrear quitrents and town taxes thereon had been paid; (2) the recovery of such rents and taxes in the magistrate's court and execution on the erf in respect of which the rents and taxes were due; and (3) a preference which reads as follows in the original:

> "Verschuldigde erfpacht en dorpsbelastingen zyn preferent voor alle ander vorderingen of verbanden op de gronden of erven en daaropstaande gebouwen."

The Master concluded that this section created a statutory hypothec but that it was impliedly repealed by section 86 of the Insolvency Law of 1916 and by section 117 of Ordinance 4 of 1913.

Fischer J reasoned that whether article 6 of chapter 87 had been repealed would depend partly on the nature and extent of the right enjoyed by the municipality under the "restraint clause" and partly on the intention of the legislator as disclosed in the Insolvency Law or the 1913 Ordinance. With regard to the nature of the rights accruing to the municipality under the restraint clause, he pointed out that they had been described as being in the nature of a lien and as securing a preference on insolvency,[34] as conferring no hypothec or lien[35] and as constituting no "claim ranking in priority to other debts and proceeds".[36] Ultimately he accepted the formulation of Curlewis J in the High Court in *Cohen's* case[37] that the effect of the restraint clause (embargo provision)

> "is to give the Council an embargo or hold on property in respect of which rates have been imposed – something not wholly in the nature of either a lien or a hypothec but *sui generis*, whereby the Council practically obtains a preference over other creditors".

Fischer J submitted that section 86 of the Insolvency Act purported to destroy the preference given by tacit or legal hypothecs, but not the hypothecs and preferences created by modern statutory enactments.[38] He also traced the retention of the restraint clause in the various Consolidating Ordinances of the Province and concluded that, save for a restriction of the restraint clause only to those rates due for the current calendar year and the two preceding years,[39] section 117 of Ordinance 4 of 1913 was not in such irreconcilable conflict with article 6 of chapter 87 that the latter was repealed thereby.[40]

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32 S 97(2) and 151(2) Act 32 of 1916.
33 Originally 2 of 1879.
34 *Cohen's* case 1909 TS 811; *Bosman's* case 1916 CPD 47.
35 *Union Government v Cape Rural Council* 1912 CPD 857.
36 *Rabie's* case 1926 TPD 286.
37 1909 TH 134.
38 141.
39 139
40 142.

Fischer J therefore held that the preference granted by article 6 was still of force and effect. The Master's ruling was therefore set aside and the assignee of the insolvent estate was called upon to file an amended account showing the petitioner's claim as a claim preferent to that of the bondholder.

For our purposes the gist of this decision is that if a mortgage or hypothec is created by statutory enactment indicating clearly how charges on property should be ranked, effect should be given to the words of such a statutory provision.

The next decision, *Pretoria Stadsraad v Geregsbode, Landdrosdistrik van Pretoria*,[41] is of importance since it was relied upon as direct authority by Curlewis J in the first of the two decisions on the embargo provision on the Sectional Titles Act. In this case the respondent (messenger of the court) had refused to pass transfer to the applicant (Pretoria City Council) of certain immovable property which it had purchased at a sale in execution following upon a judgment obtained in respect of arrear rates on the ground that there was still an amount owed to the holder of a mortgage bond over the same erf. The bondholder had refused to confirm the sale in terms of section 66(2) of the Magistrates' Courts Act of 1944[42] which provides as follows:

> "No immovable property which is subject to a claim preferent to that of the judgment creditor shall be sold in execution unless [*inter alia*] . . .
>
> (d) the preferent creditor confirms the sale in writing, in which event he shall be deemed to have agreed to accept such proceeds in full settlement of his claim."

When the respondent (messenger of the court) treated the sale of no force and effect on the strength of this provision, the applicant submitted that the municipality's claim for arrear rates was preferent in terms of s 50(2) of Ordinance 17 of 1939 (T) and that the respondent (messenger) should proceed with the registration of the immovable property.

Section 50 (1) of the Local Government Ordinance[43] contains the usual embargo provision on transfer of the property unless arrear rates and charges have been paid. The unamended version of section 50(2)(a) of the Ordinance which the court had to interpret, read as follows:

> "All such charges and sums mentioned in paras (a) and (b) of sub-sec (1) shall be a charge upon the premises or interest in land in respect of which they are owing and shall be preferent to any mortgage bond passed over such property subsequent to the coming into operation of this Ordinance."

Galgut J explained the object of inserting section 50(2) in Ordinance 17 of 1939 (T) in the following terms:[44]

> "In 1939 was art 50(2) ingevoeg as 'n nuwe artikel. Voor hierdie invoeging het 'n plaaslike bestuur geen voorkeur bo enige verbandhouer geniet vir die agterstallige betalings in die geval van geregtelike verkopings nie. Sien *Brakpan Municipality v Chalmers*, 1922 WPA 98, en *Rabie NO v Rand Townships Registrar*, 1926 TPA 286.
>
> Daar bestaan by my geen twyfel dat die doel van die invoeging van art 50(2) in hierdie Ordonnansie was om aan plaaslike besture daardie voorkeur te skenk nie."

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41 1959 1 SA 609 (T).
42 Act 32 of 1944.
43 17 of 1939.
44 513G–H.

Galgut J therefore found that the claim of the municipality was preferent to the claims of three mortgage creditors. The property was therefore not "subject to a claim preferent to that of the judgment creditor" (the Pretoria City Council). He accordingly decided that the respondent (messenger) had erred in not proceeding with the registration of the property in the name of the applicant because the bondholder had refused to confirm the sale.

In *Nasionale Behuisingskommissie v Swaziland Trustees and Executors Ltd*[45] section 50(2) of Ordinance 17 of 1939 was again considered[46] and the court again decided that preferent rights were created by the legislature in terms of this section for the purpose of obtaining due payment of rates and taxes. As soon as these rates or taxes were paid, however, the special right which flowed from the section in favour of the town council also fell away.

In *Land & Agricultural Bank of Southern Rhodesia v Jameson*[47] the Chief Registrar of Deeds refused to register a charge in terms of section 35(1) of the Land Bank Act (Rhodesia). Section 35(1) reads as follows:

> "An advance made on the security of a note shall be secured by a notice in writing sent by the bank to the Registrar stating the amount due by the borrower, and the Registrar shall make an entry thereof in respect of the land to be charged. Such entry shall constitute an hypothecation of the land ranking from the date of the entry and for the amount therein stated."

Goldin J found that the reference to hypothecation which is registered as a charge against land of the borrower to secure an obligation, created a real right and not merely a preference or an embargo or only a statutory restraint against transfer.[48] The court therefore ordered, *inter alia*, that the applicant was entitled to cause certain transactions to be registered in the Deeds Registry. The importance of this decision is that the statutory mortgage created in terms of section 35(1) was held to be a registrable real right, whereas a provision on restraint or transfer was held to be in a category of its own.

Stadsraad Pretoria v Letabakop Farming Operations[49] also examined the effect of section 50(1)(a) and (b) which contains an embargo provision, read together with section 50(3) of Ordinance 17 of 1939[50] which reads as follows:

> "Any amount due in terms of paragraph (a), (b), (c) or (d) of subsection (1) shall be a charge upon the land or right in land in respect of which such amount is owing and shall . . . be preferent to any mortgage bond registered against such land or right in land."

In this case, the Pretoria City Council procured default judgment against the respondent for outstanding rates and charges for sanitary services with regard to an erf, and made an unsuccessful application in the magistrate's court for an order to enable it to execute the default judgment against the relevant immovable property. In terms of section 66(1)(a) of the Magistrates' Courts Act[51] execution

45 1962 3 SA 816 (T).
46 820E–820E–H.
47 1970 3 SA 281 (R).
48 283G–H.
49 1981 4 SA 911 (T).
50 Local Government Ordinance 17 of 1939 (T).
51 Act 32 of 1944. S 66(1)(a) reads as follows: "Whenever a court gives judgment for the payment of money . . . such judgment, in case of failure to pay such money forthwith . . . shall be enforceable by execution against the movable property and, if there is not found sufficient movable property to satisfy the judgment . . . or the court, on *good cause*

continued on next page

can be taken against immovable property when movable property has not been exhausted only if the court so orders on good cause shown. The crucial question for decision was whether the embargo provision of section 50(1), read with section 50(3), could qualify as a good cause for levying execution against the immovable property.

Ackermann J pointed out[52] that the phrase "or the court, on good cause shown, so orders", was inserted in section 66(1) of the Magistrates' Courts Act of 1944[53] by the Amendment Act of 1952[54] for the purpose of rectifying the unsatisfactory position, that deviation from the customary order of execution could be effected only by an application to the supreme court.[55] As a result of this, a person who procured a default judgment could, on good cause shown, also execute against immovable property without the movable property of the debtor being first exhausted. In this way the preference of the creditor procuring a default judgment was effectively secured as was the case in the supreme court. On the authority of Jones and Buckle[56] and *Dorasamy v Messenger of the Court, Pinetown*[57] Ackermann J concluded that a special hypothecation of the immovable property to secure the judgment debt qualified as a good cause for the magistrate's court to order execution on that immovable property.[58] The crucial question was therefore whether the security provision of section 50(3) of the Ordinance, read with section 50(1), constituted a special hypothecation of the immovable property concerned and thus qualified as a good cause for changing the normal order of execution.

Ackermann J traced several judicial pronouncements on the nature of embargo clauses similar to the provisions of section 50(1) of Ordinance 17 of 1939.[59] He quoted De Villiers CJ as describing such a clause in the early case of *Smuts v Cathcart Divisional Council*[60] as a "lien which is hardly distinguishable from a tacit hypothecation". He also quoted the remarks of Innes CJ and Solomon J on the nature of a similar embargo clause considered in *Johannesburg Municipality v Cohen's Trustees*.[61] The *dictum* quoted from Innes CJ's judgment was the following:

> "The result, of course, was to create, in effect, a very real and extensive preference over the proceeds of rateable property realised in insolvency; and to compel payment of the burden thus imposed before the sale of such property could be carried through even in the case where insolvency had not intervened."

The *dictum* quoted from Solomon J was:

> "The consequence is that the council obtains a species of lien upon all rateable property, and in case of the insolvency of the owner secures a preference over other creditors."

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shown, so orders, then against the immovable property of the party against whom such judgment has been given.

52 915H.

53 Act 32 of 1944.

54 Act 40 of 1952 s 16.

55 For more detail see 915B–916A.

56 *The civil practice of the magistrates' courts in South Africa* (6 ed) 199 and (7 ed) Vol 1 238.

57 1956 4 SA 286 (N) 290D.

58 916A–G.

59 917B–H.

60 (1896) 13 SC 359.

61 1909 TS 811 817 821.

The judge further quoted the following *dictum* of Curlewis J in the decision of the court *a quo*, the Transvaal High Court, in *Cohen's Trustees v Johannesburg Municipality*[62] on the nature of embargo provisions which was referred to with approval in *Bloemfontein Town Council v Estate Holzman*:[63]

> "The effect of this section is to give the council an embargo or hold on the property in respect of which the rates have been imposed – something not wholly in the nature of a lien or hypothec but sui generis whereby the council practically obtains a preference over other creditors."

He also indicated that Van der Merwe[64] described the embargo clause in terms of section 50(1) as a tacit hypothec *sui generis*.

Ackermann J continued[65] that the position of the city council was strengthened by section 50(3) of Ordinance 17 of 1939, which stated that any amount due in terms of section 50(1) would be a charge on the land which enjoyed preference over any mortgage registered on such land. He therefore concluded:[66]

> "Na my mening het art 50(3) gelees met art 50(1) van die Ordonnansie verreikende gevolge. Dit sou beteken dat 'n verbandhouer nie die bestaande eiendom in eksekusie sou kon verkoop en oordrag aan die eksekusiekoper sou kon gee alvorens die Stadsraad nie vir die betrokke bedrae verskuldig ingevolge art 50(1)(a) en (b) betaal word nie. Die Stadsraad se reg geniet dus voorkeur, heeltemal afgesien van insolvensie, bo dié van die verbandhouer. Indien 'n verbandhouer se begeerte om eksekusie te hef teen die eiendom waarteen die verband geregistreer is 'gegronde rede' is vir doeleindes van art 66(1)(a) van die Wet op Landdroshowe . . . dan is die appellant se eis om die betrokke eiendom te verkoop na my mening 'n *a fortiori* geval van 'n gegronde rede. Appellant se eis geniet immers voorkeur wat sekuriteit betref, bo selfs die van 'n verbandhouer."

Ackermann J accordingly decided that the magistrate had erred in deciding that the appellant's preference arose only in the case of a *concursus creditorum* in insolvency and that the appellant had not obtained a form of statutory hypothec which constituted a good cause for the relief sought.[67]

In my submission the following conclusions can be drawn from this judgment:

(i) An embargo clause as such has certain legal consequences, *inter alia*, that property subject to such a clause cannot be transferred without arrear amounts being satisfied and that a preference is created in case of a *concursus creditorum* in insolvency;

(ii) only if the embargo clause is strengthened by a statutory provision which creates a (tacit) statutory mortgage on the property as security for the outstanding amounts,[68] can it qualify as a "good cause" for changing the order of execution in terms of section 66(1)(a) of the Magistrates' Courts Act.[69]

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62 1909 TH 134 137.
63 1936 OPD 134 141.
64 *Sakereg* 1 ed 494–495.
65 918A–B.
66 918C–E.
67 918F.
68 This conclusion is supported by the fact that the two subsections were discussed together by the judge throughout (918C and 918G).
69 For further remarks on the nature of embargo clauses see, *inter alia, Land en Landbou-bank van SA v Cogmanskloof Besproeiingsraad* 1992 1 SA 217 (A) 234E 235A.

3 *SA BUILDING SOCIETY v MESSENGER OF THE COURT, PRETORIA AND THE BODY CORPORATE OF SOLITAIRE BUILDING*[70]

The facts of this case were not fully set out in the typed copy of the judgment of Curlewis J which was furnished to me. It appeared that the applicant had a mortgage bond over a certain unit in a sectional title scheme (Solitaire Building) and that the second respondent (the body corporate of Solitaire Building) was still owed certain levies when the sectional owner (transferor) endeavoured to transfer the unit to a new purchaser. Curlewis J stressed that the only point he had to decide was whether the claim of the applicant (mortgage creditor) was preferent to that of the second respondent (body corporate).

Counsel for the body corporate relied on section 15(4)(b) of the Sectional Titles Act 95 of 1985 before it was amended:

> "No transfer of a unit, any portion thereof, or any individual share therein can be registered unless all money due to the body corporate by the transferor in respect of the unit has been paid, or satisfactory arrangements have been made for the payment thereof."

According to counsel for the body corporate, this provision was analogous to the embargo provision in the *Cohen's Trustees* case[71] which, in the words of Innes CJ, created a "very real and extensive preference" taking preference over any other right such as a (previously registered) mortgage bond. Curlewis J conceded that something could be said for this argument and also referred to the words of Curlewis J in the High Court decision in the *Cohen's Trustees* case in which he described such an embargo clause as "something not wholly in the nature of a lien or hypothec but *sui generis* whereby the council obtains a preference over other creditors".[72] Counsel also pointed out that the judgment of Ackermann J in *Pretoria City Council v Letabakop Farming Operations*[73] also relied on the *Cohen's* case[74] and argued that the judge had interpreted the two similar embargo provisions as conferring a lien or some other species of right which was preferent to a mortgage bond. He argued by analogy that the effect of section 15(4)(b) of the Sectional Titles Act 95 of 1986 would be the same.

Curlewis J, however, found that the remarks of Innes CJ and Solomon J in the *Cohen's* case were of little consequence. First of all, they were only *obiter dicta* and secondly they had been overruled by the *Rand Townships* case, a decision of the full bench of the Transvaal Provincial Division, which held that the right given to municipal councils by the embargo provision of section 47(b) of Ordinance 9 of 1912 to prevent transfer of premises until arrear rates had been paid, did not constitute a "claim ranking in priority" to a mortgage over such premises within the meaning of section 55(2) of the Magistrates' Courts Act 32 of 1917. He pointed out that the judgments of Innes CJ, Solomon J and Curlewis J had been fully dealt with in the report and that the *ratio decidendi* of the case was to be found at pages 290–292 of the report.

Curlewis J continued that he was not prepared to go an inch beyond the express words of the embargo clause contained in section 15(4)(b). He concluded

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70 Unreported case no 611 1989-04-07 (T).
71 1909 TS 811.
72 1909 TH 137.
73 1981 4 SA 911 (T).
74 917D.

that the right resulting from this embargo clause could be "not wholly in the nature of a lien or a hypothec but sui generis" but that it was nothing more. This conclusion was in his opinion supported by the fact that commercial undertakings (and indeed the public generally) required certainty from our law rather than doctrinal purity or juristic rightness (based on dogmatic interpretation of statutory enactments?) and by the fact that the preference of mortgages should not be lightly disturbed. He cautioned that if the legislature wished to change this position, the intention to do so must be clearly expressed and the ambit of the change clearly defined.

Curlewis J further pointed out that the *Rand Townships* case had never been overruled and had in fact been followed in *Pretoria City Council v Messenger of the Court*[75] in which case Galgut J considered the *Rand Township* and *Cohen's Trustees* decisions and explained that an express provision (s 50(2)) had to be inserted in the Local Government Ordinance 17 of 1939 in order to convert an embargo provision into a statutory mortgage with preference over existing consensual mortgages.

Curlewis J therefore concluded that the wording of section 15(4)(b) precluded a claim by the body corporate ranking prior to that of the mortgage creditor. He found that the claim of the bondholder indeed ranked in priority to the claim of the second respondent within the meaning of section 66(2) of the Magistrates' Courts Act 32 of 1944. Two orders were therefore made, namely, first, that the applicant's claim ranked in priority to that of the second respondent (body corporate) and secondly, that the sale had to be set aside.

Curlewis J's judgment may be summarised as follows: The interpretation of the embargo provision of section 26 of Ordinance 43 of 1903 by Innes CJ and Solomon J in the *Cohen's Trustees* case as creating an "extensive preference" in favour of local authorities for moneys owed to them even *vis-à-vis* a pre-existing mortgage and the acceptance of this by Ackermann J in *Pretoria City Council v Letabakop Farming Operations*[76] was only an *obiter dictum*, which *obiter dictum* was fully discredited by the full bench decision in the *Rand Townships* case. Curlewis J did not want to progress beyond the wording of section 15(4)(b), which mentions nothing about a preferent charge being created in favour of the body corporate. In order to achieve certainty in commercial dealings and to alter the existing preference enjoyed by mortgage creditors, his submission was that if Parliament wishes to bring about a change, then the intention to do so must be clearly expressed and the ambit of the change clearly defined. He illustrated his point by referring to the judgment of Galgut J in *Pretoria City Council v Messenger of the Court*[77] where the relevant section 50(2) of the Local Government Ordinance 17 of 1939 was amended specifically to create a real charge ranking in priority above existing mortgage bonds.

The *ratio decidendi* of the case is therefore that a mere embargo on transfer does not create a statutory preference which has priority over bondholders unless the legislator indicates in unambiguous terms that it intends creating such a preference.

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75 1959 1 SA 609 (T) 613.
76 1981 4 SA 911 (T).
77 1959 1 SA 609 (T).

4 *NEL NO v BODY CORPORATE OF THE SEAWAYS BUILDING*[78]

In this case the applicant was the liquidator of a company which owned six units in a sectional title development known as Seaways. These units were mortgaged in favour of Standard Bank for an amount of R1,3 million. The applicant caused the units to be sold by public auction in September 1992 for the sum of R1,05 million and lodged the transfer documents at the Cape Town Deeds Office for registration. The first respondent, the body corporate of Seaways Building, however, refused to issue the levy certificate contemplated by section 15B(3)(a)(i)(aa) which was required before the Registrar could register transfer of the units. It appeared that levies in the amount of R106 655,24 were due in respect of the six units and that the company would not have sufficient funds after the amounts due to the Standard Bank in terms of its mortgage bonds encumbering the units had been paid. The first respondent contended that it was entitled to refuse to issue a levy certificate until the full amount of outstanding levies had been paid or until provision had been made for payment. The applicant (liquidator of the company and *transferor* of the property) then sought an urgent declaratory order that section 15B(3)(a)(i)(aa) of the Sectional Titles Act[79] did not, as was contended by the first respondent, confer an effective preference on the body corporate in respect of the levies owed to it by the owners of units in the event of their or its insolvency or liquidation. The counsel for applicant relied on *Rabie NO v Rand Townships Registrar*[80] and the unreported decision of Curlewis J in *South African Permanent Building Society v Messenger of the Court, Pretoria*[81] for his submission that section 15B(3)(a)(i)(aa) and provisions of similar import in previous legislation, did not give rise to a claim which was preferent to the rights of a mortgage creditor in the event of insolvency.

In his judgment Brand J reasoned that the *Rabie NO v Rand Townships Registrar* decision had to be interpreted against the background of the decision of the full bench in the *Cohen's Trustees* decision. Brand J showed that the question to be decided in *Cohen's Trustees* was whether the term "rates" included interest on arrear rates, and quoted the remarks of Innes CJ and Solomon J on the nature and effect of an embargo clause. Brand J thereupon pointed out that the court in *Rabie NO v Rand Townships Registrar* had to decide whether the local authority concerned was a preferent creditor for the purposes of section 55(2) of the Magistrates' Courts Act of 1917[82] on the strength of an embargo clause similar to that in the *Cohen's* decision.[83] He showed that the applicant relied unsuccessfully on the remarks of Innes CJ and Solomon J in the *Cohen's* decision, and that Greenberg J, who delivered the judgment of the full bench, held that the effect of the embargo provision was not such as to constitute the local authority a preferent creditor for the purpose of section 55(2) of the Magistrates' Courts Act. He also pointed out that Greenberg J's response to the *dicta* quoted from the *Cohen* decision was the following:[84]

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78 1995 1 SA 130 (C).
79 Act 95 of 1986.
80 1926 TPD 286.
81 Case no 611 1989-04-07.
82 Act 32 of 1917.
83 S 47(b) of the Local Government Ordinance 9 of 1912 (T); s 26 of the Local Authorities Rating Ordinance 43 of 1903.
84 290.

> "The extracts quoted in terms deal only with the practical results of the section and in my opinion do not show that the section creates a lien in the strict legal sense or in the words of s 55(2) 'a claim ranking in priority' to other claims."

Brand J[85] also considered the unreported judgment of Curlewis J in *SA Permanent Building Society v Messenger of the Court, Pretoria*, and he showed that Curlewis J relied on *Rabie NO v Rand Townships Registrar*, which was apparently directly in point and decided that the embargo provision of the Sectional Titles Act was similar in effect to the embargo provision which was considered in the *Rabie* case in that it did not render the body corporate a preferent creditor for the purposes of section 66(2) of the Magistrates' Courts Act 32 of 1944.

Brand J then concluded that the *Rabie* case and the *SA Permanent Building Society* decision did not support the applicant's (liquidator's) case in that they did not offer an answer to the body corporate's (first respondent's) contention: He explained this conclusion in the following words:

> "First respondent's contention is not that it is a preferent creditor (properly so-called) for the purposes eg of the Magistrates' Courts Act or the Insolvency Act, 24 of 1936. First respondent's contention is that, by virtue of the provisions of section 15B(3)(a)(i)(aa), it enjoys an effective preference in the event of insolvency over any other rights including such as those derived from a mortgage bond.
>
> The very impact of the judgment in the *Rabie* case read together with the *Cohen* case is, in my view, that a creditor can by virtue of an embargo provision, such as the one under consideration enjoy an effective preference in the event of an insolvency despite the fact that he is not a preferent creditor properly so called for the purposes of the Magistrates' Courts Act or the Insolvency Act."

What Brand J was saying here is that the preference created by virtue of an embargo provision is something less than and something different from the preference referred to in the Magistrates' Courts Act or the Insolvency Act. What he is saying in effect is that, as long as the Magistrates' Courts Act is not applicable, the embargo provision will create an effective preference in insolvency over any other rights including those derived from a mortgage bond; the priority of the local authority's or body corporate's claim depends on how the matter arrives before the court. If, as in the *Cohen's* case and the present case, the trustees in insolvency or the liquidator sells encumbered property and desires to have it registered in the name of the purchaser, the embargo on transfer unless all rates and levies due have been paid, would create an effective preference, with the result that the local authority or the body corporate could refuse to issue a certificate of payment until full payment has been made and thus prevent transfer to the purchaser. If, on the other hand, the initiative is taken by the local authority or the body corporate to obtain a default judgment and proceed to a sale in execution in terms of section 55 and 66 of the Magistrates' Courts Act 32 of 1917 or 32 of 1944 respectively, the local authority and body corporate would first have to prove that there were no other preferent creditors in terms of section 55(2) and 66(2) of the two Acts. In this situation the local authority would not, in the light of the *Rabie* and the *SA Permanent Building Society* decisions, be able to succeed in proving that their right was preferent to that of a mortgage bondholder on the strength of a mere embargo provision which had not been converted by express legislative enactment into a statutory mortgage.

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85 133D–F.

Brand J then went on to show that, although the creditor supported by an embargo provision on transfer of the property on which rates and levies were owed, could not be regarded as a "preferent creditor" in terms of the Insolvency Act, an effective preference in favour of such creditor could still be recognised in the event of insolvency if this was compatible with the scheme of the Insolvency Act.[86] Brand J considered the decision of Botha J in *De Wet v Stadsraad van Verwoerdburg*[87] in which case it was decided that certain endowments payable to the respondent by the company in liquidation of which the applicant was the liquidator, constituted "costs of realisation" as envisaged by section 89(1) of the Insolvency Act.[88] He concluded:[89]

> "I therefore conclude that, if s 15B(3)(a)(i)(aa) must be understood to create an effective preference in the event of insolvency in favour of the body corporate in respect of its claim for outstanding levies, such a preference can be accommodated in the scheme of insolvency created by the Insolvency Act as being part of the 'costs of realisation' envisaged in s 89(1) of the Insolvency Act."

In the final part of his judgment Brand J endeavoured to answer the question whether section 15B(3)(a)(i)(aa) did indeed create an effective preference in favour of the body corporate for payment of pre-liquidation arrear levies in the event of insolvency. He accepted as a general principle that in a *concursus creditorum* brought about by sequestration or liquidation, all claims which were not specifically made preferent should be accepted as being concurrent claims. Brand J responded as follows to the applicant's contention that there was nothing in section 15B(3)(a)(i)(aa) which indicated an intention on the part of the legislature to deviate from this general principle by conferring on the body corporate the preference for levies which became payable prior to liquidation or sequestration:[90]

> "[I]t must, however, in my view, be borne in mind that the concept of ensuring the payment of debts to particular bodies by creating a veto against transfer in their favour until the debts owing to them have been paid was not a novel creation in the Sectional Titles Act. To the contrary, such veto or embargo sections have been used in numerous legislative enactments over many years in the past to ensure the payment of rates and taxes to local authorities."

He submitted that it appeared from the above quoted *dicta* of Innes CJ and Solomon J in the *Cohen* case (which was in his view confirmed in the *Rabie* case) that South African courts had interpreted these embargo provisions as creating an effective preference, in the event of insolvency, in respect of the full amount of rates which had became due to the local authority prior to liquidation or sequestration. He pointed out that counsel for applicant had not referred him to any authority where a contrary interpretation had been given to such an embargo provision.

He then continued:[91]

> "In accordance with the well-established rule of construction of statutes, it must be accepted that the legislature was aware of this interpretation which the courts

86 24 of 1936.
87 1978 2 SA 86 (T).
88 24 of 1936.
89 136E–F.
90 137B–C.
91 137E–G.

attached to such embargo sections when the embargo provision in question was enacted."

He therefore agreed with authorities on the subject[92] who simply accepted that the embargo created by the provision under consideration should bear a similar interpretation, namely, in the event of insolvency, it creates an effective preference in favour of the body corporate in respect of levies which became due by the individual or company prior to sequestration or liquidation.

It must be pointed out that the *dicta* of Innes CJ and Solomon J in the *Cohen* case were *not* confirmed in the *Rabie* case, but rather treated as *obiter dicta* and narrowed in their application to the effect that no preferent right to pre-existing mortgages was created. On the authority of the *Rabie* and the *SA Permanent Building Society* case, one can further submit that if the legislature had intended to create a right preferent to existing mortgages, a mere embargo provision would not be sufficient; it would have to be strengthened by express words creating a charge on the property and ideally also indicating that such charge ranks in priority above existing mortgages.

Brand J further found indications in section 15B(3)(b) that the legislature intended to confer an effective preference on the body corporate from the fact that this section contains an embargo provision in favour of local authorities in respect of rates. In this regard section 15B(3)(b) provides as follows:

"(3) The Registrar shall not register a transfer of a unit . . . unless there is produced to him –

(b) if by any law provision has been made for the separate rating of units, a clearance certificate of the local authority to the effect that all rates and moneys due to the local authority under any law before any such proof can be issued, have been paid . . ."

Against the historical background of the interpretation given by South African courts to embargo sections to compel payment of rates, Brand J accepted that in the event of insolvency section 15B(3)(b) confers an effective preference upon the local authority in respect of pre-liquidation rates. He refused to accept the applicant's explanation of the basis on which it should be accepted that the legislature intended that two almost identical provisions following upon one another in the same Act should have a different result in the event of insolvency.

Brand J therefore concluded that in the event of insolvency the embargo provision in section 15B(3)(a)(i)(aa) of the Sectional Titles Act creates an effective preference in favour of the body corporate in respect of pre-liquidation levies. In terms of the section the body corporate was and will be entitled to refuse to issue the required certificate until the full amount of outstanding levies has been paid, or until satisfactory provision has been made for payment.

5 SUMMARY OF LEGAL POSITION WITH REGARD TO EMBARGO PROVISIONS

In summarising the legal position with regard to embargo provisions, a distinction must in my submission be made between statutory enactments like the Sectional Titles Act, which contains an unsupported embargo provision, and the Local Government Ordinance 17 of 1939 (T) in which the enforcement of the

92 Joubert (ed) "Sectional Titles" 24 *LAWSA* par 280 n 3; Mars *Law of insolvency* 8th ed 382.

embargo provision is fortified by an express statutory mortgage which indicates the priority ranking of the claim.

In general, an embargo provision gives the body corporate a hold on the property in respect of which levies are outstanding. This preference is not wholly in the nature of a lien or mortgage but *sui generis*. The effect of an unsupported embargo provision may be summarised as follows:

(i) In cases where the owner of the unit is not insolvent, the embargo provision will ensure that levies owed to the body corporate will be paid before transfer of the unit is registered in the name of a new owner.

(ii) If the owner of the unit is insolvent, the embargo provision creates a preference in favour of the body corporate for outstanding levies because the payment of outstanding levies is treated as being part of the "cost of realisation" envisaged by section 89(1) of the Insolvency Act.

(iii) Since the preference in terms of the embargo clause is not wholly in the nature of a mortgage, the rights of the body corporate flowing from it is not considered to be a preferent right (strictly speaking) in terms of the Insolvency Act. The fact that the debt of the body corporate is satisfied as part of the process of realisation, however, produces the same result as if the rights by virtue of an embargo provision were a preferent right.

(iv) Since the right flowing from an embargo provision is not a preferent right, strictly speaking, the existence of such a provision will not be considered to be a "good cause" on the ground of which the court could, in terms of section 66(1)(a) of the Magistrates' Courts Act 32 of 1944, order that the sectional title unit (immovable property) is executable in terms of a default judgment even though the movable property of the owner of the unit has not been exhausted.

(v) For the same reason, a mortgage bond or other real encumbrance on the unit would, in terms of section 66(2) of the Magistrates' Courts Act, be considered to be a claim preferent to that of the body corporate which had obtained a judgment in default against the owner of the unit. The result of this is that all holders of preferent claims would have to be notified and accommodated in terms of section 66(2) before the body corporate may proceed with a sale in execution.

If, on the other hand, an embargo provision had been converted into a statutory mortgage by express legislative provisions indicating that the debt owed to the body corporate is (deemed to be) secured by a charge on the unit, the statutory mortgage thus established would have had the same effect as a consensual mortgage even though not registered against the title deeds of the unit. The statutory enactment which constitutes the mortgage could also provide a special ranking above that of pre-existing mortgages. If the embargo provision is linked to (or embodied in) a statutory mortgage it would qualify as a preferent right in the strict sense in terms of both the Insolvency Act and the Magistrates' Courts Act and would also be considered to be a "good cause" for changing the order of execution in terms of the latter Act.[93]

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93 See Ackermann J in *Stadsraad van Pretoria v Letabakop Farming Operations (Pty) Ltd* 1981 4 SA 911 (T) 918A–G commenting on the effect of s 50(1) and (2) (before amendment, now (3)) of the Local Government Ordinance 17 of 1939 (T). For similar provisions see s 88 of Ordinance 20 of 1974 (C) and s 18 of Divisional Council Ordinance 18 of 1976 (C).

6 PROPOSED AMENDMENT

It is clear from the above summary that, if the payment of outstanding levies is enforced in the usual way, namely in terms of section 66 of the Magistrates' Courts Act of 1944,[94] by attachment and sale in execution of the sectional title unit on which the levies are owed, the claim of the body corporate does not qualify as a "preferent right" by virtue of the embargo on transfer in terms of section 15B(3)(a)(i)(aa) of the Sectional Titles Act of 1986.[95] The question can, however, be asked whether the body corporate's claim for outstanding levies should not be converted by statutory enactment into a statutory mortgage which would qualify as a preferent right as well as a "good cause" for changing the order of execution in terms of section 66 of the Magistrates' Courts Act of 1944.[96]

Levies are the main source from which the body corporate finances the cost of maintenance and administration of a sectional title scheme. As far as the payment of levies is concerned, sectional owners are financially interdependent. Failure by one owner to pay his levies might lead to insolvency of the body corporate, for which the other owners are personally liable in proportion to their participation quotas.[97] The power of the body corporate to recover arrear levies by action in any court (including any magistrate's court) of competent jurisdiction is well fortified.[98] However, it is submitted that the body corporate's ability to recover arrears fully in case of the insolvency of the owner of a unit may be greatly impeded by the existence of a pre-existing mortgage on the unit. Since the efficient maintenance and administration of a scheme is to the advantage of every single unit owner, it is submitted that the body corporate's interest in receiving most of the levies due to it, justifies the creation of a statutory mortgage in favour of the body corporate to secure outstanding levies. In order to effect an harmonious balance between the interests of existing mortgage creditors (for example, a building society which financed the purchase of the unit) and the body corporate, and to encourage the body corporate to act promptly in enforcing claims for outstanding levies, it is proposed that the body corporate should be given a preferent right with regard to six months' arrear levies only. Such a mechanism was adopted by the Uniform Condominium Act of the United States, one of the most sophisticated enactments on apartment ownership (sectional titles) in the world.

The Uniform Condominium Act provides the following in 3–116 under the heading Lien for Assessments:[99]

> "(a) The association [body corporate] has a lien [statutory mortgage] for any assessment levied against that unit or fines imposed against its unit owner from the time the assessment or fine becomes due. The association's lien [body corporate's statutory mortgage] may be foreclosed in like manner as a mortgage in real estate . . . If an assessment is payable in instalments, the full

94 Act 32 of 1944.
95 Act 95 of 1986.
96 Act 32 of 1944.
97 Sectional Titles Act 95 of 1986 s 47(1) read with s 37(1)(a).
98 S 37(2) read with Annexure 8 r 31(5) to Regulations in terms of s 55 of the Sectional Titles Act 95 of 1986 in GN R 664 in *GG* 11245 of 1988-04-08 (as amended).
99 The words in brackets represent an attempt to give a South African sectional titles equivalent to an American concept.

amount of the assessment is a lien from the time the first instalment thereof becomes due.

(b) A lien [statutory mortgage] under this section is prior to all other liens and encumbrances on a unit except (i) liens and encumbrances recorded before the recordation of the declaration [before establishment of the sectional title scheme], (ii) a first mortgage deed . . . on the unit before the date on which the assessment sought to be enforced became delinquent, and (iii) liens and real estate taxes and other governmental assessments or charges against the unit. The lien is also prior to the mortgages . . . described in clause (ii) above to the extent of the common expense assessments based on the periodic budget adopted by the association [body corporate] which would have become due in the absence of acceleration during the 6 months immediately preceding institution of an action to enforce the lien. This subsection does not affect the priority of mechanics' or materialman's liens [improvement liens] or the priority of liens for other assessments by the association.

(e) A lien for unpaid assessments [levies] is extinguished unless proceedings to enforce the lien [statutory mortgage] is instituted within 3 years after the full amount of the assessments [levies] becomes due."

Subsection (a) provides that the body corporate's statutory mortgage on a unit for unpaid levies shall be enforceable in the same manner as a mortgage. In order to ensure prompt and efficient enforcement of the body corporate's statutory mortgage, such mortgages enjoy priority over most other charges on land. Accordingly, subsection (b) provides that the body corporate's statutory mortgage takes priority over all other mortgages and encumbrances except those registered against the land before establishment of the sectional title scheme, those imposed for rates and taxes or other governmental assessments or charges against the unit and first mortgages recorded before the date the assessment became delinquent. However, as regards prior first mortgages, the body corporate's statutory mortgage does have priority for 6 months' levies only, based on the periodic budget. The 6 months' priority for the statutory mortgage for unpaid levies strikes an equitable balance between the need to enforce collection of unpaid levies and the obvious necessity to protect the security interests of mortgage lenders. As a practical matter, mortgage creditors will most likely pay the 6 months' levies demanded by the body corporate rather than having the body corporate foreclose on the unit. Mortgage creditors are not only in the best position to collect such debts, but their best interests are also served by keeping the body corporate solvent.[100]

100 The last paragraph is an adaptation of the Commissioner's Comment no 1–3 on 3–116 of the Uniform Condominium Act to South African sectional title parlance.

Die eienaar van die bates van die insolvente boedel

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SUMMARY

The owner of the assets of the insolvent estate

The Appellate Division's decision and certain *dicta* in *De Villiers NO v Delta Cables (Pty) Ltd* 1992 1 SA 9 (A) necessitate an investigation into the true identity of the owner of the insolvent estate. The purpose of this study is to determine whether it is *essential* that the trustee of an insolvent estate becomes owner of the assets of the insolvent estate. Through a short but thorough investigation of the Roman law, it becomes clear that the *magister* and later the *curator bonorum*, who handled the process of insolvency, never procured ownership. The position in Roman-Dutch law is uncertain. To my mind no general rule regarding the true identity of the owner of the insolvent estate can be formulated for this period. With reference to the powers and duties of the Master, the provisional trustee and the trustee, the conclusion is that whenever a specific estate is sequestrated, a statutory and official group of functionaries or administrators, without any legal personality, is established. Each performs a specific managerial function. These functionaries succeed one another with each having its own legal powers and duties. They thus successively take office on the granting of the sequestration order while remaining in office until the given task is completed. It is my submission that the transfer of ownership is superfluous for the proper execution of the trustee's duties. Certain powers of ownership, such as the right to alienate, to dispose of, to encumber and to vindicate, are in fact transferred to these functionaries. Ownership, although restricted to a great extent, can in my opinion, however, remain with the insolvent.

1 INLEIDING

'n Bespreking van die administrasie van 'n insolvente boedel deur 'n kurator kan nooit behoorlik of volledig wees as dit nie ook handel met die vraag wie die eienaar van die insolvente boedel is nie. Uit die uiteensetting wat volg, sal duidelik blyk dat ek krities staan teenoor die manier waarop hierdie sleutelaspek in die Insolvensiewet gehanteer is. Moontlik sal dit lesers noop om die heersende posisie meer krities te benader eerder as om klakkeloos te aanvaar dat 'n korrekte siening van ons eiendomsbegrip die Insolvensiewet ten grondslag lê. 'n Ander verklaring daarvoor sal gebied word.

Na aanleiding van die feit dat die boedel deur die kurator geadministreer word volgens die aanwysings of besluite van die *concursus creditorum*;[1] dat die

1 Smith *The law of insolvency* (1988) 192 208 ev; De la Rey en Sharrock *Hockly's Insolvency law* (1990) 84; Meskin *Insolvency law and its operation in winding-up* (1994) 7–16 ev. Sien ook a 41 en 43 Insolvensiewet 24 van 1936. Uit Wessels *History of Roman-Dutch law* (1908) 664 ev blyk dit dat die likwidasieproses oorspronklik in die hande van die skuldeisers of iemand uit hul geledere was. Alhoewel die posisie tydens die bestaan

vervolg op volgende bladsy

insolvent en iedere skuldeiser die reg het om enige bestaande of voorgenome handeling van die kurator op hersiening te neem as dit nie tot voordeel van die *concursus creditorum* geskied nie;[2] dat die meester die kurator *te eniger tyd* kan gelas om enige goed wat tot die insolvente boedel behoort, aan hom te oorhandig;[3] dat die kurator nie met die bates mag spekuleer met die hoop om sodoende hul waarde te vermeerder nie; dat hy nie die realiseringsproses sonder meer kan uitstel of geld op die boedel kan spandeer nie;[4] dat hy slegs 'n fidusiêre posisie beklee;[5] en dat die meester die kurator *te eniger tyd* kan gelas om enige goed wat tot die insolvente boedel behoort, aan hom te oorhandig,[6] is dit myns insiens geregverdig om te vra of dit hoegenaamd sinvol is om te volhard met die standpunt dat die kurator *eienaar* van die insolvente boedelbates word. Die vraag kom na vore of nie volstaan kan word nie met die erkenning dat die kurator *slegs beheer* en die *ius disponendi* met betrekking tot die bates *nodig het* vir die behoorlike administrasie van die insolvente boedel.[7]

Gepaard met my siening van die kurator as 'n statutêre, amptelike reghebbende ten opsigte van die boedelgoed[8] *vir doeleindes van die sekwestrasieproses*, wil ek 'n eie weergawe van die eiendomsposisie aanbied as 'n *beter verklaring* vir wat inderdaad gebeur, as wat bereik kan word met die oppervlakkige tipering van die kurator as "eienaar van die boedel" soos dit in die Insolvensiewet voorkom.

In die loop van die sekwestrasieproses kan dit gebeur dat die meester, dán 'n voorlopige kurator, dán 'n kurator, dán moontlik weer die meester en daarna weer 'n kurator beheer oor die boedel neem. Hierdie situasie noop 'n mens om te vra of die hele proses nie veel eenvoudiger afgehandel kan word nie indien erken word dat dit telkens slegs *beheer* in plaas van eiendomsreg is wat verskuif.[9]

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van die Desolate Boedelkamer en vir 'n tyd daarna anders was, het die skuldeisers sedert 1829 reeds aansienlike seggenskap gehad oor feitlik alle besluite wat die likwidasie van die boedel raak. Hierdie patroon is in die huidige Insolvensiewet behou. Sien *Ex parte Serfontein: In re Insolvente Boedel Schoeman* 1978 1 SA 246 (O) 248.

2 Smith *Law of insolvency* 105 199–201. Igv wanadministrasie sal die kurator teenoor die insolvent (op grond van die insolvent se terugvallende belang in die boedel – *ibid*) en/of die skuldeisers aanspreeklik wees. Dit is as die skuldeisers kan bewys dat hulle verlies gely het agv die kurator se verbreking van sy algemene pligte. Die kurator is aanspreeklik tot die omvang waarin hul eise betaal sou word uit die opbrengs van bates, of groter opbrengs van bates, ens (sien ook *Callinicos v Burman* 1963 1 SA 489 (A) 499; a 144 116(*bis*); sien verder a 82(8)). Die kurator het 'n plig teenoor die skuldeisers en die insolvent op grond van die algemene beginsels van Aquiliese aanspreeklikheid (Meskin *Insolvency law and its operation* 4–28).

3 A 152(1).

4 *Thorne v The Master* 1964 3 SA 38 (N) 50.

5 In *Desai v Assignee Estate Desai* 1935 CPD 503 508 wys die hof daarop dat die kurator in 'n vertrouensposisie teenoor die skuldeisers en die insolvent staan. Agv sy aanstelling ingevolge wetgewing beklee die kurator 'n *amp*. Die oogmerk daarvan is die bestuur en bereddering van die insolvente boedel. Hy is dus 'n statutêre ampsbekleder in 'n fidusiêre posisie met verantwoordelikheid teenoor sowel die skuldeisers as die insolvent.

6 A 152(1).

7 En soos ek dit sien, die statutêre amptelike reghebbende word *ook wat die vorderingsregte betref.*

8 Wat die vorderingsregte insluit.

9 Wat onroerende goed betref, kan bv op die titelbewys daarvan bloot aangeteken word dat 'n persoon se boedel gesekwestreer is en dat beheer oorgedra is aan bestuursfunksionarisse soos deur die Insolvensiewet voorsien word.

2 ROMEINSE EN ROMEINS-HOLLANDSE REG

In die Romeinse reg het die *magister* of *curator* nie eiendomsreg op die bates of goed van die insolvent verkry nie. Hy het slegs die bevoegdheid verkry om titel aan 'n koper oor te dra.[10] Oor die posisie in die Romeins-Hollandse reg bestaan daar heelwat twyfel. Die meeste bronne wat bestudeer is, verwys slegs na die feit dat 'n *magister* of *curator* onmiddellik deur die hof aangestel word om *beheer oor die boedel uit te oefen en dit te administreer.*[11] In 'n aantal ander bronne word bloot gewys op die feit dat die skuldenaar ten behoewe van sy skuldeisers oorgawe van sy boedel kan verkry, sonder om in te gaan op die vraag of eiendomsreg vervolgens op die kurator oorgaan.[12] Volgens Lee[13] daarenteen was die posisie in die Romeins-Hollandse reg ook dat die kurator eienaar van die insolvente boedel geword het.[14] Wessels[15] wys daarop dat dit inderdaad die posisie was sedert 1829 met die daarstelling van Ordonnansie 64 van 1829. Of dit ook die regsposisie vóór daardie tyd was, word nie uitdruklik verklaar nie.

3 INSOLVENSIEWET 24 VAN 1936

Artikel 20(1)(a) bepaal dat die boedel *ophou om aan die insolvent te behoort* en op die meester oorgaan. Na aanstelling van 'n kurator gaan dit op daardie kurator oor. Ook artikel 25(2) bepaal uitdruklik dat wanneer 'n kurator sy amp ontruim of afgetree het, afgesit of oorlede is, die boedel op die oorblywende kurator oorgaan. Is daar nie een nie, gaan dit op die meester oor totdat 'n ander kurator aangestel is. Dit beteken dat daar formeel 'n onmiddellike, vasgestelde reg van huidige en toekomstige besit en beheer op hom geplaas word. Is hy dan bloot 'n regmatige beheerder of beteken die woord "oorgaan" dat hy eienaar van die boedelbates word?

Van der Merwe[16] se standpunt is dat die meester *eienaar* word. Hy noem dit 'n statutêre geval van eiendomsverkryging op *afgeleide wyse.* Volgens hom

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10 Sien bv Wubbe *Kaser's Romeins privaatrecht* (1971) 405; Feenstra *Romeinsrechtelike grondslagen van het Nederlands privaatrecht* (1990) 299; Dannenbring *Roman private law: A translation of Kaser's Römisches Privatrecht* (1968) 356; Radin *Handbook of Roman law* (1927) 315; Buckland *A manual of Roman private law* (1947) 387; Leage *Roman private law* (1964) 469; Schwind *Römisches Recht: Geschichte, Rechtsgang, System des Privatrechts* (1950) 126 ev; Thomas *Institutes of Justinian: Text, translation and commentary* (1975) 197.

11 Henry *Van der Linden's Institutes of the laws of Holland* (1828) 463 501; sien ook Kotze *Van Leeuwen's Commentaries* Vol 2 337; Wessels *History of Roman-Dutch law* 664 ev; Van der Linden *Verhandeling over de judicieele practijcq* (1744) 399; Huber *Heedendaagse rechts-geleertheyt* (1726) 861 saamgelees met Schrorer *Groenewegen en De Groot's Inleydinge tot de Hollandsche rechts-geleertheyt* (1767) 768.

12 Sien bv Van Leeuwen *Het Rooms Hollands-recht* (1732) 500 ev; Huber *Heedendaagse rechts-geleertheyt* 861 ev; Groenewegen *De Groot's Inleydinge tot de Hollandsche rechts-geleertheyt* (1738) 449; (Genootskap van rechtsgeleerden Vol 2 Obs 100) *Honderd rechtsgeleerde observatien* (1776) 224 ev.

13 Lee *An introduction to Roman-Dutch law* (1953) 249.

14 Dit is egter interessant om daarop te let dat waar die beginsels behandel word van die wyses waarop 'n persoon eiendomsreg op boedelgoedere kan verloor, sekwestrasie glad nie genoem word nie (sien bv Lee *Jurisprudence of Holland by Hugo Grotius* Vol 1 (1926) 221; Maasdorp *The introduction to Dutch jurisprudence of Hugo Grotius* (1903) 145).

15 *History of Roman-Dutch law* 670.

16 Van der Merwe *Sakereg* (1989) 298.

word die meester outomaties, dit wil sê sonder lewering of registrasie, eienaar van die insolvente boedel. Na hom word die kurator eienaar. Dit is ook die standpunt van Van Zyl.[17] Olivier, Pienaar en Van der Walt[18] stel dit dat die skuldenaar met die sekwestrasie van sy boedel eiendomsreg deur regswerking verloor; die boedel gaan dan op die meester en daarna op die kurator oor.

Hoe onaanvaarbaar die standpunt is dat die kurator eienaar van die insolvente boedelbates word, blyk myns insiens duidelik uit die uitspraak in *De Villiers v Delta Cables (Pty) Ltd.*[19] Hierdie saak handel wesenlik oor die posisie van die solvente eggenoot (van die insolvent) en sy/haar skuldeisers. Appèlregter Van Heerden wys daarop dat wat die insolvent se bates betref, daar in artikel 20 nie uitdruklik bepaal word dat *eiendomsreg* van die bates op die kurator oorgaan nie.[20] Nogtans, meen die regter, word *algemeen aanvaar* dat die bates van die insolvent in eiendomsreg op die kurator oorgaan. Aangesien die bates ingevolge artikel 21 van die Insolvensiewet op die kurator "oorgaan asof dit goedere van die gesekwestreerde boedel was", is dit volgens die regter duidelik dat *die wetgewer bedoel het dat eiendomsreg van die solvente eggenoot op die kurator van die insolvente boedel oorgaan.* Hoewel hierdie opmerking van die hof *obiter* is, is dit steeds aanduidend van die onhoudbare situasie waartoe so 'n standpunt kan lei. Myns insiens kan hierdie bedoeling nie ondersteun word nie. Dit sal onredelik beperkend op die posisie van die solvente eggenoot en sy/haar skuldeisers inwerk terwyl dit inderdaad nie noodsaaklik is vir 'n behoorlike en billike hantering van die boedel van die solvente eggenoot en die eise teen daardie boedel nie.[21]

4 POSISIE IN ANDER INSOLVENSIEREGSTELSELS

Die pasgemelde standpunt is in ooreenstemming met dié in die Engelse en Amerikaanse reg. Volgens die Amerikaanse reg vestig die titel van al die insolvent se goed in die kurator vanaf die datum van die petisie vir sekwestrasie van die boedel. Dit geskied deur regswerking.[22] In die Engelse reg is die kurator die eienaar van die boedelbates en -geld *vir* die skuldeisers.[23] Wat egter in gedagte

17 "Die subjek van 'n bestorwe boedel: Meester of eksekuteur?" 1989 *THRHR* 187 189.

18 *Sakereg studentehandboek* (1989) 179.

19 1992 1 SA 9 (A).

20 15H.

21 In *Nel v Body Corporate of the Seaways Building* 1995 1 SA 130 (K) beslis die hof mbt die verkoop van 'n deeltiteleenheid dat die maatskappy in likwidasie die transportgewer is en nie die likwidateur van daardie maatskappy nie. Alhoewel dit dus oor die posisie van 'n likwidateur van 'n maatskappy in likwidasie handel, kan die redenasie van die hof om tot hierdie gevolgtrekking te raak (138C–139C) moontlik ook op die kurator en insolvente boedel van toepassing gemaak word.

22 Jeager ea *Williston's Treatise on the law of contract* Vol 18 (1978) 298 ev. Dit is dus nie die ekwivalent van 'n verkoop van eiendom nie.

23 Fletcher *The law of insolvency* (1990) 133 153. Die outomatiese regsoorgang van bates geskied eers sodra 'n kurator oor die boedel aangestel is. Vir die tydperk vóór sodanige aanstelling behou die insolvent sy titel. Sy bevoegdhede mbt die boedelgoedere word egter deur die hof opgeskort (Fletcher *Law of insolvency* 129 ev). Mbt daardie goedere is die insolvent tegnies slegs 'n okkupeerder (*idem* 135). Sien ook Sealy en Millman *Annotated guide to the 1986 insolvency legislation* (1987) 323 ev; Grier en Floyd *Personal insolvency: A practical guide* (1987) 40; Guest ea *Chitty on contracts: General principles* Vol 1 (1989) 915; Griffiths *Insolvency of individuals and partnerships* (1988) 109.

gehou moet word, is dat 'n totaal ander eienaarsbegrip in die Engelse regstelsel figureer. Volgens die Engelse reg kan dieselfde saak wel meerdere eienaars op dieselfde tyd hê. Die gebruik van "unincorporated associations" in die Engelse reg kan as voorbeeld gebruik word. In hierdie gevalle kom geen regspersoon tot stand nie. Die lede word as mede-eienaars van die verenigingsvermoë omskryf. Hulle is nie gewone mede-eienaars nie maar *equitable joint owners*.[24] Nou kan gesamentlike eiendom in eiendomsreg aan 'n trustee oorgedra word wat dan as die sogenaamde *legal owner* alle regshandelinge met betrekking tot die gesamentlike eiendom namens die lede uitvoer.[25] Die lede bly steeds *equitable joint owners* maar alle regshandelinge word deur die trustee uitgevoer. Hierdie sakeregtelike onderskeid tussen *legal owner* en *equitable joint owner* is vreemd aan die Suid-Afrikaanse reg en strydig met die betekenis van die begrip eienaar soos dit hier verstaan word. In die Engelse reg kan die trustee weens hierdie onderskeid maklik genoeg as eienaar aangemerk word terwyl die lede steeds as *equitable joint owners* beskou word – dus twee verskillende soorte eiendomsreg deur verskillende persone op een saak of vermoë.[26]

Die posisie in die Nederlandse reg is dat die insolvent persoonlik volkome "regsbevoeg" bly. Net sy beheer en beskikkingsreg oor die goedere wat in beslag geneem is, word hom tydens sekwestrasie ontneem.[27] Die kurator verkry derhalwe slegs die beheer- en beskikkingsreg ten opsigte van daardie boedelbates.[28] Ingevolge die Duitse insolvensiereg verloor die skuldenaar beheer en beskikkingsbevoegdheid oor die boedelgoed maar sy titel en regte daarop bly voortbestaan.[29] By voortsetting van 'n onderneming van die insolvent is die kurator ook nie koopman in die plek van die insolvent nie. Laasgenoemde behou sy koopmanskap.[30]

5 BEVOEGDHEID VAN KURATOR

Die hantering van die eiendomsbeskrywing in die Suid-Afrikaanse insolvensiereg is nie bevredigend nie. Die oorheersende standpunt tans is dat die subjek van die insolvente boedel óf die kurator, óf die meester is, afhangende van die omstandighede.[31] Slegs die kurator[32] is bevoeg om bestuurshandelinge te verrig. Eiendomsreg setel in die meester of die kurator tot voordeel van en *vir* die skuldeisers van die insolvente boedel.

Tog, hoewel die kurator dus as eienaar van die insolvente boedel geag word, kan dit net in *amptelike hoedanigheid* geld. In *persoonlike hoedanigheid* beskik hy nie oor die gebruiks- en genotsbevoegdheid met betrekking tot die insolvente

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24 *Graff v Evans* (1882) 8 QBD 373; Green "The dissolution of unincorporated non-profit associations" 1980 *MLR* 628; Smith *The law of associations* (1914) 85.

25 Green 1980 *MLR* 641; Smith *The law of associations* 19 90.

26 Pienaar *Die gemeenregtelike regspersoon in die Suid-Afrikaanse privaatreg* (LLD-proefskrif PU vir CHO 1983) 172.

27 Polak *Faillissementsrecht* (1986) 15.

28 Van Zeben ea *Faillissementswet: Supplement* (1990) 1 3 2 68–1.

29 Baur en Stürner *Insolvenzrecht in Zwangvollstreckungs-, Konkurs- und Vergleichsrecht* Vol 2 (1990) 101.

30 Gottwald *Insolvenzrechtshandbuch* (1990) 237; Baur en Stürner *Insolvenzrecht* 154.

31 Sien ook a 83(4) wat bepaal dat 'n skuldeiser, as geen kurator voor die tweede vergadering van skuldeisers aangestel is nie, *met skriftelike toestemming van die meester* sekere bates te gelde mag maak.

32 Of die meester, afhangende van die omstandighede.

boedelbates nie. Artikel 72(1) bepaal ook dat die kurator strafbaar is indien hy enige geld van die insolvente boedel langer as die voorgeskrewe tyd hou, of vir 'n ander doel as ten bate van die boedel gebruik. Hy is nie persoonlik vir die boedelskulde aanspreeklik nie. Indien sy persoonlike boedel gesekwestreer word, val die bates van die boedel wat hy moet administreer nie in *sy* insolvente boedel nie. Sy persoonlike skuldeisers kan nie daarop beslag laat lê nie. Een geval waar die kurator verplig word om sy amp te ontruim, is juis wanneer sy boedel gesekwestreer word.[33] Daardie betrokke bates gaan derhalwe dadelik op die ander kurator of die meester oor.

Soos reeds genoem,[34] is die kurator 'n statutêre ampsbekleder.[35] Ingevolge die Insolvensiewet het hy sekere bevoegdhede, onder andere 'n vervreemdings- en beskikkingsbevoegdheid.[36] Hierdie beskikkingsbevoegdheid is egter nie onbeperk nie. In *Mookrey v Smith*[37] beslis die hof dat, na aanleiding van artikel 82, óf die skuldeisers, óf die meester aanwysings aan die kurator moet gee oor die verkoop van bates uit die insolvente boedel. Die kurator word nie toegelaat om sy eie kop te volg nie.[38] Dit is ook belangrik om in gedagte te hou dat die onroerende bates immers nog in die naam van die insolvent geregistreer is. Hy behou verder 'n wesenlike terugvallende belang in die boedel.[39] Dit is ook duidelik dat die eiendom van die insolvente boedel deur die kurator verkoop moet word, *maar slegs indien dit nodig sou wees om die eise van die skuldeisers te bevredig.*[40]

'n Klakkelose aanvaarding van die standpunt dat die kurator (of meester) *eienaar* van die boedel in die ware sin van die woord is, word verder bemoeilik deur die feit dat dit uit sekere artikels van die wet met die eerste oogopslag kan lyk of die insolvent tog nog 'n reg of bevoegdheid ten opsigte van die insolvente

33 A 58(a).

34 Sien vn 5 hierbo.

35 Hy is mi nie die eienaar van die goed wat binne die insolvente boedel val nie. Die kurator tree as statutêre ampsbekleder in 'n fidusiêre posisie ten bate van die insolvente boedel, skuldeisers en insolvent op.

36 Daarom kan 'n mens nie, soos in die geval van 'n balju, sê dat die kurator ten bate van die insolvent optree nie. Die insolvent het nie meer daardie bevoegdheid om goedere te vervreem of daaroor te beskik nie.

37 1989 2 SA 707 (K) 711.

38 A 82(1) maak voorsiening vir aanwysings van die een of ander aard. In die afwesigheid van enige sodanige aanwysings is die verkoop van 'n bate uit die insolvente boedel ongeldig. Die hof beklemtoon dat die oogmerk van die wet is dat die skuldeisers van die insolvente boedel in laaste instansie in beheer van die likwidasieproses van daardie boedel moet wees. Daarom is dit belangrik en ook nodig dat die wet sekere riglyne moet verskaf om te verseker dat die kurator in ooreenstemming met die aanwysings van die skuldeisers optree. Sien ook a 53 80(*bis*) 81(3). Ivm die voortsetting van die insolvent se besigheid sien a 80(1).

39 Sien *Jordaan v Richter* 1981 1 SA 490 (O) 496. Daarom het die insolvent steeds 'n belang in die administrasie van sy boedel (*Mookrey v Smith* 1987 1 SA 332 (K) 335). Ingevolge a 116 kan die oorskot van gerealiseerde bates die insolvent toeval. Hy besit 'n erkende belang om daardie oorskot te beskerm en in verband daarmee te ageer. Dit is in ooreenstemming met 'n aantal uitsprake (*Jordaan* 335). Benewens die aansoek om rehabilitasie kan die hof ook deur die insolvent versoek word om 'n uitwysingsbevel mbt sekere eiendom te gee (*Ex parte Parker* 1946 CPD 536).

40 *Jacobs v Hessels* 1984 3 SA 601 (T); Stander "Mookrey v Smith NO and another 1987 1 SA 332 (K)" 1988 *THRHR* 252 ev; Stander "Mookrey v Smith NO and another 1989 2 SA 707 (K)" 1990 *THRHR* 273 ev; *Mookrey v Smith* 1987 1 SA 332 (K) 337.

boedel het. So bepaal artikel 24(1) dat indien die insolvent na sekwestrasie van sy boedel goed[41] of regte daarop sonder toestemming van sy kurator vir 'n teenprestasie vervreem, daardie vervreemding geldig is indien die teenparty onkundig oor die feit van die sekwestrasie was. Dit kan dus lyk of die insolvent slegs die *beheer* oor sy boedel verloor. Ook artikel 25(1)[42] bepaal dat die boedel van die insolvent onder die *beheer* van die kurator bly tot dit weer volgens 'n akkoord of rehabilitasiebevel op die insolvent oorgaan. Hierdie subartikel bevat wel die volgende voorbehoud:

> "Met dien verstande dat ... alle goedere wat onmiddellik voor die rehabilitasie onder beheer van die kurator val, na die rehabilitasie onder sy beheer bly om te gelde gemaak en verdeel te word."

Impliseer dít nou dat die insolvent eiendomsreg op daardie bates verloor het? Verdere verwarring kan ook deur die bewoording van sekere ander artikels veroorsaak word. In artikel 36(b)(ii) word onder andere bepaal dat die insolvent aan 'n misdryf skuldig is as hy versuim om binne veertien dae vanaf die aanstelling van die kurator van sy boedel, laasgenoemde in kennis te stel van die bestaan van enige *tot die boedel behorende goed*. Artikel 142(1) en (2) maak die verwydering of verberging van goed deur enige persoon om beslaglegging te verydel of die versuim deur enige persoon om goed te openbaar, strafbaar. In albei hierdie subartikels word gepraat van goed wat *tot 'n insolvente boedel behoort*. Subartikel 3 bepaal egter dat die bepalings van subartikels (1) en (2) nie van toepassing is *op 'n insolvent* met betrekking tot goed wat *tot sy eie insolvente boedel behoort* nie.

Soos reeds gemeld, is die algemeen aanvaarde standpunt egter dat die insolvent wel eiendomsreg verloor. Ek is van mening dat dit nie die geval *behoort* te wees nie omdat dit *geensins noodsaaklik* vir 'n behoorlike likwidasieproses is nie. Waarom gebruik die wetgewer telkens net die woord "beheer"?[43] Dit dui myns insiens daarop dat die kurator slegs *beheer* en die *ius disponendi* nodig het om sy funksies te volvoer.[44] In artikel 69(1) word uitdruklik bepaal dat die kurator so spoedig moontlik na sy aanstelling alle roerende goedere, boeke en geskrifte wat *aan die boedel behoort waarvan hy kurator is*, in sy besit of onder sy beheer moet neem. Met betrekking tot rehabilitasie word in artikel 129(2) bepaal dat die boedel van die insolvent weer op hom *oorgaan*. Daar is weer eens geen sprake van lewering of registrasie in die naam van die insolvent nie. Alhoewel dit in die praktyk deur middel van 'n aantekening in die akteskantoor geskied, is daar geen bepaling in die Insolvensiewet wat so 'n aantekening

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41 Dit is goed wat ná sekwestrasie verkry is en deur daardie verkryging deel van die gesekwestreerde boedel geword het uit hoofde van a 20(2)(b).

42 Soos gewysig deur a 4 van die Insolvensiewysigingswet 122 van 1993.

43 Sien ook die standpunt van Joubert "De Villiers NO v Delta Cables (Pty) Ltd 1992 1 SA 9 (A)" 1992 *TSAR* 699 nl dat "oorgaan" nie noodwendig beteken dat eiendomsreg op die kurator oorgedra word nie.

44 So kan die kurator, voor of na die rehabilitasie van 'n insolvent, tov onroerende goed of 'n verband wat op die naam van die insolvent geregistreer is, 'n *caveat* laat aanteken teen transport of die rojering of sessie van die verband (a 18B, ingevoeg deur die Insolvensiewysigingswet 122 van 1993). Sien ook a 25(3) wat bepaal dat nadat die geldigheidsduur van elke *caveat* verval het wat ingevolge a 17(3), 18B of 127A tov die insolvent se goed aangeteken is, elke registrasiehandeling wat hy mbt die goed teweegbring regsgeldig is. Dit is die geval ten spyte van die feit dat die goed deel van sy insolvente boedel uitgemaak het.

gebied nie.[45] Subartikel (3)(c) bevestig dat die rehabilitasie geen invloed het op die reg van die kurator of skuldeisers op enige deel van die insolvente boedel wat onder *beheer* van die kurator is maar nog nie deur hom verdeel is nie. Insiggewend is die feit dat die wetgewer in al hierdie gevalle nie die woorde "bates waarop die kurator eiendomsreg verkry het", gebruik nie.

6 BEVOEGDHEID VAN MEESTER

Ook die meester is met uitgebreide bevoegdhede en pligte met betrekking tot die insolvente boedel beklee.[46] Hy oefen sy bevoegdhede onder toesig van die hof en die Minister van Justisie uit. Dit blyk onder andere uit artikels 53(4), 57(7)–(10), 109(3), 111(2), 127 en 151. Die bestaan van hierdie bevoegdhede dui nie noodwendig aan dat hy as subjek van die boedel optree wanneer hy genoemde bestuurshandelinge verrig nie. *Dit is blote bestuursbevoegdhede.* Dat die meester nie as subjek van die insolvente boedel kan handel nie, kan ook gemotiveer word deur die feit dat die staat (handelende deur die hof) bevoeg is om bestuurshandelinge te verrig. Dit is naamlik in die geval van hersiening en appèl. As die staat bevoeg is om bestuurshandelinge in verband met 'n insolvente boedel te verrig sonder dat dit die subjek van daardie boedel is, val dit nie in te sien waarom die meester die subjek daarvan móét wees as hy dieselfde soort handelinge verrig nie.[47] Die meester oefen slegs *statutêre* bevoegdhede uit. Hy is 'n skepping van die wetgewer en het slegs die bevoegdhede wat deur die wetgewer aan hom opgedra is. Daardie bevoegdhede moet binne die vier hoeke van sy wet, hetsy uitdruklik hetsy by noodwendige implikasie te vinde wees. Daar is ook reeds op die bevoegdhede van die hof en die *concursus creditorum* met betrekking tot die administrasieproses van die insolvente boedel gewys.

7 DIE EIENDOMSBEGRIP

Die omvang van eiendomsreg word aan die hand van die eienaar se uitoefening van inhoudsbevoegdhede op die saak omskryf. Dit is belangrik om daarop te let dat die eiendomsreg van die eienaar nie in die somtotaal van die inhoudsbevoegdhede geleë is nie. Die inhoudsbevoegdhede dui op die omvang van die eiendomsreg.[48] Dit is onbepaald deurdat dit van tyd tot tyd met betrekking tot dieselfde regsverhouding kan verskil. 'n Eienaar kan sy inhoudsbevoegdhede vrylik beperk sonder dat sy eiendomsreg op die saak daardeur beëindig word.[49]

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45 Voorsiening daarvoor moes spesiaal in die Registrasie van Aktes Wet 47 van 1937 (soos gewysig deur Wet 122 van 1993) gemaak word (a 58(1)).

46 Sien bv a 18 23(3) en (12) 39–42 44(4) 45(3) 80–82 110 129(3) 152.

47 Vgl die standpunt van Van Zyl mbt die posisie by 'n bestorwe boedel soos deur hom bespreek in 1989 *THRHR* 188 ev. Dié skrywer voer aan dat die subjek van 'n bestorwe boedel 'n bestuursliggaam as *regspersoon* is. Dit is egter geensins die bedoeling om 'n soortgelyke standpunt (nl dat 'n regspersoon tot stand kom) mbt gesekwestreerde boedels in te neem nie.

48 Olivier *et al Studentehandboek* 42.

49 Van der Merwe *Sakereg* 175 praat van die elastisiteit van eiendomsreg. Die standpunt is dat inhoudsbevoegdhede nie los van die subjektiewe reg waaraan dit verkleef is, oorgedra kan word nie; dat sy inhoudsbevoegdhede ook nie deur die reghebbende van 'n saaklike reg soos eiendomsreg aan 'n ander oorgedra kan word nie; dat die eienaar nie *sy* inhoudsbevoegdhede aan die reghebbende van 'n beperkte saaklike reg soos 'n serwituut van weg oordra nie. Met totstandkoming van die beperkte saaklike reg verkry die reghebbende van die diensbaarheid uit hoofde van sy beperkte saaklike reg sy eie

vervolg op volgende bladsy

Skrywers erken dat dit moeilik is om 'n volledige of uitputtende lys van die inhoudsbevoegdhede te maak.[50] Oor die algemeen word die volgende gewoonlik as die belangrikste inhoudsbevoegdhede aangemerk: Beheers- (wat besitsbevoegdheid insluit), gebruiks- (wat benutting en genotsbevoegdheid insluit), beswarings-, vervreemdings- en vindikasiebevoegdheid. Geen besondere bevoegdheid kan egter as die kern van eiendomsreg aangemerk word nie aangesien inhoudsbevoegdhede slegs die omvang van eiendomsreg as saaklike regsverhouding bepaal. Eiendomsreg is 'n abstrakte konsep wat meer is as die somtotaal van bepaalde inhoudsbevoegdhede wat aan die saak kleef.[51] Van der Merwe[52] verwys na volle eiendom en naakte eiendom. Naakte eiendom kan weer tot volle eiendom aangroei indien die beperkings daarop wegval.

Inhoudsbevoegdhede kan wel deur publiek- of privaatregtelike maatreëls beperk word.[53] 'n Persoon verloor eiendomsreg op 'n saak indien dit ingevolge 'n *saaklike ooreenkoms*[54] met betrekking tot die oorgang van eiendomsreg deur lewering of registrasie aan 'n ander oorgedra word. Dit moet dus geskied met die bedoeling van die eienaar om eiendomsreg oor te dra en die bedoeling van die ontvanger om eiendomsreg te ontvang.[55] Ek is van mening dat daar nie sonder meer gesê kan word dat die insolvent met die toestaan van die sekwestrasiebevel daardie bedoeling het om eiendomsreg op sy bates aan die meester of die kurator oor te dra nie. Daar word sonder meer gekonstateer dat die meester en die kurator deur regswerking, en wel op grond van artikel 20(1) van die Insolvensiewet, eiendomsreg op die boedel van die insolvent verkry. Alhoewel erken word dat eiendomsreg nie meer kan bestaan as die eienaar van alle inhoudsbevoegdhede afstand gedoen het nie, is dit my standpunt dat die insolvent tog nog sekere bevoegdhede ten opsigte van sy boedel behou.[56] Veral belangrik is daardie wesenlike, terugvallende belang in die boedel en die feit dat daardie bates ter vereffening van sy skuld aangewend moet word. Sekere inhoudsbevoegdhede gaan inderdaad op die kurator oor, soos die vervreemdings-, beskikkings-, beheers-, beswarings- en vindikasiebevoegdheid. Dit is inderdaad

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inhoudsbevoegdhede terwyl die ooreenstemmende bevoegdhede van die eienaar vir die duur van die beperkte saaklike reg opgeskort is. Sien Sonnekus en Neels *Sakereg vonnisbundel* (1994) 154. 'n Eienaar kan dus volgens hierdie standpunt kontraktueel aan 'n ander die bevoegdheid verleen om die saak te gebruik sonder dat hy daarmee sy bevoegdheid om die saak te gebruik, oordra. Vir doeleindes van my argument is dit egter nie nodig om krities hieroor standpunt in te neem nie. Dit is voldoende om te aanvaar dat dit wel moontlik is dat een persoon eiendomsreg tov 'n saak het terwyl 'n ander terselfdertyd oor sekere bevoegdhede mbt daardie saak beskik.

50 Olivier *et al Studentehandboek* 8; Van der Merwe *Sakereg* 173.

51 Olivier *et al Studentehandboek* 40; Van der Merwe *Sakereg* 174.

52 Van der Merwe *Sakereg* 173.

53 Vir 'n volledige bespreking sien Van der Merwe *Sakereg* 176 ev. Sonnekus en Neels *Sakereg vonnisbundel* 15 meen dat die eienaar se bevoegdhede hoogstens in ooreenstemming met die sg *police powers* deur die staat beperk kan word. Die staat of sy gesanksioneerde liggaam of persoon verwerf egter nie die ooreenstemmende privaatregtelike bevoegdhede of die onderliggende reg nie.

54 Die saaklike ooreenkoms is nodig slegs in die geval van eiendomsoordrag op afgeleide wyse. Vgl weer Van der Merwe *Sakereg* 298 se standpunt dat die kurator eiendomsreg op afgeleide wyse verkry.

55 Van der Merwe *Sakereg* 312 ev; Olivier *et al Studentehandboek* 135. Blote oordrag van die saak dui nie altyd op die bedoeling dat eiendomsreg op die ontvanger oorgaan nie.

56 Sien bv a 24(1).

nodig sodat die kurator volkome bestuursbevoeg kan wees. Sekere bevoegdhede kan hy egter nie uitoefen nie, soos die gebruiks- en genotsbevoegdheid.

By die bestudering van die beginsels van eiendomsreg soos dit in die Suid-Afrikaanse sakereg van toepassing is, lyk dit geregverdig om te vra of dit nodig is dat eiendomsreg inderdaad op die meester of kurator móét oorgaan. Eiendomsreg, hoewel in 'n baie groot mate beperk, kan myns insiens nog in die insolvent setel.

8 GEVOLGTREKKING

Die standpunt dat die kurator eienaar van die insolvente boedel word, kan na my mening nie met 'n beroep op die Romeinse en Romeins-Hollandse reg gestaaf word nie.[57] Die posisie in die Nederlandse en Duitse reg is ook dat die kurator net die volle beheer- en beskikkingsmag ten opsigte van daardie boedel verkry. Dit is my oortuiging dat met sekwestrasie van 'n spesifieke boedel die bevoegdhede van 'n reeks opeenvolgende, statutêre en amptelike bestuursfunksionarisse in werking tree. Dit spreek duidelik uit die feit dat die boedel[58] onmiddellik met verlening van 'n sekwestrasiebevel onder beheer van die meester geplaas word en met aanstelling van 'n kurator onder dié se beheer.[59] Die inhoudsbevoegdhede van die insolvent se eiendomsreg op die betrokke bates word deur die bepalings van die Insolvensiewet opgeskort.

Dié funksionarisse of bestuurders is met beheers- en bestuursbevoegdhede beklee. Met byvoorbeeld die sluit van kontrakte kan dié persoon betrokke wees, dan 'n ander persoon (albei in amptelike hoedanigheid), naamlik 'n voorlopige kurator, kurator of genoemde persone se ampsopvolgers. Dit geskied *telkens met die resultaat dat die regte en verpligtinge wat uit sulke kontrakte voortvloei, deel van een en dieselfde boedel vorm.* Dieselfde geld ook in die geval van verkryging van ander bates as vorderingsregte, die betaling van skulde en die voer van hofgedinge. Veral interessant is die omstandigheid dat een ampsbekleder deur 'n ander vervang kan word *sonder* dat die regte en verpligtinge waaruit die insolvente boedel bestaan, aan die nuwe ampsbekleder *oorgedra* hoef te word.

Hierdie bestuursfunksionarisse is die volgende persone en instansies: Die hof wat in 'n belangrike mate oor die likwidasie van insolvente boedels toesig hou en as opperbestuurder sekere regshandelinge deur bestuurders van laer rang kan magtig; die meester en adjunk- en assistentmeesters, wat enersyds hul funksie onder toesig van die hof vervul en andersyds as bestuurders van die tweede rang toesig oor die likwidasie van die insolvente boedel hou; een of meer van die volgende bestuurders van die laagste rang en hulle ampsopvolgers, afhangende daarvan of hulle in 'n bepaalde geval aangestel is, naamlik 'n voorlopige kurator en een of meer kurators. Elke skakel in hierdie opeenvolging van bestuurders het sy eie amp, bevoegdhede en verpligtinge. Dié verskillende ampte staan nie los van mekaar nie; hulle volg mekaar in 'n statutêr vasgestelde orde op; die *proses*

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57 Sien par 2 hierbo.

58 Dit sluit ook die vorderingsregte in. Ek meen dat die kurator die statutêre, amptelike reghebbende daarvan word *vir doeleindes van die sekwestrasieproses*.

59 Waar twee kurators oor 'n boedel aangestel is, oefen hulle in gelyke mate beheer oor die boedel uit (a 56(4)). Wanneer een kurator sy amp ontruim of bedank het, afgesit of oorlede is, gaan die boedel (soos reeds genoem) op die oorblywende kurator oor. Is daar geen oorblywende kurator nie val die boedel weer terug onder beheer van die meester.

gaan voort, al wissel die kurator of die skuldeisers (byvoorbeeld in die geval van laat indiening van eise).

Die opeenvolging van bestuurders tree in werking sodra die sekwestrasiebevel toegestaan word en funksioneer sodanig totdat die taak waarvoor hulle daargestel is, afgehandel is.[60] Die kurator[61] beskik oor die vervreemdings-, beheers-, beswarings-, vindikasie- en beskikkingsbevoegdheid slegs vir doeleindes van die sekwestrasieproses volgens die wet.[62] Die kurator het slegs hierdie bevoegdhede nodig om sy funksie te volvoer. Oordrag van eiendomsreg in hierdie verband is inderdaad onnodig. Laasgenoemde standpunt word bevestig deur die posisie by likwidasie van maatskappye waar aanvaar word dat eiendomsreg nie op die likwidateur oorgaan nie. Dit wil derhalwe voorkom of 'n mens in die geval van sekwestrasie van 'n insolvente boedel met 'n jarelange wangebruik van die term "eienaar" te doen het en wel onder Engelsregtelike invloed. By nadere ondersoek blyk dat daar sedert 1829 die foutiewe opvatting gevestig het dat die meester en kurator eienaar van die insolvente boedel word. Dit is myns insiens te wyte aan die feit dat Engelsregtelike terminologie en Hollandse beginsels in een stelsel saamgeweef is om die beginsels van ons huidige insolvensieregpraktyk vas te stel.

60 Dit moet egter nié met 'n bestuursverband wat met regspersoonlikheid beklee is, verwar word nie. Vgl ook weer Van Zyl 1989 *THRHR* 340 ev.

61 Of meester, of voorlopige kurator, afhangende van die omstandighede.

62 Daar word erken dat hierdie benadering in stryd met dié van die Insolvensiewet is. Die voordeel daarvan is egter dat dit 'n opeenvolging van oordragshandelinge uitsluit, 'n veel eenvoudiger proses daarstel en 'n beter verklaring bied vir wat inderdaad by die sekwestrasieproses gebeur.

Different methods to determine the value of agricultural land

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OPSOMMING

Verskillende metodes om die waarde van landbougrond te bepaal

Wanneer gepoog word om die belasbare waarde van landbougrond te bepaal, is hoofsaaklik drie metodes beskikbaar. Ten eerste kan die waarde van elke eiendom individueel bepaal word en in 'n kadaster opgestel word. In Suid-Afrika bestaan 'n omvattende kadaster reeds in die vorm van die aktesregister ten opsigte van kommersiële plase. Hierdie kadaster kan wel as vertrekpunt gebruik word, maar kan om verskeie redes nie as afdoende bewys van die waarde van individuele eiendomme aanvaar word nie. Individuele waardasies sal moet plaasvind, wat duur en tydrowend is en die instel van 'n grondbelasting aansienlik kan vertraag. Indien besluit sou word om 'n kadaster ten opsigte van die geheel van die grondgebied van Suid-Afrika in te stel, sal dit nie net met aansienlike koste gepaard gaan nie maar ook tegniese kennis vereis. Ten tweede kan van individuele waardasies afgesien word en kan waardasies op 'n massagrondslag geskied. Hierdie blyk die geskikste metode te wees. Die voorbehoud is egter dat, ongeag die belasbare waarde wat bereken staan te word, homogene gebiede met verteenwoordigende eenheids-/gemiddelde waardes vergelyk word en dat vergelykings nie op 'n konstitusionele streeksgrondslag geskied nie.

Alhoewel massawaardasies goedkoper as die opstel van kadasters is, gaan dit nog steeds met koste gepaard en verg dit deskundige insette. Massawaardasies is dus buite bereik van baie lande. Hierdie lande maak soms van selfaanslag gebruik. Alhoewel selfaanslag ver te kort skiet by amptelike waardasies is dit beter as geen waardasies nie. Selfaanslag, verkieslik volgens 'n metode van ouditering en nie gedwonge verkopings nie, kan dus ingestel word totdat individuele of massawaardasies kan plaasvind.

Ongeag die waardasiemetode wat aangewend word, moet herwaardasies op 'n gereelde grondslag plaasvind. Gereelde herwaardasies sal nie net verhoogde staatsinkomste lewer nie maar ook tot groter billikheid lei.

1 INTRODUCTION

The Commission of Inquiry into Certain Aspects of the Tax Structure of the Republic of South Africa[1] brought out its first report in November 1994, in which several changes to the tax system were proposed. The report, however, contained no reference to the possibility of introducing a land tax in South Africa. Seen in the light of the active debate surrounding the introduction of such a tax,[2] a sub-committee was appointed to investigate the matter. This

1 The so-called Katz Report, named after the chairperson, Mr MM Katz.

2 Newspapers regularly carried reports on political leaders and advisers who were considering its imposition (Davis *The Star* 1993-03-11 19; Loots *Financial Mail* 1991-07-26 63–64 and Lunsche *Saturday Star* 1994-01-15 1). The issue was discussed at seminars and

continued on next page

sub-committee brought out its report in 1995.[3] Although the sub-committee did not recommend the introduction of a national land tax in the short to medium term, it is of the opinion that sufficient evidence exists to justify the possible implementation of a rural land tax at local government level.[4] The possibility cannot therefore be excluded that a land tax may be imposed in South Africa in the future.

Immovable property can have different values for land tax purposes. This value may be calculated according to the market value of the land only (the so-called unimproved land value), the market value of land and improvements, or its agricultural value. Three approaches may be employed to determine the agricultural value of land, namely the resources quality index,[5] the income capitalisation method[6] and the rental value method.[7] Sometimes the quality of land is not taken into account, but tax is levied according to the quantity of landholding, the so-called surface area oriented land tax.

The purpose of this article is, however, not to analyse the different taxable values.[8] What will be discussed are the different methods that may be used to determine the taxable value of land. These methods may also be employed in an adapted form to determine the value of urban properties for municipal rates purposes.

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workshops (cf Franzsen and Heyns (eds) *A land tax for the new South Africa?* (1992) and Strasma *A tax (or "rates") on rural land in South Africa* Seminar: South African Agricultural Union Pretoria 1994-01-20) and an *ad hoc* committee of the Department of Finance has investigated this aspect (Franzsen and Lombard *'n Ondersoek na 'n grondbelasting vir Suid-Afrika* Report of the sub-committee on land and property taxes of the committee of investigation into intergovernmental fiscal relations in South Africa (1993)).

3 Ch 4 and Appendix B of the Third Interim Report of the Commission of Inquiry into Certain Aspects of the Tax Structure of South Africa.

4 Par 4 2 4.

5 In short, the resources quality index of the land is determined with reference to factors that influence production, the so-called farm and non-farm factors. The former include, *inter alia*, subterranean water sources, mineral deposits, height above sea level, declivity and climate (sunlight, wind, rain and temperature), plantations or orchards, permanent improvements and distance from markets, and the latter population density and farming debt.

6 When an attempt is made to calculate the value of agricultural land according to the income capitalisation method, two methods in particular play a role: the income potential of the land (or the expected net farming income that can be obtained from the land), and the expectation in respect of the interest compensation on the total capital investment in the land, or the so-called capitalisation rate. The net yield that can be generated from agricultural production must therefore be discounted at an appropriate rate.

7 In *R v Paddington, Valuation Officer: Ex parte Peachy Property Corporation Ltd* [1965] 2 All ER 836 (CA) 848 the concept "rental value" was defined as follows: "The rent . . . is a hypothetical rent, as hypothetical as the tenant. It is the rent which an imaginary tenant might be reasonably expected to pay an imaginary landlord for the tenancy of this dwelling in this locality, on the hypothesis that both are reasonable people, the landlord not being extortionate, the tenant not being under pressure, the dwelling being vacant and available to let, not subject to any control, the landlord agreeing to do the repairs, and pay the insurance, the tenant agreeing to pay the rates, the period not too short nor yet too long, simply from year to year. I do not suppose that throughout the length and breadth . . . [of the lease] you could find a rent corresponding to this imaginary rent."

8 This aspect was discussed in previous articles: see Theron "Belasbare waarde van landbougrond" 1994 *TSAR* 526 and 1994 *TSAR* 734.

There are primarily three methods that can be employed to calculate the value of the tax object. First of all, the so-called traditional approach can be followed, according to which each parcel of land is valued individually and recorded in a cadastre. Secondly, valuations can be conducted on a mass basis, so-called mass valuations. The disadvantages of both these systems sometimes induce countries to employ a system of self-assessment; in other words, taxpayers themselves place a value on their property.

2 TRADITIONAL APPROACH

Traditionally, information with respect to land values is recorded in a cadastre, which is an official record of the location,[9] extent, value and taxpayer's identity in respect of each individual parcel within a particular area.[10] This record usually consists of a series of maps on which the different units are indicated, as well as registers containing information according to which individual units can be identified.[11] The scope of the information contained in the registers depends on the value in respect of which the tax is levied.[12] Thus, for example, far less information needs to be recorded in the register if a surface area oriented land tax is levied than in the case of a tax based on the income potential of the land.[13] The ideal is to gather as much information as possible so that a tax may be levied in accordance with the precise value of each parcel of land. However, this ideal is often not practicable owing to cost and other considerations.

A distinction needs to be made between a fiscal and a legal cadastre, which may be explained as follows:[14]

> "[A] fiscal cadastre ... avoids complex problems of multiple ownership, etc. In principle, at least, it is strictly a tax on the land and not on the owner. Thus the fiscal cadastre is not concerned with proof of ownership and specifying title, which are key features of a legal cadastre. The fiscal cadastre is interested in the taxpayer and not necessarily the owner. A legal cadastre also involves far more accurate determination of the physical coordinates of each parcel. This requires formal surveying procedures for which highly trained specialists are necessary. Such a survey is far more expensive than a fiscal cadastre, since it is more time-consuming and involves either long training periods for local surveyors or the bringing in of high salaried experts."

The difference between a fiscal and a legal cadastre is therefore not so much a difference in information, but a difference in the accuracy of the information in respect of location, boundaries and ownership. Since the chief aim of a fiscal

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9 A cadastre is therefore also used to identify the tax object.

10 Wald and Froomkin *Papers and proceedings of the conference on agricultural taxation and economic development* (1954) 292; Wald *Taxation of agricultural land in underdeveloping economies – a survey and guide to policy* (1959) 47.

11 Bird *Taxing agricultural land in developing countries* (1974) 229.

12 Bonbright *The valuation of property* (1937) 4–5; Kent "Property tax administration in developing countries: Alternatives for land registration and cadastral mapping" 1988 *Public Administration and Development* 105.

13 If the registers also contain information on the quality of the soil, and irrigation and cultivation possibilities, they can be used profitably in other fields, eg agricultural planning.

14 United Nations Secretariat "Site-value taxation in developing countries" in Bird and Oldman (eds) *Readings on taxation in developing countries* (1975) 473; cf also Holland "A study of land taxation in Jamaica" in Becker (ed) *Land and building taxes – their effect on economic development* (1969) 251.

cadastre is to serve as an aid to the levying of a land tax and not as proof of right of ownership, absolute accuracy is not required. Although the person liable for the tax has to be identified, the cadastre cannot be used as proof of right of ownership. If the tax is levied *in rem*, it is only necessary to indicate the person or persons who are *prima facie* liable for the tax owing to their use of the land. Should the tax be levied *in personam*, however, the cadastre has to indicate the real owner.[15]

The principal disadvantages of employing a cadastre are the time and costs involved, and the latitude it leaves for subjectivity.[16] Although guidelines are provided for valuers, valuations remain an estimate in the last instance:

> "While standardized valuation techniques and procedures have been developed which facilitate an orderly and consistent approach to value determination, the final value selected is in every instance an estimate, the accuracy of which will depend upon the value indicators available and the judgment and experience of the valuer."[17]

It therefore stands to reason that most of the criticism voiced against the levying of a land tax is aimed at the way in which the tax object is valued.[18]

3 MASS VALUATIONS

As the name indicates, mass valuation is a technique employed to appraise land on a large scale in order to eliminate the cost and trouble entailed by individual valuations.[19]

The same kind of information included in a cadastre is used as basis for mass valuations. The difference between the two methods is that a cadastre contains data about each individual tax object, whereas mass valuations employ averages. Mass valuations therefore do not lay claim to accuracy.[20] According to

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15 Although the compilation of a legal cadastre is more expensive and time-consuming, it is not as expensive and time-consuming as a fiscal one. Kent 106 is of the opinion that if it has been decided to use a cadastre, it is a waste of money and manpower to compile a fiscal instead of a legal cadastre.

16 Holland 251; McCluskey and Adair "Assessment techniques and advances in mass appraisal for property tax" International Conference on Regional and Local Taxation in a Future South Africa, Centre for Human Rights, University of Pretoria 1993-11-25–26 3.

17 Back "Property tax administration: current conditions and future possibilities" in Lynn (ed) *Property taxation and land use & public policy* (1973) 58. Cf also Bird 231–232: "Valuation is an art as much as a science. Few taxes involve more judgment in their determination than the land tax . . . The extensive use of notional or artificial values instead of real or actual values as the basis of assessment is perhaps the characteristic of land taxes which most distinguish them from other taxes."

18 Committee for economic development, research and policy *Modernising local government* (1966) 54: "*Real* property tax administration suffers from two major sources of inequity: unequal assessment and under-assessment. In view of the primary reliance on real property taxes, it is quite shocking that in most parts of the country – whether urban or rural – its administration may accurately be described as inequitable, inefficient, incompetent, or corrupt."

19 Bird 229; Kleynhans and Lombard *'n Ondersoek na 'n grondbelastingstelsel vir Suid-Afrika* Investigation done for the sub-committee on land and property taxes of the committee of investigation into intergovernmental fiscal relations in South Africa (1992) 3.

20 It is interesting, for all that, that McCluskey and Adair 3, in view of the major role that human judgment plays in the traditional approach, regard mass valuations as the scientific approach and the traditional approach as the unscientific one.

Strasma[21] it is a pragmatic approach which provides practical solutions when theoretically purer approaches are not feasible.

Mass valuations can be used regardless of the taxable value that is taken into account. If valuation is done according to the market value of the property, mass valuations involve the identification of comparable farms sold on the open market. Farms that are identified must be representative not only in respect of the type of farming practised on the individual farms, but also in respect of extent, location, production capacity and improvements.[22] The aim, therefore, is to compare *homogeneous* areas.[23] The selling price of farms serving as basis of comparison must subsequently be determined.[24] As many representative sales figures as possible must be taken into account in order to make the most accurate valuations. Available sales figures cannot be used *per se*, however. These figures must first be analysed in order to determine whether they were *bona fide* market transactions and whether the sales did not perhaps occur among family members or otherwise connected persons. Secondly, provision should be made for changes brought about since the actual sales that may have an influence on the current value. The comparison can be done with the aid of computers[25] or by means of on-site inspections. The most important advantage of the use of computers is time-saving, but this should be weighed against the costs of installation and maintenance of a computer system.

Similar steps are taken if the taxable value of land is determined with reference to its unimproved value, but with the difference that comparative sales figures are used only if they actually reflect the unimproved value of the land. The identification of such farms may pose problems because most land has already been developed and utilised to a greater or lesser extent.[26] A possible solution is to use the comparable sales figures of improved properties and to analyse the figures in order to determine which part of the buying price was paid for the land and which part for improvements.[27]

If the point of departure is that the agricultural value of the land must be determined and not the market or unimproved land value, it is of cardinal importance that relatively homogeneous farming areas be identified.[28] One of the ways in which the income potential of land can be determined with the aid of mass valuations, is by the identification of main utilisation classes of land, for example, dry-land crop cultivation (field husbandry, pasturage, orchards and plantations), irrigation (field husbandry, pasturage and orchards), veld pasturage,

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21 "Agricultural taxation in theory and practice" in Bird and Oldman (eds) *Taxation in developing countries* (1990) 444; cf also Kleynhans and Lombard 4.

22 Temporary State Commission on the Real Property Tax *A two-rate real property tax system: its impact and implications for New York state* (1986) 123; Kleynhans and Lombard 8.

23 The tax must be environment specific, in other words.

24 In South Africa, this information can be obtained from deeds offices, *inter alia*.

25 Various computer programmes can be used to determine the capital and rental value: see McCluskey and Adair 5–13.

26 Hicks "The taxation of urban land and buildings" in Taylor (ed) *Taxation for African economic development* (1969) 340; Van Zyl and Vink "An agricultural economic view on land taxation" in Franzsen and Heyns (eds) *A land tax for the new South Africa?* (1992) 32.

27 Cf s 9(1) of Ordinance on Local Authorities Rating 11 of 1977 (Tvl).

28 Kleynhans and Lombard 22.

infields and odd parcels of land, which can each be divided into further subclasses. A distinction can also be made between high-, medium- and low-potential land, particularly regarding crop cultivation. These factors may differ from farm to farm – even adjoining farms.[29] Equity requires that as many classes and subclasses as possible be distinguished,[30] a process which is expensive and time-consuming.[31] The number of classes and subclasses created is a balance between, on the one hand, the number of homogeneous areas of land that can be identified and, on the other, the administrative costs.

The public may be involved in the identification of classes and subclasses.[32] The obvious advantage of this is that the tax would thus be politically more acceptable. It has the disadvantage, though, that it could delay the imposition of the tax.

Should it not be feasible to involve the public, aerial photography or distance observation could be used. After the information has been gathered – by whichever of the methods mentioned – it is recorded on maps and published for comment. After a reasonable period meetings can be held to study the maps. The purpose of these meetings is to calculate the capitalised income value in each class and subclass in order to establish a representative unit or average value, or so-called "ideal value", for each of the various classes.[33] The information obtained during such meetings is processed and an amended map is published, after which the same procedures as for the original map should be repeated.

The individual properties are subsequently compared with the representative unit or average value allocated to a class and subclass of the same kind.[34] A similar method may be employed in order to determine, on a comparative basis, the resources quality index of individual parcels of land or their rental value.[35]

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29 Van Zyl *Waardasie van landbougrond vir doeleindes van 'n belasting op grondwaarde* Discussion document for the committee of investigation into intergovernmental fiscal relations (1991) 2.

30 Van Zyl 6 points out the danger that if income potential is calculated over large areas and no provision is made for differences in the variability of farming income between different types of farming, this may lead to overvaluation of marginal land and undervaluation of more productive land.

31 Kleynhans and Lombard 17.

32 Kleynhans and Lombard 22 are of the opinion that the public should be involved through group discussions initiated by the regional services councils in cooperation with agricultural extension officers. Van Schalkwyk, Groenewald and Vink (*Kommentaar op die ondersoek na 'n grondbelastingstelsel vir Suid-Afrika* – by Kleynhans and Lombard for the subcommittee on land and property taxes of the committee of investigation into intergovernmental fiscal relations in South Africa (1993) 4) criticise this suggestion. They are of the opinion that the group discussions will involve too small a number of people and that the information obtained may not be objective because the participants will be aware that it is to be used for taxation purposes.

33 Cf Strasma *Alternatives for land tax reform in Zimbabwe* I Background document for the Agricultural Division, Southern Africa Department of the World Bank (1990) 27: "The modern technique of assessment uses a set of unit values, determined in a semi-public process with lots of participation by local notables . . . In public meetings, staff proposes and public discusses, a table of suggested unit values for land of different soil qualities in each District. The public also opines as to the premium or discount that should apply when a farm is close to or far from a major market city."

34 Van Zyl 7.

35 Thus units that are representative in respect of resources quality or rental values are selected.

Although the employment of mass valuations is sometimes less accurate than the traditional method, it has two advantages over the latter. First of all, it is not dependent on the taxpayer's cooperation[36] and, secondly, the subjective judgment of the valuer and even corruption are largely eliminated.[37]

Van Schalkwyk, Groenewald and Vink[38] foresee two problems in particular with the determination of homogeneous areas for income capitalisation purposes in South Africa. First of all, this method may be unworkable in certain regions since a large number of different, small areas will have to be identified in view of the large variety of soil types, declivities and water supplies.[39] Secondly, a description of representative farming units in regions with high natural potential and thus alternative application possibilities, such as urbanisation, will entail major practical problems.[40] Owing to the variety of valuation possibilities, a plethora of representative units can exist without their being statistically or scientifically representative. In spite of this, a start has already been made with the determination of relatively homogeneous farming areas (RHFAs) for income capitalisation purposes. Each of the seven large regions of the Department of Agriculture has been scientifically subdivided into 580 RHFAs by the resources sections of the Department. These areas are largely homogeneous with respect to aspects such as soil quality, climate and farming patterns.[41] Considering Van Schalkwyk, Groenewald and Vink's criticism, these regions will possibly have to be subdivided into further subclasses.

Progress has already been made with the determination of the resources quality index for South Africa. The Republic has been divided into 78 statistical regions[42] and an average resources quality index has been calculated for each.[43] The basis of the classification is therefore the determination of arbitrary administrative boundaries (statistical regions) without specific consideration of the homogeneity of the soil and/or resources.[44] Furthermore, an average calculated resources quality index per region is used. Consequently, some farmers in a specific region will be overtaxed whereas others will be undertaxed.[45]

There are problems associated with the identification of comparable rent transactions in South Africa, although the composition of leasehold property appears to be a fair indication of the total land composition with respect to the main utilisation classes.[46] The existing rent market appears to be representative

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36 The public is not involved when individual properties are compared with unit values, but is involved in the determination of these unit values.

37 Dillinger *Urban property tax reform – Guidelines and recommendations* Infrastructure and urban development, The World Bank WPS 710 (1991) 18; McCluskey and Adair 3.

38 4.

39 Specific "problem regions" are parts of Bronkhorstspruit, Waterberg and Pietersburg.

40 Regions such as Nelspruit, Stellenbosch, Paarl and Tzaneen may serve as examples.

41 Kleynhans and Lombard 22.

42 The concept of "region" in this context does not refer to a governmental level between the central or provincial levels and the local authorities, but to homogeneous farming areas.

43 Van Schalkwyk, Groenewald and Vink 5.

44 Franszen and Lombard *'n Ondersoek na 'n grondbelasting vir Suid-Afrika* Report of the sub-committee on land and property taxes of the committee of investigation into intergovernmental fiscal relations in South Africa (1993) 5.

45 Van Schalkwyk, Groenewald and Vink 5.

46 Joubert (ch): *Metodes vir die bepaling van grondwaardes as basis vir die berekening van grondbelasting* Report of the technical committee of the sub-committee on land and

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of the total land composition, since approximately 20 per cent of the total land surface is leased.[47] Comparative rent figures can therefore be used in principle. Closer investigation, however, reveals that employment of these comparative rent figures is not desirable. First of all, they are not very reliable since information is provided by the farmer himself, and, secondly, they are not readily available since approximately 30 per cent of all leases are concluded verbally.[48] Thirdly, information on actual rental income is available only for statistical regions and not broad homogeneous areas.[49]

4 SELF-ASSESSMENT

4 1 General

The cost and time factors of both individual and mass valuations sometimes compel countries to employ a system of self-assessment. As the name indicates, owners are expected to determine the value of the tax object themselves in terms of a self-assessment system. The chief problem in this method is to ensure that taxpayers place a fair value on their property. Various writers take different views on how to overcome this problem.

4 2 Various standpoints

At a conference in Santiago on the tax problems of Latin America, an economist, Harberger, proposed the following:[50]

> "It is important that the assessment procedures be adopted which estimate the true economic value of property with reasonable accuracy . . . The economist's answer to the assessment problem is simple and essentially fool-proof: allow each property owner to declare the value of his own property, make the declared values a matter of public record, and require that an owner sell his property to any bidder who is willing to pay, say 20 per cent more than the declared value . . . The beauty of this scheme, so evident to economists, is not, however, appreciated by lawyers, who object strongly to the idea of requiring the sale of properties, possibly against the will of their owners. The economist can retort here that if owners value their property at the price at which they are willing to sell, they should not be unwilling to sell at a price 20 per cent higher."

The way in which it is therefore ensured that owners place a market-related valuation on their property is by stipulating that they be willing to sell the property to any person at a certain percentage above the declared value. Sharp criticism has been voiced against this proposal, particularly against the element of compulsory sales.[51] It is clear that the system will only be successful if a

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property taxes of the committee of investigation into intergovernmental fiscal relations in South Africa (1993) 8; Swart *Ondersoek na die moontlike gebruik van 'n huurwaarde as basis vir die berekening van grondbelasting* Research done for the technical committee of the taxation sub-committee of the committee of investigation into intergovernmental fiscal relations in South Africa (1993) (ii).

47 Joubert 6.

48 *Idem* 7–8.

49 Swart 18.

50 Harberger "Issues of tax reform for Latin America" in *Fiscal policy for economic growth in Latin America* Papers and proceedings of a conference held in Santiago, Chili, December 1962 (1965) 119–120.

51 Strasma *Market-enforced self-assessment for real estate taxes* A research paper, Land Tenure Center University of Wisconsin Madison, Wisconsin USA (1965) 8–11.

credible threat exists. Should such a threat merely consist in the possibility that the government may acquire the land, it would have little deterrent effect because a government often lacks the capital to acquire undervalued land and, moreover, may not have use for all land thus obtained. The possibility of corruption also exists.[52]

In an attempt to circumvent compulsory selling, another participant at the conference proposed that owners be offered the opportunity to increase the value of their property themselves and to pay tax accordingly if a higher offer is made.[53] After this conference, the possibility of self-assessment elicited considerable academic debate. Two alternative proposals, in particular those of Strasma and Oldman, warrant discussion.

Strasma proposes that a distinction be made between land that may possibly be expropriated for public purposes and land that may not. In the former case the land cannot be expropriated at a price higher than the declared value. Regarding land that is not exposed to the danger of expropriation, any individual may at any time make an offer at a price which exceeds the declared value by at least 10 per cent. If an offer is indeed made, the owner has three choices, namely acceptance of the offer, rejection of the offer and acceptance of the value that the offerer was willing to pay for the land as the value of his property for tax purposes, or he may reject the offer and request the tax authority concerned to value the property for his own account.[54]

If the second option is exercised, or if the final valuation in terms of the third option is higher than the initial value, the owner has to pay not only the increased tax, but also a fine not exceeding double the amount owing. The unsuccessful offerer, however, is rewarded in that he is entitled to a part of the increased tax liability for the first year as well as to the fine.[55]

Oldman, on the other hand, suggests that an owner be compelled to declare the value of his property every four years or when transfer of the property takes place, whichever occurs first. In an attempt to make the taxpayers' task easier, the tax authority must furnish them with all available information regarding comparative sales figures that may be of help. Declarations are subject to auditing, however. Since it is impossible to audit all declarations, only random samplings are done. If a person's valuation is approximately 20 per cent below market value, a fine is levied. The taxpayer should, however, be granted the opportunity to enter a protest and to lodge an appeal. The persons conducting the random sampling should not be civil servants, but professional independent

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52 Strasma 6–7; Tideman *Three approaches to improving urban land use* (PhD thesis University of Chicago 1969) 53.

53 "[I]t might be more acceptable if the owner always had the option of retaining his property if he revalued it above the offer made; for example if an offer was made to buy the property at the owner's valuation plus 20 percent, the owner could retain it if he raised his valuation by 25 percent. That would lead to the correct valuation on the basis of a kind of auction, without involving forced sales. Mr Harberger's original proposal might lead to certain difficulties: for example, an owner who was particularly attached to his property might overvalue it through fear of losing it, which would lead to resentment against the system": Harberger 132–133.

54 Strasma 16–17.

55 *Idem* 17–18; cf also Huh *Self-assessment for a property tax – with emphasis on developing countries* Research paper international tax program, Harvard Law School (1978) 24–26.

valuers.[56] Oldman's proposal, in contrast to other proposals, therefore does not contain an element of compulsory selling, but only auditing.

4 3 Criticism against self-assessment

The main objection against self-assessment in principle is the supposition that the value of land can be determined objectively. Land has no "correct" value. Reasonable persons often differ from one another about the inherent characteristics of land.[57] Even professional valuers differ among themselves on the value of properties. It is consequently unfair to expect laymen to estimate the value of their properties correctly and to penalise them if they fail to do this "correctly".[58]

Various points of criticism can be levelled against self-assessment methods that contain an element of compulsory selling. First of all, the smaller landowner is exposed to the risk of compulsory selling to a greater extent than the larger landowner, since there are more buyers for smaller properties than for larger ones. This means that affluent persons can rest assured that they will not easily be compelled to sell their land, yet at the same time the system enables them to acquire the properties of lower-income groups.[59] The smaller landowner can protect himself/herself against offers of outsiders only if he values his land far above its market value.[60] Even then the possibility exists that a wealthy, envious rival may make an offer.

Secondly, compulsory selling is at variance with the essence of freehold right. One of the competencies of freehold right is the owner's choice whether he wishes to sell or not. The argument that compulsory selling amounts to expropriation is spurious, since expropriation occurs through the action of the state and not that of individuals.[61] A prospective buyer will make an offer only if he is afforded the opportunity to inspect the property, which constitutes an invasion of the owner's privacy.[62] Self-assessment therefore threatens the institution of freehold right and may involve the possibility of blackmail.[63] In South Africa, where private ownership is protected in terms of the 1993 Constitution,[64] such a provision may in all likelihood also be declared unconstitutional.

The success of self-assessment depends on the political support it enjoys. If compulsory selling – at whatever price – is an element of the system, it will not easily gain acceptance. Furthermore, outsiders will not always be willing to come to the fore and make offers. Particularly in the South African context,

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56 Oldman *Property taxation in Latin America* International seminar on real property and land as base for development Taoyuan Republic of China 1988-11-14–17 18–20. The costs of such valuations are borne by the tax authority.

57 Cf Bird 238: "[G]ive up the quest for the Holy Grail of the 'true' value of land; there is no such thing, and . . . the quest is more likely to hinder than to facilitate constructive analysis and action." Cf also Massenet "General report" 1991 *Cashiers De Droit Fiscal International* 46. It is even more difficult to determine the value of improvements.

58 Skinner "Prospects for agricultural land taxation in developing countries" 1991 *The World Bank Economic Review* 498.

59 Huh 38.

60 Skinner 500.

61 Huh 35.

62 Tideman 59.

63 Oldman 18.

64 S 28(1) of the Constitution of the Republic of South Africa 200 of 1993 reads: "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."

these objections are of cardinal importance as compulsory selling may give rise to unrest.

If costs and other factors do compel countries to employ self-assessment, however, Oldman's proposal appears to be the most acceptable. Even if random samples do not bring undervaluations to light, they have the advantage that properties are revalued regularly. In terms of this system, it is incumbent upon owners to revalue their properties regularly, and if they fail to do so, there is the risk of a fine. The cost of revaluation is therefore negligible. The uncertainties and abuses associated with a "traditional" self-assessment system are also greatly reduced.[65]

4 4 Other jurisdictions

Regardless of the foregoing criticism, self-assessment is applied in some countries. Between 1954 and 1963 a system of self-assessment was imposed successfully in the rural areas of Colombia in spite of the fact that the state had obtained the right to expropriate land at the declared value and that the extent of mortgage loans was limited to this value.[66] In Peru self-assessment was imposed with limited success.[67] Brazil[68] and Turkey[69] also employ this system.

In the late 1950s, self-assessment in respect of urban properties in Panama was terminated with the institution of a cadastral commission which had to record and value all urban properties. Self-assessment was retained for agricultural areas, however.[70] In terms of this system the value of land cannot be less than the value declared by the owner or previous owner. In an attempt to keep declarations realistic, the National Bank of Panama grants loans only up to 60 per cent of the declared value.[71]

Up to the commencement of the Land Valuation Act in Jamaica in 1957, valuations were based on self-assessment. It was not a success, since properties were substantially undervalued.[72] The maximum fine that could be imposed for undervaluation was £1.[73]

In Australia, landowners had to determine the unimproved land value of their properties themselves for the purposes of the federal land tax levied from 1910 to 1952. The federal government had the competence to acquire the land at this declared value, plus a 10 per cent bonus as well as compensation for improvements made. No evidence could be found that this competence was ever exercised.[74]

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65 Oldman 20.
66 Strasma (1965) 5; Kent 103.
67 Kent 103.
68 Bird 101.
69 Organisation for economic co-operation and development *Taxes on immovable property* (1983) 34.
70 Bird 84.
71 Wald 29; Kent 103.
72 Risden "A history of Jamaica's experience with site value taxation" in Bahl (ed) *The taxation of urban properties in less developed countries* (1979) 249–250 257–258; Tulloch-Reid *Land value tax re-instituted: The Jamaican experience* (1988) 4.
73 Chang "Recent experience of establishing land value taxation in Jamaica" in Woodruff, Brown and Lin (eds) *International seminar on land taxation, land tenure, and land reform in developing countries* (1967) 214.
74 Bird "A national tax on the unimproved value of land: the Australian experience 1910–1952" 1960 *National Tax Journal* 391.

In Taiwan, too, landowners have to declare the value of their property themselves for the purposes of the land value and rural land tax.[75] The tax authority has the right to acquire any property at the declared value.[76]

5 REVALUATIONS

Revenue secured from a land tax does not increase by itself if the tax value of the tax object rises or if taxpayers' income increases. One of the ways in which increased revenue can be obtained, is by an increase in the tax rate. It stands to reason that tax rates cannot be increased indefinitely.[77]

An alternative and more acceptable way in which increased revenue can be secured is by regular revaluations. It is crucially important that these revaluations be done frequently, otherwise unfairness results:

> "Resistance to upward adjustments in tax rates can also be explained by other considerations. As cadastral values become outdated, it is probable that the original assessments will become less equitable. The impact of inflation or development on property values and income is not likely to spread evenly over the agricultural sector. To raise the tax rate without first equalizing the assessment would therefore result in compounding inequities inherent in obsolete assessments. Because of this fact, inflexible assessments and stable tax rates tend to go hand in hand."[78]

Various negative results therefore ensue if revaluations do not take place regularly. Thus, for example, an annual inflation rate of 15 per cent will halve land values within five years if revaluations are not conducted.[79] Moreover, persons become used to the low valuations and should the valuations suddenly be brought into line with market value, considerable resistance may follow. Revaluations after a long passage of time often involve a substantial increase in liability for taxpayers.[80]

Like initial valuations, revaluations are expensive and time-consuming if the traditional method is employed and each property is assessed individually. In Bangladesh, for instance, it was ascertained that if a cadastre is updated every five years, the costs entailed will exceed the expected increased yield.[81] If administrative costs stand in the way of equitable valuations, the tax rate ought to be kept low in order to eliminate serious inequities and to keep taxation morale high.[82] The use of computers in mass valuations will facilitate regular revaluations. As mentioned previously, each individual property need not – otherwise than if the traditional method is used – be visited, and only information in respect of representative properties have to be gathered and processed.[83]

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75 Harriss "Land taxation in Taiwan: selected aspects" in Bahl (ed) *The taxation of urban property in less developed countries* (1979) 193.

76 Shen "Land taxation as related to land reform program in Taiwan" in Woodruff, Brown and Lin (eds) *International seminar on land taxation, land tenure and land reform in developing countries* (1967) 319; Dillinger 12.

77 Organisation for economic co-operation and development 17.

78 Bird *Taxing agricultural land in developing countries* (1974) 215.

79 Dillinger 6.

80 In the USA this phenomenon is known as "sticker shock": Bland *A revenue guide for local government* (1989) 37. Also compare the recent events in this regard in Cape Town where taxpayers reacted against reassessments after several years. This reaction was so severe that the valuation roll had to be cancelled.

81 Skinner 500.

82 Lewis *Taxation for development: principles and applications* (1984) 152.

83 *Supra* 402 ff.

6 CONCLUSION

In this article it has been demonstrated that when an attempt is made to determine the taxable value of land there are chiefly three methods available. First, the value of each property can be determined individually and a cadastre can be drawn up. In South Africa a cadastre already exists in the form of a deeds register for commercial farms.[84] This cadastre may well be used as a point of departure, but it cannot be accepted as conclusive evidence of the value of individual properties. Individual valuations will have to be done, which – apart from being expensive and time-consuming – can delay the imposition of a land tax considerably. Should it be decided to introduce a cadastre for the entire land area of South Africa, it would not only entail substantial costs but also require technical expertise. Secondly, individual valuations may be dispensed with and valuations on a mass basis be employed instead. This method appears to be the most suitable. The proviso is, however, regardless of the taxable value which needs to be calculated, that homogeneous areas with representative unit or average values must be compared and that comparisons may not be made on a constitutional regional basis.

Although mass valuations are less expensive than the compilation of cadastres, they still entail costs and require expert inputs. Mass values are consequently beyond the reach of many countries, which sometimes make use of self-assessment. Despite falling far short of the mark in official valuations, self-assessment is better than no valuations at all. Self-assessment, preferably according to a method of auditing and not compulsory selling, can therefore be imposed until individual or mass valuations can be introduced.

The necessity of revaluations cannot be overemphasised. If conducted on a regular basis, they will not only produce increased state revenue but also lead to greater fairness.

The purpose which the law seeks to achieve by making contempt a criminal offence is to protect 'the fount of justice' by preventing unlawful attacks upon individual judicial officers or the administration of justice in general which are calculated to undermine public confidence in the courts. The criminal remedy of contempt of court is not intended for the benefit of the judicial officer concerned or to enable him to vindicate his reputation or to assuage his wounded feelings ... Nor does a prosecution for contempt do more than punish the offender. It may, incidentally, vindicate the good name of the judicial officer, but it does not provide him with any personal relief by way of damages. There are many differences of substance and procedure between a prosecution for contempt and an action for defamation. It is true that in certain cases the two may overlap in the sense that the facts may give rise to the possibility of either being instituted, but this is no reason to regard the one as displacing the other (per Corbett CJ in *Argus Printing and Publishing Co Ltd v Esselen's Estate* 1994 2 SA 1 (A) 29).

84 Commercial farming, in contrast to subsistence farming, is carried on on land that has traditionally mainly been possessed by whites, but sometimes also by Coloureds and Indians. (Subsistence farming is carried on on land traditionally possessed by blacks.)

Die aard van juridiese regte

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SUMMARY

The nature of legal rights

After analysing various theories (including the subjective rights theory) on the nature of rights in the narrower sense, the conclusion is that the existing theories do not provide an acceptable explanation.

An alternative exposition is offered. According to this view, rights must be seen as implying reciprocal positive or negative normative constraints (duties and/or disabilities) on others because of the fact that rights can be infringed upon. It is this quality that distinguishes rights from other legal concepts. Furthermore, there are two kinds of right, that is, claim rights and freedom rights (immunities). Two other legal concepts that must be differentiated are freedoms and competences (or powers).

1 INLEIDING

Die gevierde Amerikaanse regsfilosoof Roscoe Pound het te kenne gegee dat "there is no more ambiguous word in legal and juristic literature than the word right".[1] Dit is voor die hand liggend dat enige juris 'n bepaalde gedagte moet hê oor wat hy of sy met die gebruik van die woord "reg" bedoel. Daarom is 'n ondersoek na die aard van regte nie bloot 'n akademiese oefening nie:

> "Understanding the nature of the 'right' involved helps clarify our consideration of the degree of protection available, the nature of the derogations or exceptions, the priorities to be afforded to various rights, the question of whether a series of rights will be treated in hierarchical relationships, and similar problems."[2]

Binne die Suid-Afrikaanse regstradisie het die subjektiewe regte-leerstuk nie net goeie gevolge gehad nie. Dit het ook al ongelukkige konklusies oor regte meegebring. Hiervan is Claasen se standpunt oor die aard van die stakingsreg 'n voorbeeld.[3]

Volgens Claasen is die reg om te staak "niks anders as 'n bestanddeel van elke persoon se handelingsvryheid nie", omdat daar nie so 'n subjektiewe reg kan wees nie.[4] Met verwysing na die fundamentele stakingsreg sê Claasen dat dit verkeerd sou wees om te postuleer dat só 'n reg 'n absolute reg is wat nie ingekort kan word nie en derhalwe kan hierdie reg "hoogstens as 'n vryheid of bevoegdheid beskou word".[5]

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1 Pound *Jurisprudence* vol IV (1959) 56 (hierna Pound).
2 Shestack "The jurisprudence of human rights" in Meron (red) *Human rights in international law: Legal and policy issues* vol 1 (1984) 69–113 74.
3 Claasen *Stakingsreg in diensverband in Suid-Afrika* (1975) 96–111 (hierna Claasen); "Die sogenaamde privaatregtelike 'reg om te staak'" 1983 *THRHR* 32–42.
4 Claasen 98–101; 1983 *THRHR* 41–42.
5 Claasen 104–106; 1983 *THRHR* 38.

Uit die bespreking wat volg, sal dit duidelik word dat dié standpunte van Claasen voortspruit uit 'n ongenoegsame regsbeskouing. Dit het tot gevolg dat sy standpunte nie steek hou nie.

Let daarop dat *juridiese regte* (*legal rights*) hier onder bespreking is. Die implisiete aanname is dus dat 'n abstraksie uit verskillende *species* van regte, byvoorbeeld morele regte en juridiese regte, nie sinvol is nie. Dit is so omdat die gebruik van die term "reg" nie sin het as dit a-kontekstueel gebruik word nie. Voorts is hierdie artikel nie regshistories van aard nie maar regsfilosofies.[6] Derdens word daar nie voorgegee dat 'n konsepsuele analise (soos die analise hier) substansiële vraagstukke kan oplos nie.[7] Dit is egter nuttig omdat dit die moontlikhede waarin regsverhoudinge gegiet kan word, uitstip. Laastens moet daar in die oog gehou word dat die artikel nie primêr daarop ingestel is om 'n (in diepte) ontleding van die subjektiewe regte-leerstuk te doen nie. Daarom word daar nie meer aandag aan dié teorie geskenk as aan enige ander teorie nie. Die gedagte is (onder andere) om 'n kort oorsig van al die bestaande teorieë te gee voordat 'n alternatiewe uiteensetting aangebied word.

2 JURIDIESE REGTE

Daar word in die algemeen onderskei tussen 'n algemene of wye en 'n besondere of spesifieke gebruik van die woord "reg". Die algemene gebruik verwys na juridiese verhoudings in die algemeen en het alreeds in die Griekse filosofie kop uitgesteek.[8]

Dit is egter die besonderse of enger gebruik van die woord wat hier van belang is.[9] Hohfeld is die eerste belangrike eksponent van die regsfilosofie wat die begrip reg geanaliseer het met verwysing na ander fundamentele juridiese begrippe.[10] Hohfeld se standpunt[11] word dus vervolgens aan die orde gestel.

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6 Vir 'n regshistoriese bespreking, sien Singer "The legal rights debate in analytic jurisprudence from Bentham to Hohfeld" 1982 *Wisconsin LR* 975–1059.

7 Sien vn 9 *post*.

8 Cook "Introduction" in Cook (red) *Fundamental legal conceptions* (1966) 6–7 (hierna Cook); Lamont "Duty and interest-II" 1942 *Philosophy* 3; Pound 58–74.

9 Hudson en Husak "Legal rights: How useful is Hohfeldian analysis?" 1980 *Philosophical Studies* 44–53 bevraagteken die bruikbaarheid van 'n konsepsuele analise van regte met verwysing na dié van Hohfeld (sien bespreking *supra*). Volgens hulle kan sodanige analises nie ingespan word om substansiële vraagstukke (die "behoort" vraag) op te los nie. Hoewel dit so is, ontneem Hudson en Husak se kritiek nie hierdie analises se waarde nie; hulle is nuttig omdat dit die moontlikhede waarin regte ens gegiet kan word, uitspel. Vgl die reaksie van Perry "Reply in defense of Hohfeld" 1980 *Philosophical Studies* 203–209 (veral 208) op Hudson en Husak, asook Perry "A paradigm of philosophy: Hohfeld on legal rights" 1977 *American Philosophical Quarterly* 42–46 50. Dít beteken nie dat daar gepoog word om substansiële vraagstukke aan die hand van konsepsuele analise op te los nie – Ig word juis verwerp – vgl Perry 1977 *American Philosophical Quarterly* 44.

10 Cook 6–7 11; Pound 77; Hudson en Husak 1980 *Philosophical Studies* 45; Stoljar *An analysis of rights* (1984) 51 (hierna Stoljar).

11 Soos weergegee in Hohfeld "Some fundamental legal conceptions as applied in judicial reasoning" 1913 *Yale LJ* 16–59. Hohfeld het nie, anders as wat hy graag sou wou, die geleentheid gehad om sy volledige sistematiese standpunt in 'n latere werk weer te gee nie agv sy ontydige dood. Corbin "Legal analysis and legal terminology" 1919 *Yale LJ* 163–173 gee 'n nuttige uiteensetting van Hohfeld se sisteem.

3 HOHFELD SE UITEENSETTING

Volgens Hohfeld kan alle juridiese verhoudings[12] tussen regsubjekte aan die hand van agt fundamentele regsbegrippe verklaar word.[13] Die agt begrippe is reg (*right* of *claim*[14]) en verpligting (*duty*), vryheid (*privilege*)[15] en nie-reg (*no-right*), bevoegdheid (*power*) en aanspreeklikheid (*liability*), immuniteit (*immunity*) en onbevoegdheid (*disability*).[16]

Hohfeld omskryf die begrippe met verwysing na mekaar. Vir elke grondbegrip is daar 'n wederkerige[17] en 'n teenstellende begrip.[18] So lê die betekenis van die begrip *reg* in die wederkerige *verpligting* opgesluit. Wanneer X dus 'n bepaalde reg het, het Y 'n bepaalde verpligting (en andersom).[19]

'n Vryheid is die wederkerige van 'n nie-reg en die teenstelling van 'n verpligting. X se vryheid om binne die voorskrifte van die reg sus of so te handel, is dus die teenoorgestelde van 'n verpligting om dit te doen en die wederkerige van ander se nie-reg dat X dit nie doen nie. X se vryheid is egter nie 'n reg nie omdat dit nie 'n verpligting op iemand veronderstel nie.[20]

'n Bevoegdheid is die wederkerige van 'n aanspreeklikheid en die teenstelling van 'n immuniteit. 'n Bevoegdheid bestaan daarin dat die houer daarvan regsverhoudinge kan wysig.[21] Deur middel van sy bevoegdheid kan X dus regte, verpligtinge, vryhede, nie-regte, bevoegdhede, aanspreeklikhede, immuniteite en onbevoegdhede daarstel. Die wysiging van regsverhoudinge kan natuurlik ook plaasvind vanweë ander oorsake as bevoegdhede wat in regsubjekte vestig, as gevolg van operatiewe feite[22] of gebeurtenisse wat nie onder die willekeurige beheer van mense staan nie.[23]

X se bevoegdheid om regsverhoudinge te wysig, veronderstel 'n aanspreeklikheid op die party op wie die bevoegdheid betrekking het en 'n immuniteit op die partye wat nie daardeur gebind word nie.

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12 Cook 10 en Corbin 1919 *Yale LJ* 165 173 wys tereg daarop dat juridiese verhoudings vir Hohfeld met verwysing na twee regsubjekte bestaan. Daarvolgens is 'n regsverhouding tussen 'n regsubjek en 'n regsobjek onmoontlik. 'n Regsubjek het bloot 'n juridiese belang in 'n regsobjek.

13 Hohfeld 1913 *Yale LJ* 20 28–30 58.

14 Volgens Hohfeld is die begrip *claim* 'n sinoniem vir die begrip reg (sien 1913 *Yale LJ* 32).

15 Die vertaling van *privilege* met vryheid kan vreemd voorkom maar wanneer gekyk word na die betekenis wat Hohfeld aan die begrip *privilege* heg, is dit duidelik waarom dié vertaling gepas is. Sien verder Hohfeld 1913 *Yale LJ* 41: "The closest synonym of legal 'privilege' seems to be legal 'liberty'."

16 Hohfeld 1913 *Yale LJ* 30.

17 "Wederkerig" impliseer dat die komponent in die ander regsubjek van die regsverhouding vestig.

18 Hohfeld 1913 *Yale LJ* 30.

19 *Idem* 30–32.

20 *Idem* 32–44.

21 'n Bevoegdheid is per definisie regmatig omdat onregmatige handelinge nie die regte, verpligtinge ens van partye kan wysig nie – *ex iniuria non oritur ius*. Sien Tapper *Powers and secondary rules of change* (1973) 246–247 (hierna Tapper).

22 Corbin 1919 *Yale LJ* 164 gee 'n nadere omskrywing van wat Hohfeld onder die term "operatiewe feit" verstaan, te wete "any fact the existence or occurrence of which will cause new legal relations between persons. A clear distinction should always be observed between physical phenomena and the legal relations consequent thereon".

23 Hohfeld 1913 *Yale LJ* 25–28 44–54.

'n Immuniteit is die posisie waarin 'n party staan indien 'n ander party se handelinge hom nie juridies bind nie. Dit is die wederkerige van 'n onbevoegdheid en die teenstelling van aanspreeklikheid.[24]

Dus kan die regsverhouding tussen X en Y altyd met verwysing na die agt fundamentele grondbegrippe beskryf word. X se (moontlike) reg veronderstel 'n verpligting op Y, terwyl X terselfdertyd 'n vryheid[25] (maar nie 'n nie-reg nie) teenoor Y kan hê. X se (moontlike) bevoegdheid ten opsigte van Y veronderstel 'n aanspreeklikheid op Y terwyl X nie terselfdertyd 'n onbevoegdheid teenoor Y kan hê nie.

Alle verskyningsvorme van die wye gebruik van die woord reg kan dus verklaar word met verwysing na 'n reg, vryheid, bevoegdheid of immuniteit of 'n kombinasie daarvan.[26]

Ingevolge Hohfeld se uiteensetting impliseer 'n reg dus 'n verpligting op 'n ander regsubjek(te). Indien laasgenoemde nie die geval is nie, kan daar bloot van 'n vryheid gepraat word. Daar sal verder van 'n bevoegdheid sprake wees as die houer uit hoofde van die bevoegdheid regsverhoudinge kan wysig deur die bevoegdheid uit te oefen. 'n Immuniteit kan ter sprake wees in soverre dit impliseer dat 'n regsubjek nie deur 'n ander regsubjek teenoor wie hy of sy 'n reg of vryheid of bevoegdheid het, daarvan ontneem kan word nie.

4 KOMMENTAAR OP HOHFELD

4 1 Simmetrie

Hohfeld se uiteensetting kom gekunsteld voor in soverre dit gedwonge simmetries is. Die gedwonge simmetrie is sigbaar op twee vlakke: elke fundamentele regsbegrip veronderstel nie 'n wederkerige en teenoorstellende begrip nie en 'n fundamentele reg/verpligting/bevoegdheid/ensovoorts hoef nie 'n *enkele* wederkerige verpligting/reg/aanspreeklikheid te veronderstel nie.

Volgens MacCormick word komplekse institusionele regte deur Hohfeld beskou as 'n blote aggregaat van 'n ontelbare aantal atomiese regsverhoudinge. Regsubjekte se regte kan uit meer bestaan as 'n enkele verpligting op 'n ander regsubjek.[27] MacCormick se kritiek is geregverdig. Daar is voorts 'n goeie argument voor uit te maak dat daar verpligtinge is wat nie wedersydse regte veronderstel nie.[28] Die enigste wyse waarop só 'n argument verslaan kan word,

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24 *Idem* 55–58.

25 Anders gestel: X se vryheid kan gepaard gaan met 'n reg sodat Y nie slegs 'n nie-reg het nie maar ook 'n verpligting.

26 Sien Cook 10 12–15; Tapper 243: "Thus one can only meaningfully consider whether one party has a right or a no-right, a duty or a privilege, a power or a disability, an immunity or a liability, as against the other. The situation of the other can then be characterized by reference to the table of correlatives."

27 Haksar "The nature of rights" 1978 *Archiv für Rechts- und Sozialphilosophie* 197; MacCormick *Rights, claims and remedies* (1983) 172–173 (hierna MacCormick). Vgl ook Pound 78 ev: "Hohfeld's scheme presupposes that there can only be one opposite and one correlative . . . there may be many contrasts and there are sometimes two correlatives."

28 Vgl Feinberg *Social philosophy* (1973) 61–64 (hierna Feinberg). Feinberg haal die voorbeeld aan van 'n verpligting op 'n persoon om by 'n stopteken stil te hou: "When a traffic signal directs me to stop, it is difficult to find an assignable person who can plausibly claim my stopping as his own due."

is om toe te gee dat die wedersydse regte nie in 'n enkele ander regsubjek vestig nie.[29] Dieselfde geld ten aansien van bevoegdhede en aanspreeklikhede.[30]

Hohfeld se gedwonge simmetrie word deur Stoljar verder beklemtoon. Volgens hom móés Hohfeld ter wille van simmetrie die nie-reg in sy uiteensetting insluit sonder dat dit enige besondere betekenis bydra.[31]

Hohfeld se simmetrie oortuig dus nie. Elke fundamentele regsbegrip veronderstel dus nie 'n enkele, wederkerige en teenoorstellende begrip nie.

4 2 Bevoegdhede

Stoljar staan krities teenoor Hohfeld se uiteensetting van bevoegdhede.[32] Die kritiek slaan op die streng simmetrie in Hohfeld se uiteensetting, wat tot absurditeite aanleiding gee. Neem die volgende voorbeeld: X bemaak sy boedel aan Y en Z. Y en Z het derhalwe die diskresie om die bemaking te adieer of repudieer. X handel uit hoofde van 'n bevoegdheid, maar waaruit bestaan die wederkerige aanspreeklikheid op Y en Z?[33]

Hohfeld se standpunt dat 'n bevoegdheid in een van die partye tot die regsverhouding vestig, voorspel probleme. Daar is baie verhoudinge ten aansien waarvan dit kunsmatig sou voorkom om die bevoegdheid tot die wysiging van die juridiese aspek van die verhouding aan een van die regsubjekte toe te skryf.[34] 'n Verbandhoudende kritiekpunt teen Hohfeld se uiteensetting is dat dit nie voorsiening maak dat 'n regsubjek oor die bevoegdheid kan beskik om die regsverhoudinge tussen ander regsubjekte te wysig nie.[35]

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29 Thomas "Duty, character and the rights-theory of morals" 1987 *The Journal of the Value Enquiry* 318. Lamont 1942 *Philosophy* 12–13 is van mening dat sulke regte in die regsubjekte as lede van die publiek vestig. Lamont gee egter toe dat daar verpligtinge is sonder wederkerige regte. Hy haal die verbod op selfmoord in die (destydse) Engelse reg as voorbeeld aan. Dit kan volgens hom aan die hand van 'n beskermde belang verklaar word. Daar is ook die voorbeeld van die verbod op huwelike binne sekere grade van verwantskap wat volgens Lamont nie aan die hand van 'n beskermde belang verklaar kan word nie (!) (sien 1942 *Philosophy* 19–25). Daar is egter geen rede waarom ook hierdie verpligting nie gesien kan word as die wederkerige van publieke regte nie.

30 Vgl *post* par 4 2.

31 Stoljar 53–56. Sien ook Pound 78: "All we have here is a contrast of a right in the narrower sense with the absence of such a right and of a power with the absence of a power." Mullock "The Hohfeldian no-right: A logical analysis" 1970 *Archiv für Rechts- und Sozialphilosophie* 265–270 toon aan dat daar logieserwys niks skort met Hohfeld se uiteensetting nie en Pound ea se kritiek daarom misplaas is. Mullock se reaksie is egter niksseggend: die blote feit dat die kategorieë in 'n uiteensetting logieserwys stand hou, beteken nie dat elke kategorie ekstra betekenis het nie.

32 Stoljar 60 is ook krities tav 'n ander punt. Volgens hom gee die uitoefening van énige reg aanleiding tot veranderinge in die regsverhoudinge tussen partye. Daaruit lei hy af dat bevoegdhede ens onnodige kategorieë is. Dié kritiek is doodgewoon misplaas. A se uitoefening van sy reg op spraakvryheid wysig nie enige regsverhoudinge nie. A beskik steeds oor die reg en die verhouding tussen hom en ander regsubjekte bly presies dieselfde.

33 Stoljar 60–61. Let daarop dat Y en Z se aanspreeklikheid nie daaruit kan bestaan dat die bemaking geadieer of gerepudieer moet word nie aangesien dit die uitoefening van 'n bevoegdheid behels.

34 Neem die arbeidsregtelike verhouding as voorbeeld: Werkgewer en werknemer wysig die onderlinge verhouding se juridiese aspek deur 'n proses van onderhandeling.

35 Hart "Bentham on legal rights" in Simpson (red) *Oxford essays in jurisprudence: Second series* (1973) 171–201 179 (hierna Hart).

Hohfeld se uiteensetting van bevoegdhede skiet volgens Hart verder in een opsig te kort. Dit maak nie voorsiening nie vir bevoegdhede wat deur die reg op regsubjekte afgewentel word om in te meng met of beheer uit te oefen oor objekte of die *corpi* van ander regsubjekte.[36] Hierdie bevoegdhede is egter niks anders as regte nie.[37]

4 3 Regte, verpligtinge en *claims*

Regte is volgens Hohfeld implisiet verwant aan verpligtinge en is 'n sinoniem vir eise. Op grond daarvan het verskeie skrywers 'n noodsaaklike verband tussen regte, eise (*claims*) en verpligtinge gepostuleer.[38] Volgens diesulkes is dit onsinnig om van 'n reg te praat indien daar nie in terme daarvan iets geëis kan word nie.[39]

White staan krities teenoor die standpunt dat daar 'n noodsaaklike verband tussen regte en eise is. Hy onderskei, met verwysing na die verwantskap tussen regte en eise, tussen 'n indikatiewe en subjunktiewe gebruik van die woord *claim*.[40] Daar is sprake van die indikatiewe gebruik as feite gestel word, byvoorbeeld: elke persoon beskik oor die reg op lewe (met verwysing na die Suid-Afrikaanse positiewe reg).[41]

> "A subjunctive claim is a call for acceptability of the proposal that something (*should*) *be* the case; it is a call *for* it, a request or demand for it."[42]

White wys voorts daarop dat 'n regsubjek op een van twee wyses oor 'n *claim* kan beskik; daar moet waarheid (indikatief) of regverdiging (subjunktief) daarin steek.[43] Dit het tot gevolg dat die *beskikking oor* en die *doen van* 'n *claim*, wedersyds onafhanklik is.[44]

Die vraag is of daar 'n noodsaaklike verwantskap tussen regte en *claims* is. White voer oortuigend aan dat die feit dat 'n reg ge*claim* kan word, nie van regte

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36 Hart 178.

37 Sien *post* par 6 1.

38 Feinberg 64–67 en Haksar 1978 *Archiv für Rechts- und Sozialphilosophie* 183 beskou regte as geldige eise (*valid claims*). Vgl ook Stoljar 1–12.

39 Vgl Stoljar 3. Stoljar staan krities teenoor White se standpunt (*post*) dat daar nie 'n noodsaaklike verwantskap tussen regte en *claims* is nie ogv die stelling dat dit onsinnig is om van 'n reg te praat indien dit nie of daar nie in terme daarvan iets geëis kan word nie. White ontken egter nie lg stelling nie maar slegs dat die stelling die afleiding van 'n noodsaaklike verwantskap tussen regte en *claims* noodsaak: sien "Do claims imply rights?" 1986 *Law and Philosophy* 417.

40 Macfarlane *The right to strike* (1981) 13 maak 'n soortgelyke onderskeid. Volgens MacCormick 174 ev moet die ook imperatiewe gebruik van die woord onderskei word. Wat MacCormick imperatief noem, is egter niks anders as 'n *claim* nie – iets wat White wel in berekening gebring het.

41 White "Rights and claims" en "Concluding comments" in Steward (red) *Law, morality and rights* (1983) 139–160 140–141 189–198 (hierna White).

42 White 142: "Subjunctive claims, unlike indicative claims, are not true or false; they are not confirmed or unconfirmed, proved or disproved, made out or not made out. Nor are they supported or refuted by evidence. They are just or unjust, legitimate or illegitimate."

43 White 143–147. Indien 'n *claim* dus vals of ongeregverdig is, beskik die regsubjek nie oor 'n eis nie.

44 White 143–147. 'n Regsubjek hoef nie sy *claim* te *claim* om daaroor te beskik nie, en andersom.

claims maak nie, omdat regte en ander dinge sowel indikatief as subjunktief op presies dieselfde wyse ge*claim* word.[45]

Daar is ook nie 'n noodsaaklike konsepsuele of logiese verwantskap tussen die beskikking oor regte en *claims* nie tensy dit die regsbeskouing is dat 'n reg noodwendig 'n verpligting in 'n ander regsubjek veronderstel.[46] Dit bring natuurlik 'n sirkelredenasie mee want in die ondersoek na die inhoud van die reg word juis dit voorveronderstel wat vasgestel moet word:[47]

> "Certainly, one person's right may involve another's duty ... [b]ut, first, it is at most the *kind* of right which dictates whether there is an accompanying duty, not the *nature* of the right. At most we have different kinds of rights, not different concepts of rights."[48]

Op grond hiervan kom White tot die gevolgtrekking dat die wederkerige verpligting van sommige regte 'n uitvloeisel is van juridiese beskerming, eerder as 'n logiese gevolg van die aard van die besonderse regte. Dit, meen White, beteken dat daar nie verskillende soorte regte is nie maar regte met betrekking tot verskillende aangeleenthede en objekte.[49]

White se gevolgtrekking dat daar nie verskillende soorte regte is nie, oortuig nie. Die implikasie daarvan is dat dit onsinnig is om regte in die eng sin van die woord te onderskei. Dit blyk dat White onder die indruk is dat Hohfeld na aanleiding van sy onderskeid substansiële vraagstukke wou oplos.[50] Die doel van die onderskeid tussen regte in die eng sin is juis om verwarring te vermy en duidelikheid te bevorder – 'n akademies-legitieme doelwit.[51]

Desnieteenstaande word daar met MacCormick akkoord gegaan dat dit inderdaad 'n fout is om te verklaar dat regte wat 'n wedersydse verpligting het, die enigste konsep is wat die benaming reg waardig is.[52]

Die gevolgtrekking is dus dat daar nie 'n noodsaaklike verwantskap tussen regte, verpligtinge en *claims* is nie. Dat sommige regte egter 'n wedersydse verpligting het, kan nie betwyfel word nie. Sulke regte kan met reg as eisregte (*claim-rights*) geklassifiseer word.

5 DIVERSE TEORIEË

Voordat daar voortgegaan word om die soorte regte te kategoriseer, is dit nodig om vas te stel of daar nie 'n noodsaaklike universele verwantskap is wat misgekyk word nie. Daar is verskeie moontlikhede: die verwantskap tussen regte en

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45 White 147–150. Sien ook 151–152: "One may have a right to something which one has not claimed ... one may claim something, either indicatively or subjunctively, to which one has no right ... not only is it often false to say that that which I claim I have a right to or that which I have a right to I claim ... it sometimes does not even make sense to talk of having a right to some of the things one can claim, for one can claim almost anything."

46 White 152–155.

47 Haksar 1978 *Archiv für Rechts- und Sozialphilosophie* 201, 'n aanhanger van die idee dat daar 'n noodsaaklike verband tussen regte en *claims* is, gee toe dat die standpunt 'n sirkelargument is. Hy gee egter ook toe dat sulke regte nie die enigste soort reg is wat bestaan nie: sien 187.

48 White 156.

49 *Idem* 159.

50 Vgl White 157–159 se kritiek op Hohfeld.

51 Vgl MacCormick 171–172; Stoljar 52.

52 MacCormick 172. Vgl ook Pound 80. Haksar 1978 *Archiv für Rechts- und Sozialphilosophie* 187 gee toe dat dit die geval is.

aansprake, regte en voordele,[53] regte en diskresies, en regte en objekte moet ondersoek word.[54]

5 1 Regte en aansprake

Die aanspraketeorie (*entitlement theory*) gee voor dat regte nie primêr uit eise bestaan nie. Volgens dié teorie is juridiese regte niks anders nie as juridiese aansprake.[55] Regte word nie omskryf met verwysing na verpligtinge op ander partye nie maar met verwysing na iets waarop dit betrekking het.[56] Wat dus onderstreep word, is dat aansprake sentraal is aan regte en derhalwe dat *eise teen* van *aansprake op* afhanklik is.[57]

Daar is verskeie punte van kritiek teen die aanspraketeorie. In die eerste plek verloor die teorie uit die oog dat *aansprake op* as regte sonder wederkerige beperkings op derdes sinloos is.[58] Die aanspraketeorie suggereer verder "that a right is something that is not only due to, but also considered *beneficial* to, the agent".[59] Die aanspraketeorie is dus verwant aan die voordeleteorie én die besware daarteen.[60]

5 2 Regte en voordele[61]

Die simplistiese voordeleteorie (*benefit theory*) bestaan uit die stelling dat die houers van regte diegene is wat voordeel trek uit ander se verpligtinge.[62] Dit is duidelik dat die teorie nie steek hou nie aangesien regte nie altyd voordeel hoef in te hou nie en omdat nie alle verpligtinge waaruit 'n regsubjek voordeel kan trek, impliseer dat laasgenoemde oor regte beskik nie.[63]

Lyons het die simplistiese voordeleteorie aangepas. Volgens hom is 'n regsubjek die houer van 'n reg as hy bedoel is om "the direct, intended beneficiary of that obligation" te wees.[64]

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53 Hohfeld "Fundamental legal conceptions as applied in judicial reasoning" 1917 *Yale LJ* 717 het gesuggereer dat hy dié teorie aanhang: "the word 'right' is used . . . to denote any sort of legal advantage".

54 Vir 'n kort oorsig van die verskillende teorieë sien Benditt *Rights* (1982) 13–19.

55 McCloskey "Rights" 1965 *The Philosophical Quarterly* 116.

56 *Idem* 117–122. Bv die reg *op lewe*, die reg *op eiendom* en die reg *om te staak*.

57 Wasserstrom "Rights, human rights and racial discrimination" 1964 *The Journal of Philosophy* 629–631 is 'n aanhanger van die aanspraketeorie. Volgens hom beskik 'n regsubjek oor 'n juridiese reg indien die regsubjek 'n aanspraak op iets het. 'n Aanspraak word omskryf as 'n baie sterk *legal claim op* 'n objek.

58 Stoljar 8–10.

59 Marshall "Rights, options, and entitlements" in Simpson (red) *Oxford essays in jurisprudence: Second series* (1973) 228–241 229 (hierna Marshall) (my kursivering).

60 Sien *post* par 5 2.

61 'n Verwante teorie is die belangeteorie. Volgens dié teorie spruit regte voort uit persoonlike belange. Alle belange gee egter nie aanleiding tot regte nie en bowendien is regte nie daarvan afhanklik of dit 'n regsubjek se belange dien of nie (sien Stoljar 31–35). Haksar 1978 *Archiv für Rechts- und Sozialphilosophie* 188 wys daarop dat selfs die uitgangspunt dat slegs wesens wat belange het, regte kan hê, nie inhou dat regte gepositiveer word om daardie belange te bevorder nie.

62 Kearns "Rights, benefits and normative systems" 1975 *Archiv für Rechts- und Sozialphilosophie* 465; Hart 176–178.

63 Sien Kearns 1975 *Archiv für Rechts- und Sozialphilosophie* 465.

64 Lyons "Rights, claimants and beneficiaries" 1969 *American Philosophical Quarterly* 176. Vgl Haksar 1978 *Archiv für Rechts- und Sozialphilosophie* 184.

Kearns wys uit waarom ook die aangepaste voordeleteorie nie geslaagd is nie: om 'n reg te verkry hoef 'n regsubjek nie die bedoelde bevoordeelde van 'n verpligting te wees nie.[65] Die voordeleteorie omarm ook die aanname dat elke verpligting 'n wederkerige reg veronderstel,[66] 'n aanname wat hierbo as twyfelagtig uitgewys is.[67] Nog 'n beswaar teen die voordeleteorie is die kwessie van die aard van voordele: word dit objektief of subjektief vasgestel?

MacCormick gee toe dat "not everything which is good for any individual is his/hers/its by right", maar hou vol dat regte na "something" verwys wat in normale omstandighede as voordelig vir regsubjekte beskou word omdat dit iets is wat deur regsubjekte geniet kán word.[68] In effek sê MacCormick dus dat iets 'n reg kan wees as dit objektief as voordelig vir regsubjekte beskou word omdat dit subjektief as voordelig beskou kán word. Enige iets onder die son kán deur 'n regsubjek geniet word en dus 'n reg wees.[69] MacCormick se beskouing is dus so wyd dat dit niksseggend is.[70]

5 3 Regte en diskresies

Kearns staan die volgende voor met betrekking tot regte:[71]

> "[O]ne has a right if and only if he is the addressee of a second-order norm or rule by means of which he can alter or discharge another's obligation, or, in connection with the obligation he can activate enforcement responsibilities lodged in others."

Twee elemente is dus aanwesig. 'n Diskresie en 'n afdwingingsmeganisme – "a choice respected by law".[72] Hoewel daar met Kearns se standpunt saamgestem word dat juridiese regte binne 'n normatiewe juridiese sisteem bestaan en

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65 Hart "Are there any natural rights?" 1955 *The Philosophical Review* 180–182 het Lyons se tipe standpunt oorspronklik gekritiseer deur gebruik te maak van die voorbeeld waar X teenoor Y onderneem dat hy Y se moeder (Z) sal versorg. Y is die houer van 'n reg sonder dat hy die bedoelde bevoordeelde is. Lyons 1969 *American Philosophical Quarterly* 182–183 het daarop gereageer deur aan te voer dat Y inderdaad voordeel trek uit die ooreenkoms. Lyons meen verder dat indien nie Y nie maar Z die direk bedoelde bevoordeelde is, Z (en nie Y nie) inderdaad die reghebbende is. Kearns 1975 *Archiv für Rechts- und Sozialphilosophie* 466–473 dui egter (tereg) aan dat 'n bedoelde voordeel aan Y nie 'n *essentiale* vir die sluiting van 'n ooreenkoms is nie en dat Lyons se tweede verweer 'n sirkelargument is. Sien ook Haksar 1978 *Archiv für Rechts- und Sozialphilosophie* 194–195; Nino "Introduction" in Nino (red) *Rights* (1992) xi–xxxiv xv–xvi (hierna Nino: 1992) en *The ethics of human rights* (1991) 27 (hierna Nino: 1991); Stoljar 28–31.

66 Kearns 1975 *Archiv für Rechts- und Sozialphilosophie* 474; Hart 190.

67 Vgl *supra* par 4 1.

68 MacCormick 162.

69 Vgl White 194.

70 Nino: 1991 33–34 handhaaf net so 'n niksseggende standpunt: "an individual has a right to a certain situation *S* when he belongs to a certain class *C* and it is assumed that access to *S* is normally a good so important for each of the members of *C* that he ought to have access to *S*, or that it is wrong to deny him of *S* . . ."

71 Kearns 1975 *Archiv für Rechts- und Sozialphilosophie* 477. Sien *idem* 477–483 vir 'n volledige bespreking.

72 Hart 197. Hart was aanvanklik ook 'n aanhanger van dié teorie (sien "Definition and theory in jurisprudence" 1954 *LQR* 49 en vn 15. Lamont 1942 *Philosophy* 4–10 is 'n voorstander van dié teorie. Volgens hom is regte "sfere van outonomie" (sfere waarbinne regsubjekte hul belange na willekeur kan bevorder – maw sfere waarbinne regsubjekte oor diskresies beskik) wat deur die reg beskerm word.

afhanklik is van afdwingingsnorme,[73] is die term diskresie te eng om alle regte in te sluit. By sommige regte is daar nie 'n diskresie aanwesig nie. Hohfeld se immuniteite is hier ter sprake: 'n regsubjek kan nie afstand doen van sy fundamentele reg op lewe of op 'n regverdige verhoor nie.[74]

5 4 Regte en objekte

Aanhangers van die subjektiewe regte-leerstuk hou vol dat 'n (subjektiewe[75]) reg sonder 'n regsobjek 'n onmoontlikheid is.[76] Die leerstuk is verwant aan die aanspraketeorie deurdat die standpunt gehuldig word dat regte betrekking het op objekte.[77]

Binne die (Suid-Afrikaanse) tradisie van die subjektiewe regte-leerstuk vind 'n aardige verskynsel plaas. Indien die bestaande omskrywing van objekte nie meer voldoende is om positiewe regte te verklaar nie, word een van twee weë gevolg. Daar word tot die slotsom gekom dat daar nie van 'n reg sprake is nie[78] of die bestaande omskrywing van objekte word uitgebrei.[79]

Neem die omskrywing wat Van der Vyver aan regsobjekte toeskryf. Volgens hom sluit regsobjekte alles in wat waarde het in die sin dat dit 'n juridiese behoefte van 'n regsubjek bevredig.[80] Dié standpunt herinner sterk aan dié van MacCormick:[81] enigiets onder die son kan vir regsubjekte van waarde wees. Van

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73 McCloskey 1965 *The Philosophical Quarterly* 117 meen anders: "We have legal rights in the absence of legal rules." Alhoewel regte moontlik is in die afwesigheid van norme wat die regte verbied, is alle juridiese norme afhanklik van norme wat dit binne 'n juridiese sisteem handhaaf en in stand hou. Sonder sulke norme is daar nie sprake van juridiese regte nie.

74 Marshall 236–239; Haksar 1978 *Archiv für Rechts- und Sozialphilosophie* 184–185 200; Hart 196–201. Hart is van mening dat alle regte volgens diskresies óf voordele verklaar kan word aangesien onvervreembare fundamentele regte juis vanweë die voordelige aard daarvan onvervreembaar is. Selfs al sou Hart reg wees, impliseer dit steeds nie 'n noodsaaklike verband tussen regte en diskresies óf voordele nie.

75 Volgens Joubert "'n Realistiese benadering van die subjektiewe reg" 1958 *THRHR* 100 is subjektiewe regte niks anders nie as *legal rights*, maw juridiese regte.

76 Joubert 1958 *THRHR* 105–108; Van Zyl en Van der Vyver *Inleiding tot die regswetenskap* (1987) 415 ev (hierna Van Zyl en Van der Vyver); Van der Vyver *Regsubjek, regsobjek en die reg in subjektiewe sin* (1989) 15 (hierna Van der Vyver); Venter "Die publieke subjektiewe reg – 'n voorraadopname" 1991 *THRHR* 355 358. 'n Subjektiewe reg veronderstel twee verhoudings, nl 'n subjek-objek-verhouding en 'n subjek-derdes-verhouding. Die aard van subjektiewe regte word bepaal deur die objekte waarop hulle betrekking het.

77 Vgl Van Zyl en Van der Vyver 402–407 419; Van der Vyver 14: "'n Subjektiewe reg kan voorlopig gedefinieer word as die aanspraak van 'n regsubjek op 'n regsobjek"; Venter 1991 *THRHR* 355: "'n Reg bestaan tog *op* 'iets', anders is dit self net 'n voorwerp soos 'n toordokter se dolos waarmee die wêreld beïnvloed moet word."

78 Vgl die standpunt van Claasen *supra* par 1 oor die "sogenaamde" stakingsreg.

79 Joubert 1958 *THRHR* 108–109 wys daarop dat (hyself en) Dooyeweerd regsobjekte beskou as entiteite met ekonomiese waarde. Omdat die omskrywing van objekte met verwysing na ekonomiese waarde te eng is om oa persoonlikheidsgoed in te sluit, brei Van der Vyver 4–10 die omskrywing uit om alles in te sluit wat waarde het in die sin dat dit 'n juridiese behoefte van 'n regsubjek bevredig. Venter 1991 *THRHR* 358–364 beskou 'n regsobjek as iets wat regsobjektiveerbaar is in die sin dat dit regswaarde het aangesien dit bruikbaar is in die juridiese ordeningsproses, omdat hy wil aantoon dat ook publieke subjektiewe regte moontlik is.

80 Sien *supra* en Van Zyl en Van der Vyver 402 ev.

81 *Supra* par 5 2.

der Vyver kwalifiseer sy standpunt egter: die waarde moet "gemeenskapsordende werking hê", "daarom kan 'n persoon nie outeursreg op 'n pornografiese werk hê nie".[82] Dit blyk dus dat Van der Vyver pragmaties te werk gaan. Wanneer dit hom pas, word die omskrywing van regsobjekte uitgebrei om byvoorbeeld persoonlikheidsregte moontlik te maak. Is dit nie die geval nie, ontken hy die bestaan van 'n reg.

Beide die bovermelde uitweë is teoreties onaanvaarbaar. Deur te ontken dat sekere regte die benaming reg waardig is omdat dit nie betrekking het op 'n objektiveerbare entiteit nie, is in die eerste plek doodgewoon onrealisties. Neem Venter se standpunt as 'n voorbeeld. Volgens hom is die reg op lewe nie 'n subjektiewe reg nie maar dien dit bloot as 'n "kragtige regsmorele beginsel aan die hand waarvan die publiekregtelike verhouding gereguleer en in stand gehou moet word".[83] Dit sou tog sekerlik meer in pas met die werklikheid wees om die reg op lewe as 'n reg te beskou wat 'n regsubjek toekom en waarop daar inbreuk gemaak kan word![84] Tweedens bestaan die gevaar dat belange van individue wat nie op regsobjekte betrekking het nie, nie behoorlik in ag geneem word nie omdat hulle nie ingevolge subjektiewe regte uitgedruk kan word nie.[85]

Die tweede uitweg is ook onaanvaarbaar. Binne die subjektiewe regte-leerstuk is die kernvraag of daar 'n bepaalde regsobjek bestaan. Indien wel, is daar sprake van 'n subjektiewe reg.[86] Die "bestaande teorieë oor subjektiewe regte" hoef egter nie 'n *numerus clausus* aan regsobjekte op te lewer nie met die gevolg dat daar aan die sisteem "getimmer en geskaaf sou kon word om kritiek" te ondervang.[87] Deur regsobjekte voortdurend te herformuleer, kan enigiets wat die formuleerder pas, as regsobjek geklee word.

Die slotsom is dat daar met Pound akkoord gegaan word dat daar nie 'n noodsaaklike verwantskap tussen reg en regsobjek bestaan nie.[88] Dit blyk dat die inlees van regsobjekte by regte bloot afhang van 'n bepaalde formulering van regte en dus nie 'n onafhanklike bydrae lewer tot die betekenis van regte nie.

6 'N ALTERNATIEWE UITEENSETTING VAN REGTE

Drie aannames kan dien as uitgangspunt vir 'n analise van juridiese regte. In die eerste plek is juridiese regte afhanklik van afdwingingsnorme en bestaan dus as gepositiveerde regte binne 'n normatiewe juridiese sisteem.[89] Tweedens vestig regte in regsubjekte.[90] Derdens kan daar op regte inbreuk gemaak word.

Daar moet onderskei word tussen (juridiese) regte, vryhede en kompetensies. Die onderskeid sal vervolgens uiteengesit word.

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82 Van Zyl en Van der Vyver 407.
83 Venter 1991 *THRHR* 366.
84 Vgl die alternatiewe uiteensetting *post* par 6.
85 Van der Walt "Kritiese vrae oor die leerstuk van regte in die Christelike regsleer" ongepubliseerde lesing gelewer tydens 'n *colloquium* aan die PU vir CHO op 1994-08-12.
86 Du Plessis se resensie van Venter *Die publiekregtelike verhouding* (1985) 1987 *THRHR* 120; Venter 1991 *THRHR* 362.
87 Du Plessis 1987 *THRHR* 121.
88 Vgl Pound 85.
89 Vgl die standpunte van Hart 1954 *LQR* 43 49, Kearns 4 3; MacCormick 161.
90 Vgl MacCormick 162.

6 1 Regte

'n Reg veronderstel 'n wederkerige verpligting óf 'n wederkerige onbevoegdheid in 'n ander regsubjek of regsubjekte omdat daar op regte inbreuk gemaak kan word. Die blote feit dat daar op regte inbreuk gemaak kan word, gesien in die lig daarvan dat regte binne 'n normatiewe sisteem bestaan, impliseer dat daar vir elke reg 'n wederkerige normatiewe (positiewe of negatiewe) beperking op 'n ander regsubjek of regsubjekte moet wees.[91] Die wederkerige normatiewe beperking hóéf egter nie uit 'n verpligting te bestaan nie – daar is ook die moontlikheid van 'n onbevoegdheid.[92]

Die tipe wederkerige beperking wat deur 'n reg geïmpliseer word, bepaal die soort reg waarvan daar sprake is.[93] Daar is twee soorte regte in die eng sin, te wete eisregte en vryheidsregte.

Op grond van 'n eisreg het ander regsobjekte verpligtinge teenoor die houer van die eisreg.[94] Die verpligting bestaan daarin dat die draer daarvan iets (in juridiese sin) positiefs of negatiefs verskuldig is aan die houer van die reg. Eisregte sluit in wat tradisioneel onder bevoegdhede tuisgebring is, sogenaamde bevoegdhede wat deur die reg op regsubjekte afgewentel word om in te meng met of beheer uit te oefen oor objekte of die *corpi* van ander regsubjekte.[95]

Vryheidsregte is soortgelyk aan Hohfeld se immuniteite.[96] Op grond van 'n vryheidsreg rus daar 'n onbevoegdheid[97] op 'n ander regsubjek of regsubjekte

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91 Vir dié insig word daar veral op Rainbolt "Rights as normative constraints on others" 1993 *Philosophy and Phenomenological Research* 93–103 gesteun. Vgl ook Stoljar 13–24.

92 Die debat tussen diegene wat 'n noodsaaklike wederkerigheid van verpligtinge mbt regte (maw elke reg veronderstel 'n wederkerige verpligting(e) sien en diegene wat dit ontken, bestaan omdat beide groepe die derde moontlikheid, nl 'n aanvullende noodsaaklike wederkerigheid van onbevoegdhede mbt regte, miskyk. Vgl bv Braybrooke "The firm but untidy correlation of rights and obligations" 1972 *Canadian Journal of Philosophy* 361: "[T]he alleged right [without a correlative duty] has turned out to be a right that has no meaning . . . [for] . . . it does not protect . . ." Wat Braybrooke miskyk, is dat 'n reg nie 'n verpligting moet impliseer om betekenis te hê nie; 'n reg het betekenis so lank as wat daarop inbreuk gemaak kan word. Sien ook Montague "Two concepts of rights" 1980 *Philosophy and Public Affairs* 372–384. Montague sien 'n noodsaaklike wederkerigheid tussen regte en verpligtinge. Hy onderskei egter tussen regte wat "exercisable" is en verpligtinge voorafgaan sodat dit as basis vir verpligtinge dien, en regte wat "non-exercisable" is en dus deur verpligtinge voorafgegaan word. Alles hang af van hoe die betrokke reg geïnterpreteer word. Voorts gee Montague te kenne dat hy ook nie eintlik weet wat hy met "exercisable" bedoel nie sodat hy in 'n post-modernistiese hoender-of-die-eier-afhangende-van-watter-kant-gesien-standpunt verval.

93 Regte impliseer dus altyd 'n wederkerige begrip. Die feit dat die soort reg geken word aan die hand van sy wederkerige begrip beteken nie dat die reg daaruit voortvloei nie. Wederkerige verpligtinge en onbevoegdhede vloei uit regte voort omdat dit nie moontlik sou wees om daarsonder op regte inbreuk te maak nie.

94 Vgl Feinberg 56–63.

95 Volgens Stoljar 66 is bevoegdhede kombinasies van regte en verpligtinge. Hoewel sommige bevoegdhede daarin kan bestaan dat daar terselfdertyd regte en verpligtinge in 'n regsubjek vestig, is dit nie noodwendig die geval nie. Neem die voorbeeld van 'n persoon se bevoegdheid om sy eiendom te vervreem.

96 Vgl Lyons "The correlativity of rights and duties" 1970 *Nous* 49–52; Nino: 1991 28–29. Stoljar 13 noem vryheidsregte "defensive rights".

97 Onbevoegdheid in die sin dat 'n regsubjek iets juridies nie mag doen nie. In die opsig verskil die uiteensetting van dié van Rainbolt. Volgens Rainbolt 1993 *Philosophy and*

vervolg op volgende bladsy

om die juridiese aspek van die verhoudinge van die houer van die vryheidsreg met ander regsubjekte te wysig.[98]

Die verskil tussen onbevoegdhede en verpligtinge is daarin geleë dat dit by laasgenoemde gaan om gebeurtenisse met verwysing na die juridiese aspek van die verhouding en by eersgenoemde om die juridiese aspek van die verhouding *as sodanig*.

6 2 Vryhede

Vryhede word van regte onderskei deurdat 'n vryheid nie verpligtinge of onbevoegdhede op ander regsubjekte veronderstel nie.[99] 'n Vryheid is dus iets wat in 'n regsubjek vestig wat nie teenoor ander regsubjekte afgedwing kan word nie.

Die rede waarom vryhede (wat nie wedersydse verpligtinge of onbevoegdhede impliseer nie) nie regte is nie, is dat 'n verpligtinglose of onbevoegdheidlose reg niksseggend is. Vryhede is niksseggend omdat dit as gevolg van 'n normatiewe gaping bestaan.[100] Anders gestel: dit is nie moontlik om op vryhede inbreuk te maak nie;[101] daarom is dit van nul en gener waarde.

6 3 Kompetensies

Kompetensies is die vermoë van regsubjekte om verhoudinge met 'n juridiese kant aan te gaan en die regsaspek van verhoudinge in die algemeen te wysig.[102]

Die term kompetensie (en nie bevoegdheid nie) word gekies om verwarring te vermy. 'n Kompetensie veronderstel net soos 'n vryheid nie 'n wederkerige begrip nie.[103] 'n Kompetensie kan voorts ten aansien van 'n enkele aspek in meerdere regsubjekte vestig.

Phenomenological Research 97 verwys 'n verpligting na iets wat nie gedoen mag word nie en 'n onbevoegdheid na iets wat nie gedoen kan word nie.

98 Wysig moet wyd verstaan word. Dit impliseer die instelling, wysiging, handhawing en beëindiging van regte, verpligtinge, onbevoegdhede, vryhede en kompetensies.

99 Feinberg 58: "What the right adds to the liberty is the duty of others not to interfere."

100 Nino: 1992 xiii; Nino: 1991 25–26.

101 Rainbolt 1993 *Philosophy and Phenomenological Research* 102.

102 Wysig moet hier weer eens wyd verstaan word. Dit impliseer die instelling, wysiging, handhawing en beëindiging van regte, verpligtinge, onbevoegdhede, vryhede en kompetensies.

103 Indien 'n regsubjek 'n verhouding met 'n regsaspek aangaan of die regsaspek wysig sonder dat die regsubjek juridies kompetent is, is die handeling nietig. Die feit dat 'n betrokke party die handeling deur 'n hof nietig kan laat verklaar, beteken nie dat die applikant oor 'n reg beskik waarop inbreuk gemaak is nie. Neem die voorbeeld van die parlement wat gebonde is aan 'n grondwet. Die parlement kan nie verskanste fundamentele regte wegneem nie want die parlement beskik nie oor die kompetensie nie. Die parlement mag nie inbreuk maak (deur wetgewing) op fundamentele regte nie want die parlement is onbevoeg (maar wel kompetent) om dit te doen.

Epilepsy and delictual liability

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OPSOMMING

Epilepsie en deliktuele aanspreeklikheid

Indien 'n persoon wat aan epilepsie ly tydens 'n epileptiese aanval skade aan 'n ander persoon veroorsaak, ontstaan die vraag of hy of sy deliktueel aanspreeklik gehou mag word.

In die VSA is sodanige aanspreeklikheid uitgesluit tensy antesedente aanspreeklikheid bewys kan word. Dit is ook die posisie in Engeland aangesien daar geag word dat hy of sy nie skuld het nie; antesedente aanspreeklikheid is egter steeds moontlik.

Daarenteen sal so 'n persoon in Nederland aanspreeklik gehou kan word vir skade aangerig tydens 'n epileptiese aanval aangesien daar absolute aanspreeklikheid bestaan – 'n persoon word toerekeningsvatbaar geag indien hy of sy 'n onregmatige daad pleeg en ingevolge 'n wet of die mening van die gemeenskap toerekeningsvatbaar vir die handeling geag moet word. Ingevolge wetgewing word 'n persoon wat ouer as 14 jaar is en 'n onregmatige daad pleeg tydens 'n fisiese of geestelike steurnis, toerekeningsvatbaar geag. 'n Persoon met epilepsie sal dus aanspreeklik gehou kan word vir skade aangerig tydens 'n epileptiese aanval; dit is egter onbillik aangesien hy of sy onbewus is van die handelinge wat hy of sy verrig.

In Suid-Afrika is die posisie analoog aan dié in die VSA en Engeland; die persoon met epilepsie word geag nie toerekeningsvatbaar te wees nie. Aanspreeklikheid kan egter wel vir antesedente gedrag opgedoen word.

1 INTRODUCTION

Should a person with epilepsy cause harm to another while suffering from a seizure, the question arises whether he may be held delictually liable. In this article, this issue will be discussed with reference to the position in the USA, England, the Netherlands and South Africa.

2 THE USA

2 1 The tort of intentional interference with the person

The tort of intentional interference with the person comprises battery, assault, false imprisonment and infliction of mental distress. Only battery and assault are relevant in the present context. An action for the tort of "battery" protects the individual's freedom from intentional and unpermitted contact with his person. This protection extends to any part of the body or to anything which is attached to it and is practically identified with it.[2] As this tort requires intentional contact

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1 This article has been derived from the author's LLD thesis *Epilepsy – Legal problems* (1994) Unisa.

2 Prosser *Handbook of the law of torts* (1971) 34; Keeton *Prosser and Keeton on the law of torts* (1984) 39 *et seq*; Kionka *Torts* (1988) 106–107.

with the other person, and a person suffering from epilepsy will usually not have any intention if he assaults someone during a seizure, it would appear that a person with epilepsy cannot be held liable for this tort.

An action for the tort of assault protects the freedom from apprehension of an intentional harmful or offensive contact with the person, as distinguished from the contact itself. It may take place without any physical contact.[3] It would appear that liability for this tort can likewise not be incurred by a person suffering from epilepsy harming another person during a seizure or shortly afterwards, as he would have had no intention because of the seizure.

2 2 The tort of negligence

Under the tort of negligence a person will be liable if he had a duty to act, breached the duty and caused damage to another person. He will not be liable if the breach was caused by an unavoidable accident which was unintentional and which, in the light of all the circumstances, could not have been foreseen or prevented by the exercise of reasonable precautions. An act is regarded as unavoidable if it did not result from any lack of proper care in the handling of an object (for example, driving a car) because both wrongful intent and negligence are lacking.[4] Thus a driver of a motor car who suddenly loses control of his car because he experiences a heart attack, a stroke, a fainting spell, or an epileptic fit, or is merely overcome by sleep, is not liable unless he was aware that he was likely to become ill, fall asleep or have an epileptic seizure. In such cases he will be found negligent merely because he drove the car.[5]

In *Eleason v Western Casualty & Surety Co*,[6] the driver, a person suffering from epilepsy, was involved in a motor vehicle accident during an epileptic seizure. Because he knew that he was likely to have a seizure, he was found negligent in driving the car and was held responsible for the accident.

Negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm.[7] The definition of negligence in section 282 of the second *Restatement of torts*[8] includes only such conduct which involves a risk and not a certainty that the interest of another will be involved. It therefore excludes conduct which gives rise to liability because of the actor's intention to invade a legally protected interest of the person injured or of a third person.

Intention involves knowledge that the conduct will invade the interest as well as the purpose of invading it.[9]

Section 464 of the second *Restatement of torts*[10] provides that unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent, is that of a reasonable man under like circumstances.

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3 Prosser 37; Keeton 43 *et seq*; Kionka 107–108.
4 Prosser 140; Keeton 162 164–165; Kionka 136.
5 Prosser 140–141; *Wishbone v Yellow Cab Co* (1936) 97 SW 2d 452; *Shirks Motor Express v Oxenham* (1954) 106 A 2d 46 cert denied 350 US 966; *Moore v Capitol Transit Co* (1955) 226 F 2d 87 cert denied (1956) 350 US 966; Keeton 162.
6 (1948) 254 Wis 134, 135 NW 2d 301.
7 Keeton, Keeton, Sargentich and Steiner *Cases and materials on tort and accident law* (1983) 167 (hereinafter cited as Keeton *et al*); s 282 of the second *Restatement of torts* (1965); Kionka 13 136; Keeton 428–433.
8 Keeton *et al* 167; Kionka 13 136; Keeton 428–433.
9 *Ibid.*

No allowance is made for mental deficiency in judging whether a person's conduct conforms to the reasonable person's standard of care. However, the standard is subjective to the extent that, if a person has a physical deficiency or disability, his conduct is measured against that of a reasonably prudent person with his physical characteristics.[11] A person suffering from epilepsy will therefore be tested against the conduct of a reasonably prudent person suffering from epilepsy.

In *Breunig v American Family Insurance*,[12] a truck driver instituted action against the insurer of a car after he had been involved in a road accident. The defendant claimed that she was not negligent since immediately before the collision she was suddenly and without warning seized with a mental aberration or delusion that rendered her unable to operate the car with a conscious mind. A psychiatrist testified that she had been suffering from "schizophrenic reaction, paranoid type, acute". The court held for the plaintiff, and the defendant appealed against the verdict. The State Supreme Court held that whether the motorist had knowledge of her schizophrenic, paranoid condition and of the likelihood of hallucination while driving a motor car, was a question for the jury to decide.

Some forms of mental illness, or as generally referred to in the USA, "insanity", are a defence to and preclude liability for negligence under a doctrine that originated in *Theisen v Milwaukee Automobile Mutual Insurance Company*.[13] A driver fell asleep behind the wheel and caused an accident; the court accepted that negligence is not present if a person is unable to conform his actions through no fault of his own. The driver in this instance was, however, held to be negligent because every person has conscious warnings of drowsiness. If a person does not heed such warnings and continues to drive, he is negligent.

A sudden onset of mental incapacity, equivalent in its effect to such physical causes as a sudden heart attack, epileptic seizure, stroke, or fainting, must not be treated alike and certainly not under the general rule of mental illness.[14]

3 ENGLAND

3 1 The torts of trespass to the person and negligence

There are a number of specific torts in English law, for example trespass to the person, negligence, trespass to land, nuisance, etcetera.[15] These, however, do not constitute a *numerus clausus*. Trespass to the person and negligence will be discussed briefly, as they may be of relevance to a person suffering from epilepsy. Trespass (wrong) to the person includes assault, battery and false imprisonment.[16] Assault and battery may be relevant to a person with epilepsy as he could assault a person during a seizure. Battery is the intentional and direct

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10 Keeton *et al* 168 185; Keeton 174; Kionka 13 136.
11 Kionka 14 138; Keeton 175–179.
12 (1970) 45 Wis 2d 536, 173 NW 2d 619, 49 ALR 3d 179; see also Keeton *et al* 187.
13 (1962) 18 Wis 2d 91, 118 NW 2d 140, 119 NW 2d 393; see also Keeton *et al* 187.
14 Keeton *et al* 189.
15 Rogers *Winfield and Jolowicz on tort* (1989) 50–52; Brazier "Trespass to the person" in Dias (ed) *The common law library no 3 Clerk and Lindsell on torts* (1989) 959 *et seq*.
16 Rogers 53–54 58; Heuston and Buckley *Salmond and Heuston on the law of tort* (1992) 125–132.

application of force to another person.[17] Assault is an act of the defendant which causes the plaintiff reasonable apprehension of the infliction of a battery on him by the defendant.[18] A blow inflicted in a state of automatism will not amount to battery or assault as no intention is present. However, it is no defence that, simply because of mental incapacity, the defendant did not know that what he was doing was wrong.[19]

Negligence as a tort is the breach of a legal duty to take care which results in damage, undesired by the defendant, to the plaintiff. Its ingredients are: (a) a legal duty on the part of A towards B to exercise care in such conduct of A as falls within the scope of the duty; (b) breach of that duty; and (c) consequential damage to B.[20] Should a person suffering from epilepsy have a seizure, there will be no legal duty on him to exercise care, since he will not be acting voluntarily.

3 2 Conduct

The wrong complained of must be attributable to the act or omission of the defendant. An act involves a bodily movement controllable by will.[21] Since epilepsy causes reflex movements that are not controlled by the will, the person suffering from epilepsy will not be held liable for harm caused during a seizure or shortly afterwards.

The mental element involved in the willed movement is distinct from that in malice, intention and negligence. The first refers to intention to do an act while the others involve bringing about some result. The requirement of voluntariness is also applicable to omissions. An omission is any failure to act where there is a duty to do so. An omission is involuntary when something, for example illness, prevents a person from doing what he should do. Persons of unsound mind are liable in tort to the same extent as sane persons, provided they know what they are doing. If they do not, there is no voluntary act. A person suffering from epilepsy will therefore not be liable in tort should he cause damage to a person during an epileptic seizure since it is regarded as an involuntary act due to unsoundness of mind. Should he have foreseen that he might have a seizure but still continues with his conduct and subsequently causes damage to another, it will be regarded as a voluntary act.[22]

3 3 Fault

Fault consists in either intention or negligence. It is difficult to define intention as it can only be inferred from the conduct of the wrongdoer. In those cases where it seems necessary to define intention, the law of tort would usually include the state of mind of a defendant who does not actively desire a consequence to ensue, but foresees it as likely.[23] Since a person suffering from

17 Rogers 54; Brazier in Dias (ed) 961; Heuston and Buckley 127–128; Tiernan *Tort in a nutshell* (1990) 1–3; Street *The law of torts* (1976) 18–21; Baker *Tort* (1986) 15–17.

18 Rogers 54; Brazier in Dias (ed) 970; Heuston and Chambers 115; Street 21–22; Baker 17–19; Tiernan 3–4.

19 Brazier in Dias (ed) 959–960.

20 Rogers 72; Dias and Tettenborn "Negligence" in Dias (ed) 427; Tiernan 8–9; Tyas, Pannett and Willett *Law of torts* (1989) 9.

21 Dias in Dias (ed) 40; *Moriss v Marsden* [1952] 1 All ER 925; *Roberts v Ramsbottom* [1980] 1 WLR 823.

22 Dias in Dias (ed) 41; Carty "Parties" in Dias (ed) 167.

23 Rogers 44–45; Dias in Dias (ed) 47–50.

epilepsy cannot have the intention to commit a tort during or shortly after a seizure, intention will not be discussed.

Negligence may mean either a careless state of mind or careless conduct (a tort in itself).[24] These are not mutually exclusive but are relevant in different contexts. Negligence as a careless state of mind may signify blameworthy advertence to the consequences by a defendant who either decided to take the risk or ignored it, for example in the case of a motorist who falls asleep at the wheel.[25] Such a person will be guilty of wilful or gross negligence or recklessness. Negligence as careless conduct refers to behaviour of a person who, although innocent of an intention to bring about the result in question, has nevertheless failed to act up to the standard set by law, which is usually the objective test of the reasonable man. This is the sense in which the term is used in the tort of negligence.[26]

The reasonable man does not have the courage of Achilles, the wisdom of Ulysses or the strength of Hercules. "Reasonable" may be described as achieving a reasonably exact compliance with the required standard; on the other hand, it may be recognised that exact compliance is neither attainable nor desirable. Furthermore, the judge has to decide what "reasonable" means, and it is inevitable that, with respect to such an elastic term, different judges may take variant views about the same issue.[27] A subjective standard is used in relation to physical attributes and the objective test with regard to mental and emotional characteristics. The physically handicapped person is judged by the standard that can be expected from a reasonably prudent man suffering from his disability.[28] A person who has epilepsy will therefore be tested against a reasonably prudent man suffering from epilepsy. A compromise has to be struck between allowing the handicapped a degree of freedom in participating in the ordinary activities of life and safeguarding the general public against the risks created by that section of the community. Drivers are usually excused for losing control because of involuntary conduct, for example, spasms during an epileptic fit. Previous symptoms, however, ought to have put the driver on his guard.[29]

Should epilepsy be regarded as unsoundness of mind, this is not in itself a ground of immunity from liability in tort. The true question in each case is whether the defendant had the requisite state of mind for liability in the particular tort with which he is confronted.[30]

In *Morriss v Marsden*[31] the plaintiff had been attacked by the defendant who was an adult catatonic schizophrenic and a certifiable lunatic. He knew the nature and quality of his conduct, but his incapacity of reason arising from the disease of his mind was of so grave a character that he did not know what he was doing. The defendant was held liable for assault and battery as he was capable of forming the requisite intention. The court found that the M'Naghten rules do not

24 Dias in Dias (ed) 50; Heuston and Buckley 199; Percy *Charlesworth and Percy on negligence* (1990) 3.
25 Rogers 45; Dias in Dias (ed) 50; Percy 3–5.
26 Dias in Dias (ed) 52; Percy 5–11.
27 Rogers 47–48; Heuston and Buckley 227; Tyas, Pannett and Willett 52; Tiernan 27.
28 Fleming *The law of torts* (1987) 102.
29 Fleming 102; *Hill v Baxter* [1958] 1 QB 277, [1958] 1 All ER 193.
30 Rogers 678–679.
31 [1952] 1 All ER 925; also see Keeton *et al* 29; Carty in Dias (ed) 168.

necessarily provide the correct test for determining liability in tort. Stable J[32] stated:

> "I cannot think that, if a person of unsound mind converts my property under a delusion that he is entitled to do it or that it was not property at all, that affords a defence."

According to Rogers,[33] the tort of negligence probably creates the greatest difficulty in determining negligence. The standard of negligence is said to eliminate the individual characteristics of the defendant. This does not mean, for example, that a driver who suffers a sudden unexpected and disabling illness is liable for the damage he causes – even the reasonable man may have a heart attack. The unexpectedness of the illness is important, because if a person has reason to believe that he will have an epileptic attack he may be negligent in setting out to do anything in the first place. Should he unexpectedly suffer a seizure, he would not be liable.

It will be regarded as a defence if the illness rendered the person an automaton, for example, an epileptic fit or total unconsciousness, but a person will not avoid liability if his consciousness was merely impaired, owing to some malfunctioning of the brain, or if the person knew beforehand he may have an epileptic attack.[34]

It is a question of fact for the court to determine in each case whether the defendant was sufficiently self-possessed to be capable of taking reasonable care in the circumstances. In cases of negligence the applicable standard of care is, however, objective.[35]

4 THE NETHERLANDS

4 1 Introduction

Article 6:162(1) of the *Nieuw Burgerlijk Wetboek* (*NBW*) stipulates that when an unlawful deed is committed and damage is caused to another person owing to the fault of the wrongdoer, he will be liable.[36] There are four elements for personal liability, namely a wrongful act, accountability, damages and causation.[37] Only accountability is discussed here.

4 2 Accountability

A person is liable for the damage caused by his wrongful act if he is accountable for his conduct.[38] In terms of article 6:162(3) a person is accountable for a wrongful act if it is due to his fault (*schuld*), or in terms of a stipulation in the Act, or in accordance with the opinion of the community.[39]

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32 927; see also Rogers 679.
33 679.
34 Rogers 679; Carty in Dias (ed) 168; Percy 117–118 242 469; *Roberts v Ramsbottom* [1980] 1 WLR 823.
35 Tiernan 27; Percy 117; Tyas, Pannett and Willett 8 52; Heuston and Buckley 226.
36 Van Zeben *Boeken 3, 5, 6 en Titels 7 1, 7 7, 7 9, 7 14 Niew Burgerlijk Wetboek* (1990) 103.
37 Asser-Rutten-Hartkamp *Handleiding tot de beoefening van het Nederlands burgerlijk recht. Verbintenissenrecht* (1986) 26; Schut *Onrechtmatige daad volgens BW en NBW* (1985) 42.
38 Article 6:162(3) *NBW*; Asser-Rutten-Hartkamp 17.
39 Van Zeben 103.

Under fault is meant a "aan de dader toerekenbare onrechtmatige daad" (an unlawful act for which the wrongdoer is accountable) by art 6:162(3).[40]

For a person suffering from epilepsy, the requirement of fault is of the utmost importance, should he commit a delict during an epileptic seizure. The concept of fault has different meanings.[41] It is used when referring to culpability, carelessness or intention and is often used as a synonym for "wrongful act", which creates considerable confusion. Article 6:162 makes a distinction in principle between a wrongful act and fault. "Wrongful" refers to the act, and "fault" qualifies the wrongdoer.[42] However, in this sense fault means "verwijtbaarheid" (culpability) or "vermijbaarheid" (avoidability).[43]

Absolute liability is possible in terms of article 6:162(3): a wrongful act may be laid at the door of the wrongdoer if it is due to a cause for which he should be accountable in terms of a statute or according to the opinion of the community.[44] This is called "risk liability". There is no fault but the wrongdoer is liable.[45] Article 6:164 is one of the statutory provisions that may result in a person suffering from epilepsy incurring liability. In terms of this provision the fact that an act of a person older than 14 years was committed under the influence of a physical or mental deficiency, is no impediment to the imputation of the wrongful act to the wrongdoer.[46] A physical or mental deficiency (which may include epilepsy) will therefore not exempt a person from being liable.[47]

A person who falls ill behind the steering wheel of a vehicle (for instance, has an epileptic seizure) and causes an accident is liable in terms of article 6:165 despite his lack of guilt.[48] A wrongdoer may therefore be held accountable for a wrongful act despite the absence of blameworthiness. The reverse is also true: sometimes a wrongdoer is not liable despite the fact that he is blameworthy, for instance a child under 14 years of age.[49] Should a person under that age have an epileptic seizure and cause damage to another person, he will not be liable.

It seems unfair that a person should be liable for a delict committed during an episode of mental incapacity.

In *Rechtbank's-Dordrecht*,[50] which was decided before article 6:165 came into operation, a dentist had brought action against a patient for damage done to his dental chair during an epileptic attack suffered by the patient. The court dismissed the claim as the patient was unconscious owing to the epileptic seizure at the time when he damaged the chair, and therefore could not form any intention.

Should such a case be heard before a court today, the application of article 6:165 would result in the patient being held absolutely liable, for the following

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40 Jansen *Onrechtmatige daad: algemene bepalingen* (1986) 17.
41 Asser-Rutten-Hartkamp 57.
42 *Idem* 59–61; Van Maanen *Onrechtmatige daad* (1986) 201 204 205; Pitlo *Het systeem van het Nederlandse privaatrecht naar het Nieuwe Burgerlijk Wetboek* (1988) 398.
43 Van Maanen 201.
44 Asser-Rutten-Hartkamp 18; Van Maanen 201; Schut 110; Jansen 45.
45 Asser-Rutten-Hartkamp 63 67; Van Maanen 201; Schut 75.
46 Van Maanen 202; Asser-Rutten-Hartkamp 67–68; Pitlo 398; Jansen 75.
47 Van Maanen 202; Asser-Rutten-Hartkamp 68.
48 Pitlo 398; Asser-Rutten-Hartkamp 68.
49 Art 6:164 *NBW*; Asser-Rutten-Hartkamp 69; Pitlo 398; Drion and Bloembergen (1) (eds) 1-10b.
50 1984-03-14, NJ 1985, 63 VR 1986 no 46; also see Drion and Bloembergen (1) (eds) 1-284, V-74.

reason: article 6:162(3) states that a person will be liable for a wrongful act if it results from a course for which the defendant should be accountable in terms of a statute (in this case article 6:165).[51] Epilepsy will accordingly not exempt a person from liability.

It would therefore seem that a person suffering from epilepsy will be held liable by the courts for a wrongful act committed during an epileptic attack, in terms of article 6:165 of the *Nieuw Burgerlijk Wetboek*.

5 SOUTH AFRICA

5 1 Fault and accountability[52]

In South Africa, fault (*culpa* in a wide sense) is a general requirement for delictual liability. Fault in this sense may take two forms, namely intention (*dolus*) and negligence (*culpa* in the narrow sense), both of which in general refer to the legal blameworthiness or reprehensible state of mind or conduct of somebody who has acted wrongfully.[53]

Before it can be determined whether a person's wrongful act was legally blameworthy (in other words whether there is fault on his part) it must be established that he was accountable (had the capacity to have a blameworthy state of mind). This means that his mental ability, subjectively viewed, should have been of such a nature that fault (intention or negligence) may be imputed to him. Van der Walt states:[54]

> "The law requires that the person concerned must at least have had the mental and intellectual capacity to comprehend and avoid the danger in a particular situation. The defendant's state of mind or lack of due care can be accountable to him only if at the time of his deed he had this capacity; if he was *culpae et doli capax*. Accountability (or imputability) on the part of a defendant is therefore a prerequisite for the existence of fault on his part. The law thus requires at least a certain minimum capacity of moral responsibility."

A person is accountable (*culpae capax*) if he has the necessary mental ability to distinguish between right and wrong, and if he can act according to this insight.[55] If a person lacks accountability at the relevant time, there is no fault on his part. Accountability may therefore be seen as the basis of fault.[56]

If, because of a lack of mental capacity, a person cannot distinguish between right and wrong at a given moment, or if he can distinguish but cannot adapt his actions accordingly, he is *culpae incapax*.[57] This may be the result of a mental disease or illness, provocation or youth. Only these three grounds have been

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51 Van Zeben 103.

52 Epilepsy may, of course, also exclude the *act* as delictual element where the defence of automatism is applicable (see Neethling, Potgieter and Visser *Law of delict* (1994) 23–26 (hereinafter cited as Neethling *et al*).

53 Neethling *et al* 113; Van der Merwe and Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 109 *et seq*; Boberg *The law of delict* 1 (1984) 268 *et seq*; Van der Walt *Delict: Principles and cases* (1979) 60 *et seq*.

54 60; Neethling *et al* 114.

55 Neethling *et al* 114; Van der Merwe and Olivier 111; *Weber v Santam Insurance Co* 1983 1 SA 381 (A) 389 403 410.

56 Neethling *et al* 114; Van der Merwe and Olivier 111; Snyman *Strafreg* (1992) 167; Van der Walt 60; Boberg 271; De Wet and Swanepoel *Strafreg* (1985) 105.

57 Neethling *et al* 115; Van der Walt 61.

identified thusfar, but they may be expanded to include the behaviour of an epileptic at the time of a seizure.

Persons under the influence of liquor or other drugs (for instance the medication a person suffering from epilepsy takes, which may have a negative sedative effect on him) who commit delicts, may also be unaccountable.[58] The intake of drugs in itself may, however, under certain circumstances, be negligent; if, for example, a person suffering from epilepsy takes in medicine which he knows will make him sleepy and reduce his concentration, and then drives a motor vehicle, he will be accountable.[59]

5 2 Negligence

In the case of negligence, a person is blamed for a careless, thoughtless or imprudent attitude or act, because, by giving insufficient attention to his actions he has failed to adhere to the standard of care legally required of him. A person suffering from epilepsy may act negligently if he fails to take his medication, and thus provoke seizures during which he causes damage to another. He may, furthermore, be negligent if he knows that he may have a seizure while driving a vehicle, but nevertheless continues to drive, causing damage to other persons. The criterion adopted by our law to establish whether a person has acted carelessly and thus negligently, is the objective standard of the reasonable man, the *bonus paterfamilias*.[60]

Negligence is present if the reasonable man in the position of the person in question would have acted differently. The reasonable man would have acted differently if the wrongful causation of damage was reasonably foreseeable and preventable.[61]

A person is negligent and will incur delictual liability if:[62]

(a) a *diligens paterfamilias* in the position of the defendant–

(i) would have foreseen the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would have taken reasonable steps to guard against such occurrence; and

(b) the defendant has failed to take such steps.

Whether a *diligens* paterfamilias in the position of the person concerned would take any preventive steps at all and, if so, what steps would be reasonable, will always depend on the particular circumstances of each case.

The reasonable man is not an exceptionally gifted or developed person; nor is he an ignorant person, or someone who recklessly takes chances. The qualities of the reasonable man are found between these two extremes.[63] He has a certain minimum knowledge and mental capacity which enables him to appreciate the

58 Neethling *et al* 115–116; Van der Walt 61; *S v Chretien* 1981 1 SA 1097 (A); Visser "*Jefta v Williams* 1981 3 SA 678 (C)" 1981 *THRHR* 423.

59 Neethling *et al* 116.

60 *Idem* 122; Van der Walt 65; Boberg 274; Van der Merwe and Olivier 126.

61 Neethling *et al* 122; Van Rensburg *Normatiewe voorsienbaarheid as aanspreeklikheidsbegrensingsmaatstaf in die privaatreg* (1972) 23–24 (hereinafter cited as *Normatiewe voorsienbaarheid*).

62 *Kruger v Coetzee* 1966 2 SA 428 (A) 430.

63 *Herschel v Mrupe* 1954 3 SA 464 (A) 490; Neethling *et al* 124.

dangerous potential of certain actions.[64] In general, the law makes no provision for the fact that an individual wrongdoer may be intellectually retarded or mentally unstable. Everyone must conform to the objective standard of the reasonable man. A person suffering from a physical disability may therefore be negligent if he engages in an activity which the reasonable person in his position would not regard as safe. This could, for example, include a person suffering from epilepsy driving a motor car.[65] Our law should, like Anglo-American law, not completely ignore physical handicaps in determining the possible negligence of, for example, a person suffering from epilepsy. The question should be how a reasonable man with a particular handicap (for example, epilepsy) would have acted.

6 SUMMARY

In this article the question whether a person suffering epilepsy may be held accountable for a wrongful act committed during an epileptic seizure, was investigated.

In the USA, the tort of intentional interference with the person comprises any of the following: battery, assault, false imprisonment and infliction of mental distress. As this tort requires proof of intention if the defendant has assaulted someone, an action relying on this tort will obviously not be successful if instituted against a person suffering from epilepsy where the conduct complained of has occurred at the time of a seizure.

Under the tort of negligence, should a person suffering from epilepsy cause damage to another person during a seizure, he will not be regarded as having acted negligently; in *Theisen v Milwaukee Automobile Insurance Company*[66] the court recognised that a person is not negligent if he is unable to conform his conduct through no fault of his own. Should the person have known that he is likely to have a seizure, but still continues to act, he will, however, be liable for damages.

In England there are also a few specific torts, for instance trespass to the person, negligence, trespass to the land, nuisance, and so on. In the tort of trespass to the person, a blow inflicted in a state of epileptic automatism will not amount to battery. However, if the defendant intended to strike the plaintiff, it will not be a defence to say that, by reason of mental incapacity, he did not know that what he was doing was wrong.

The elements of the tort of negligence are: a legal duty to exercise care, the breach of that duty and consequential damage to the other party. The breach of the duty could have been caused by an epileptic seizure, causing the person suffering from epilepsy not being held liable. However, as in American law, should a person suffering from epilepsy have realised at the time of his action that he could have a seizure, and nevertheless persists with his act because he has decided to take the risk or ignored it, he will be held to have been negligent.

In the Netherlands, a person will be liable if he commits a wrongful act and causes damage to another person owing to his fault. Four elements must be

64 Van der Walt 69–70.
65 Van der Walt 70; Neethling *et al* 126.
66 (1962) Wis 2d 91, 118 NW 2d 140, 119 NW 393.

present for liability, namely a wrongful act, accountability, damage and causation.

Risk liability is recognised, namely that a person will be accountable for a wrongful act committed as a result of his fault or is due to a cause for which he should be accountable in terms of a statute or according to the attitudes of the community. A physical or mental shortcoming is not regarded as an impediment to liability. This means that a person suffering from epilepsy will not be exempted from liability should he commit a delict during an epileptic seizure – a situation which seems to be unfair.

In South Africa, before it can be determined whether a person's wrongful act was legally blameworthy, he must be accountable. He must have had the mental and intellectual capacity to distinguish between right and wrong and to act accordingly. The necessary mental faculties of a person can be absent owing to *inter alia* mental illness which could be accompanied by epilepsy. Epilepsy will therefore rightly exclude delictual liability. This position is preferable to that obtaining in the Netherlands, where liability based on risk is accepted.

I am not unmindful of the need for criminals to be detained and brought to justice, and of the duty of every police officer, and all others to whom police powers have been entrusted, to do so; nor am I insensitive to the inherent difficulties of such a hazardous task. We cannot pretend to be unaware, moreover, of the public outcry in recent times for better protection against crime, and for offenders to be brought to book speedily and effectively in order to receive their just deserts. On the other hand, however, we must bear in mind that s 49(2) invests arresting officers with the power of taking human lives even on a mere (albeit reasonably held) suspicion. Such an awesome power plainly needs to be exercised with great circumspection and strictly within the prescribed bounds. Section 49(2) should not, and indeed cannot, be regarded as a licence for the wanton killing of innocent people; nor can any attempt to extend its operation to cases not falling within its ambit be countenanced (per Hefer JA in *Government of the Republic of South Africa v Basdeo* 1996 1 SA 355 (A) 366).

AANTEKENINGE

LEGAL CONTROL OF OUTDOOR ADVERTISEMENTS

1 Introduction

Control of outdoor advertising in South Africa has traditionally been aimed at advertisements along roads, streets, highways, railroads and airports, such areas constituting prime outdoor advertising terrain. One of the most far-sighted, but – probably as a result of its very effect in preventing the worst problems – also least known environmental statutes is the Advertising on Roads and Ribbon Development Act 21 of 1940 (ARRDA). This Act came about mainly as a consequence of the Automobile Association's representations, as long ago as January 1937, to the provincial consultative committee, pleading for the introduction of legislation to prohibit the display of advertisements on or near public roads, where such signs may disfigure the environment. It is remarkable that during the second reading of the Bill of 20 March 1940, almost all the emphasis was on the need for environmental conservation; road safety was hardly mentioned, while it would probably today be regarded as a consideration of at least equal importance. It was emphasised that South Africa was in the fortunate position that it could learn from the unfortunate experience of other countries. It is no exaggeration to state that through this timely Act a potential environmental disaster – from an aesthetic perspective – was averted (see generally Rabie "The control of advertisements along roads" 1987 *SA Public Law* 215).

Until 1971, the ARRDA was the only legislation controlling the display of advertisements along roads outside urban areas. Since the promulgation of the National Roads Act 54 of 1971 (NRA), the control over advertisements on or along national roads has been effected in terms of this Act, along somewhat similar lines as in terms of the provisions of the ARRDA. Since 1971, the latter Act accordingly applies to public roads other than national roads. The authority which has been responsible for the administration of the latter Act has been the Administrator of the province concerned, who in turn delegated the responsibility to the applicable road authority. Appropriate provisions of the ARRDA have formally been assigned to the provinces under section 235(8) of the Constitution (Proclamation 23 of 1995-03-31). The "Administrator" is now defined as the competent authority to whom the administration of the Act has under the above provision been assigned in the particular province (s 1 and Proclamation 23). The National Transport Commission, and its successor, the South African Roads Board, (acting through the Department of Transport) have been the bodies which administer the NRA. Advertisements within urban areas have been controlled mainly by the local authority in question, but also to some extent by the Department of Transport (in the case of national roads within urban areas).

Total expenditure on outdoor advertising is growing at an unprecedented rate and is estimated by the Outdoor Advertising Association of South Africa (OAASA) at R100 million per year, amounting to some four per cent of the advertising cake. There has been growing pressure from the advertising industry for a reassessment of the above legislation which dates back more than 50 years. During February 1992 representations were made by the OAASA to the Minister of Transport for the relaxation of the prohibition on advertisements along certain roads. However, the subsequent draft amendment of the legislation concerned, which envisaged such relaxation, encountered so much opposition in Parliament that it failed. Also, the Council for the Environment advised the Minister of Environmental Affairs and Tourism to resist the liberalisation of the legislation concerned. A document was produced which set out the Council's stand on the matter (*Outdoor advertising* 1994).

Nevertheless, pressure for the relaxation of strict controls on outdoor advertising continued to be exerted by the respective interest groups, with the result that a Ministerial Committee on Guidance and Tourism Signs and Advertisements on the Road Network was established by the Department of Transport during 1992. A subcommittee on advertising was also established. The principal aim of the subcommittee was to produce a national code of practice to guide outdoor advertising. However, at the end of 1993, the subcommittee reported that owing to a lack of sufficient scientific information and to substantial disagreement among its members, it could not make satisfactory progress. The upshot was that the Departments of Transport and of Environmental Affairs and Tourism agreed to refer the project of producing a code of practice to an independent consultant. The consultant, Professor Willem van Riet of the Department of Landscape Architecture, University of Pretoria, assisted by a multi-disciplinary project team, a steering committee and a specialist panel, eventually submitted a draft National Code of Practice on Outdoor Advertising (NCOP) during September 1995. The applicable legislation will have to be adapted if the principles of the NCOP are to be enforceable. The purpose of this note is to discuss the applicable legislation, to highlight some problems and to explore some potential solutions, mindful of a possible implementation of the proposed NCOP's underlying principles.

2 The Advertising on Roads and Ribbon Development Act 21 of 1940

2 1 Prohibition

The ARRDA seeks to achieve its aim through a provision which prohibits anyone from displaying an advertisement which is visible from a public road (s 2(1)), that is, any road declared a public road, but not including a national road (s 1). This provision has a wide compass, since "advertisement" is defined in a comprehensive fashion as any visible representation of a word, name, letter, figure or object or of an abbreviation of a word or name, or of any sign or symbol; or any light which is not intended solely for illumination or as a warning against danger (s 1). Moreover, the phrase, "visible from a public road", rather than the stipulation of a fixed distance, ensures that the very purpose of anyone seeking to display an advertisement is frustrated.

2 2 Criminal sanction

The prohibition is supported by a criminal sanction in that contravention constitutes an offence (s 15). Given adequate staff to administer the Act, combined

with the necessary determination, detection of offenders and proof of contraventions should not be too difficult, since advertisements are fixed structures and are displayed with the very purpose of being visible and of being attracting attention. Enforcement of the criminal sanction is facilitated further by a number of presumptions (s 5).

2 3 Administrative sanction

Of greater significance, nevertheless, is the further potentially effective administrative sanction which has been stipulated, namely that when an advertisement is, in certain circumstances, displayed in contravention of the prohibition, the controlling authority concerned may, by written notice, direct the offender to remove it or to effect the required alterations as may be prescribed in the notice (s 4(1)). Failure to comply with the notice, apart from amounting to a further offence (s 15), entitles the authority in question to remove the advertisement or to effect the alterations (s 4(2)), and to recover the expenses incurred in this process from the person upon whom the notice was served (s 4(3)).

Although the above provisions are potentially very effective, control bodies seem to prefer reliance upon a court interdict. In the interests of transparency and participatory democracy, such bodies do not wish to rely upon a sanction such as the administrative notice procedure, which appears to be authoritarian. A court of law would be a more objective arbiter and its order can be enforced through the judicial system.

2 4 Authorisation

The above-mentioned prohibition, however, is not absolute. In the first place, advertisements may be displayed if this is done in accordance with the written permission of the controlling authority concerned (s 2(1)). A controlling authority may decide according to its own discretion whether to grant or refuse such permission; if it grants permission, it may prescribe the specifications to which the advertisement in question must conform, the period during which the permission shall be effective, the manner, place and circumstances in which and the conditions on which the advertisement may be displayed. Finally, the controlling authority may at any time alter or revoke any such permission (s 3).

2 5 Exceptions

Secondly, the prohibition is subject to the proviso that it is not applicable to the display of certain specified advertisements of rather narrowly restricted categories, although such display is subject to specifications which may be – but have not yet been – prescribed in regulations authorised by virtue of the Act (s 14(1)(b)). The proviso relates to certain business advertisements on buildings (s 2(1)(a)), certain informational advertisements on gates (s 2(1)(d)) and any advertisement outside a public road which merely indicates the name of the farm or the nature of the road or that it leads to a particular place (cf *S v Muller* 1967 2 SA 21 (O)), or that a particular act is prohibited or permitted (s 2(1)(c)). Another provision – which has for all practical purposes become obsolete – deals with advertisements which had already been displayed at the commencement of the Act (s 2(4)).

The competent authority of the province concerned may, by proclamation in the *Provincial Gazette*, augment the categories of advertisements falling within the proviso, by defining any further class of advertisement. Any advertisement

falling within this class and complying with the requisite prescriptions, would then be deemed to be an advertisement mentioned in the proviso concerned (s 2(3)).

In the third instance, the Act makes provision for certain exceptions which by and large have the same status as exemptions contained in the above-mentioned proviso, save that these exceptions are not subject to the application of the administrative sanction (provided for in s 4) nor to the provisions of regulations that may be enacted (compare s 2(2) and 14(1)(b)). The exceptions comprise any advertisement on a vehicle which is not used mainly to display that advertisement (s 6(a)), any advertisement which is displayed in an urban area (s 6(b)), any advertisement which is displayed in the performance of a person's duties in the service of the state or in the construction or maintenance of roads (s 6(c)), certain advertisements displayed on a public road, which merely indicate that a road or path leading out of the public road, is destined for a certain use or leads to a particular place or to land owned or occupied by a particular person, or which convey merely a warning (s 6(d)) and certain advertisements displayed on windmills, or on vehicles, implements or machinery used in connection with farming (s 6(e)).

2 6 Application in urban areas

In terms of section 6(b), the ARRDA does not apply to urban areas. An "urban area" is defined as the area consisting of erven or lots, with or without public open spaces, excluding commonage land and land which consists of any other open space which has not been developed or reserved for public purposes, and of the streets bounded by erven or lots or such public open spaces in a city, borough, town, village or township which is under the jurisdiction of a city council, municipal council, village council, town board, village management board, local board, local administration and health board, or health committee, and includes such an area as aforesaid under the jurisdiction of any other local authority which the Premier concerned has, by notice in the *Provincial Gazette*, declared to be an urban area for the purposes of the Act (s 1). This definition leaves some room for doubt about the exact area covered by the term "urban area", especially on the outskirts of cities or towns. For instance, it is uncertain what the size of the erven or lots should be and this has particular relevance for small holdings surrounding cities or towns. Where the Act does not apply, control is exercised by the local authority concerned in terms of the respective municipal ordinances.

3 The National Roads Act in relation to the Advertising on Roads and Ribbon Development Act

The NRA constitutes the legislation in terms of which advertisements on, or visible from, national roads have been controlled since 1971. The relevant provisions of this Act are similar to those contained in the ARRDA.

3 1 Authorisation and exceptions

The most notable difference between the two Acts is that no provision is made in the NRA for the display of an advertisement on, or visible from, a national road to be authorised by the permission of the authority in question. The prohibition on advertisements, however, is subject to a number of exceptions, comparable to those applicable in respect of public roads other than national roads, by virtue of the ARRDA.

One of the exceptions, which does not apply to public roads other than national roads, seems to legalise the display of advertisements which have been authorised by or under regulations (s 14(2)(f)). The provision (s 20) dealing with regulations, none of which has yet been issued (GN R871 of 1994-05-06 is not relevant), however, contains no explicit reference to such authorisation. The only possibility is the provision which authorises the minister, on the recommendation of the South African Roads Board, to make regulations in relation to anything which in terms of any provision of the Act may be prescribed or determined by regulation (s 20(1)(d)). It is doubtful whether "prescribed or determined" would encompass the concept of authorisation.

3 2 Application in urban areas

Whereas the display of advertisements in urban areas is totally exempt from the prohibition contained in the ARRDA (s 6(b)), the NRA does to some extent relate to advertisements in urban areas in that no person may display any advertisement visible from a national road on any land adjoining a national road in an urban area or separated by a street from a national road in an urban area (s 14(1)(c)). The concept of "urban area" is defined in section 1 and differs somewhat from the definition contained in the ARRDA.

3 3 Punishment

Both Acts rely upon the criminal sanction to buttress the prohibition on advertisements, although there is a marked discrepancy between the respective punishments. While the punishment prescribed by the ARRDA is a mild maximum fine of R200 or imprisonment for a period not exceeding 6 months, or both such fine and imprisonment (s 15(1)), that of the NRA is a maximum fine of R4 000 or imprisonment for a period not exceeding one year, or both such fine and imprisonment (s 22).

3 4 Administrative notice procedure

Both Acts authorise the administrative notice procedure and accompanying sanctions. However, only the ARRDA renders a failure to comply with the administrative notice in question an offence. On the other hand, only the NRA empowers the controlling authority *mero motu* (that is without first following the prescribed notice procedure) to remove an advertisement displayed on a national road contrary to the Act's provisions (s 14(4)(b)).

3 5 State bound

Even though both the ARRDA (s 18) and the NRA (s 28) bind the state, different railway administration authorities that have been in existence over the years have traditionally allowed the erection of huge advertisements on land under their control (particularly in urban areas), which advertisements are deliberately placed to be visible from adjoining roads. These advertisements resemble the American-type of billboards and, in fact, constitute the single most objectionable aesthetic disfigurement of some urban environments along roads.

Neither of the above-mentioned Acts contains any exception to its prohibition on advertisements, in favour of the railway administration. Both Acts, however, exempt the South African Rail Commuter Corporation Ltd from their respective prohibitions on the erection of structures in building restriction areas along certain roads (s 9(1)(b) and 9A(1)(ii) of the ARRDA and s 13(2)(b) of the NRA). The concept "structure" is not defined in either Act but it may be argued that

advertisements are necessarily fixed upon some or other structure and would therefore be covered by the above-mentioned provisions. On the other hand, it does seem strange that the provisions explicitly dealing with advertisements do not include the railway administration within their respective exemptions. This leaves a considerable degree of doubt whether the legislature in fact intended that the railway administration, relying upon the exemptions in respect of the prohibitions on the erection of structures, can justify the utilisation of land under its control for advertising, in contravention of the respective prohibitions on advertisements visible from certain roads.

To be sure, the Legal Succession to the South African Transport Services Act 9 of 1989 authorises Transnet to develop, to cause to be developed, to use and to let its immovable property for any purpose, including the construction and exploitation of buildings and structures for commercial purposes, notwithstanding the fact that the immovable property concerned is either not zoned or is zoned or intended for other purposes in terms of an applicable township construction or development scheme, guide plan or statutory provision (s 13(1)). Although the "construction and exploitation of buildings and structures for commercial purposes" would seem to encompass their use for advertising, it is doubtful whether this provision is intended to override any prohibition to the contrary, such as those contained in the ARRDA, the NRA and in municipal by-laws. It rather seems that the provision is aimed at circumventing zoning and other similar provisions. Even if it were applicable, the above provision is subject to an agreement having been reached with the local authority concerned (s 13(2)(a)) or with the administrator of the province concerned (s 13(2)(b)). In any case, the issue has become academic, since the above provision contains a sunset clause, to the effect that the authorisation in question expired on 6 October 1994 (that is five years after the date on which Transnet became the successor to the South African Transport Services).

The conclusion accordingly is that the railway administration's purported exemption from the relevant prohibitions on advertising along certain roads seems to rest on a somewhat uncertain and shaky basis. On the other hand, it should be remembered that the ARRDA does not apply, while the NRA applies only partly to urban areas, where most of the advertisements on the property of the railway administration seem to be displayed. Nevertheless, as will be shown, local by-laws which control advertisements along streets and in urban areas do not exempt the railway administration.

3 6 Recently proposed amendments

During the 1992 parliamentary session, two different attempts to amend the NRA and the ARRDA respectively, failed. On the one hand, it was proposed to authorise the South African Roads Board to permit advertisements along national roads. This would have represented a more liberal approach to accommodating advertisements, but owing to severe criticism, the proposed amendment was withdrawn.

On the other hand, a draft amendment – representing a stricter approach to advertising along roads – was submitted (Notice 797 of 1992-09-04). It was to have extended the ARRDA's application to urban areas, that is, to advertisements displayed on land adjacent to a freeway (as defined in the Road Traffic Act 29 of 1989) while such advertisements are visible from such road. This attempt, likewise, failed.

4 Local authorities and urban areas

Reference has been made to the fact that the ARRDA does not apply to urban areas (s 6(b)) and that the NRA has only limited application in such areas (s 14(1)(c)). Where this legislation does not apply, control is exercised by the local authority concerned in terms of the respective provincial municipal control statutes.

The Cape Municipal Ordinance 20 of 1974 (s 188(5)), for example, authorises the making of by-laws in respect of the control of advertising, including the use, distribution, fixing, size, construction, nature, shape and appearance of any appliance, article, contrivance, device, document, poster, handbill, sign, structure, vehicle or other thing, whether movable or immovable, whereby any advertisement or notice of any kind is publicly displayed or given. It would accordingly depend upon each local authority what its policy in respect of advertising along streets or roads under its control is going to be. In order to stimulate some degree of uniformity, standard (or model) by-laws are sometimes promulgated, which by-laws may be adopted by local authorities: for instance, the Cape standard regulations relating to advertising signs and the disfigurement of the front or frontage of streets (PN 593 of 1958-09-26) and the Cape standard by-law relating to streets (PN 562 of 1987-10-02). Control is effected, like that in terms of the ARRDA, through a criminal prohibition (reg 2 of PN 593) in respect of which certain exceptions apply (reg 22) and a provision authorising official permission to display advertisements ("signs") (reg 3). In addition to the criminal sanction, provision is also made for use of the administrative notice procedure (reg 5(8)).

Although the ARRDA does not confer any jurisdiction upon provincial administrations in respect of urban areas, some legislation on roads does in fact apply to urban areas and grants the provincial administration concerned and some local authorities powers in respect of advertisements along certain roads in cities and towns. Thus the Cape Roads Ordinance 19 of 1976 prohibits any person to erect or install or to cause or permit to be erected or installed on land owned by him or under his management or control any structure the whole or any portion of which falls within the statutory width, or five metres from the boundary of the statutory width of certain public roads (proclaimed as such in terms of s 3), except with the permission of and in accordance with plans, standards and specifications approved by the road authority (defined in s 2(xxxii): s 17(1)). "Structure" is defined as any structure, erection or thing whatsoever . . . whether permanent or temporary, and irrespective of its nature or size (s 2(xxxvi)). This term would seem to encompass advertisements along roads, since such advertisements are invariably displayed on structures. Sanctions similar to those contained in the ARRDA are contained in the Cape Roads Ordinance (s 17(3) and (5)).

5 The proposed national code of practice on outdoor advertising

The draft NCOP, referred to above (par 1), is based on a classification of South Africa's landscapes and outdoor advertising media, and the identification of different areas of control. These areas constitute the functional base of the NCOP: Outdoor advertising in areas of maximum control (natural, rural and aesthetically significant urban areas) should be restricted to a minimum and only composite type signs conveying a message essential to the travelling public would be permissible. On the other hand, most types of outdoor advertising

should be permitted in areas of partial and minimum control (commercialised sections of the urban environment). Guidelines have been developed for each sign type in each landscape and according to each area of control. Finally, certain steps which are deemed necessary for the implementation of the NCOP, have been proposed. The first step – and the point of departure – would be to adapt the currently applicable legislation.

The findings and proposals of the NCOP are based on an extensive research process, the results of which have been appended to the NCOP-report. The draft NCOP was published in September 1995 and has been distributed for commentary.

6 Problems with the current situation

6 1 Fragmentation of legislation and control bodies

A feature of current legislation on the control over outdoor advertising – and indeed of environmental legislation generally – is its fragmented nature. Such fragmentation is also reflected in the different control authorities which administer the legislation in question. Legislation, and control authorities, are encountered at national, provincial and local level; different authorities administer different legislation. Moreover, a wide variety of concerns are involved in outdoor advertising, such as environmental aesthetics, road safety, commercial enterprise, tourism, the need for information and land ownership. The aims of the proposed NCOP seem to be justified: there is a need for the consolidation of legislation and for the introduction of standardised assessment criteria and the application of uniform control measures, depending upon the appropriate classification of the area involved.

6 2 Discrepancies between the different control statutes

Related to the above remarks is the observation that three different control dispensations prevail in respect of outdoor advertisements. At national and provincial level, such control is exercised in terms of uniform statutes and is related to advertisements along roads, while the control at local level is somewhat more diffuse, although still basically related to advertisements along streets and is effected by virtue of a variety of municipal by-laws.

The control mechanism at national level is a prohibition to which there are certain exceptions. There is only one control body, the South African Roads Board. At provincial level one also encounters a prohibition with exceptions, but, in addition, provision is made for the display of advertisements in accordance with the permission of the control authority. (It is noteworthy that a recent attempt to introduce an authorisation for permitted advertisements as regards national roads, resulted in failure.) Different control authorities exist in different provinces. Control at local government level also relies in principle upon a criminal prohibition, with exceptions and a provision for official permission for the display of advertisements. A plethora of local authorities administer the different by-laws, although some degree of uniformity has been achieved by means of model or standard by-laws.

A wide divergence exists between the different exceptions and exemptions to the respective prohibitions on the display of advertisements, at national, provincial and local level. Moreover, the exceptions in respect of the ARRDA are inelegantly structured in that they are encountered in two different and seemingly unrelated provisions (proviso to s 2(1) and s 6).

Finally, a substantial discrepancy exists between the degree of punishment provided for in the different statutes and by-laws.

6 3 Wide discretionary powers

A major problem is that some of the legislation which confers discretionary powers in respect of the granting of permission to display advertisements, that is, the ARRDA, leaves the decision entirely to the controlling authority's discretion (s 3). The only potential and rather limited restriction upon the authority's discretion is that when it decides to grant permission, the specifications to which the advertisement in question must conform, the manner in which, the place where and the material on which or by means of which it is to be displayed, may be prescribed by the Premier of the province concerned (in terms of s 14(1)(b)). In any case, no such regulations have been promulgated. Much the same applies to the minister's decision in effect to exempt a class of advertisement from the prohibition (s 2(3)).

It stands to the credit of the provincial administrations as the controlling authority that the Act has, during its entire history of almost half a century, been applied strictly in accordance with the declared aims of its proponents: applications for permission to display advertisements along roads have generally been refused. To be sure, the controlling authorities have devised their own guidelines to assist them – and potential applicants – in deciding whether or not to grant permission for the display of advertisements. Such guidelines, however, are not enforceable. It must be remembered, furthermore, that with a change in the policy of the controlling authority, which may occur, for instance, if sufficient commercial or other pressure is brought to bear upon the authority in question, the present situation may easily be reversed.

Some local by-laws, such as the Cape standard regulations relating to advertising signs and the disfigurement of the front or frontages of streets (P 593 of 1958-09-26), require applications for permission to display advertisements ("signs") to comply with certain forms and requirements relating to plans (reg 3(1)). The local authority is obliged to indicate to the applicant the non-compliance, if any, of the form and plans with the above requirements (reg 3(3)). However, the local authority has no further discretion in the matter because it is obliged to approve applications which conform with the above requirements (reg 3(4)).

6 4 Urban areas

The scope of application of provincial Roads Ordinances to urban areas, the different definitions of "urban areas" in the ARRDA and the NRA, and the uncertainty relating to the outer boundaries of urban areas, constitute obstacles to effective control.

6 5 State bound

The fact that the railway administration has for many years with impunity failed to abide by the provisions of the governing legislation, makes a mockery of the provisions of both the ARRDA and the NRA to the effect that the state is bound by the statutes concerned.

6 6 The present position in the light of the Constitution

The Constitution of the Republic of South Africa Act 200 of 1993 provides for an entrenched bill of rights (chapter 3). The bill of rights binds all legislative and

executive organs of state at all levels of government (s 7(1)). The bill entrenches certain fundamental rights. It is, however, important to note that these rights are not absolute – they can be restricted or limited in various ways, but subject to important conditions (laid down in limitation clauses). The most important limitation clause is that in section 33(1) which provides that all the rights entrenched in the bill may be limited by law of general application, provided that such limitation is reasonable and justifiable in an open and democratic society based on freedom and equality. Such a limitation may furthermore not negate the essential content of the right in question. With regard to the limitation of certain rights, an additional requirement of necessity is laid down. A few other "special" limitation clauses also appear in the bill of rights (see eg s 14(2) and (3), 26(2) and 28(2) and (3)). A less stringent test is laid down with respect to these limitations. The state, or the party relying on government action, can decide whether to rely on the general limitation clause (s 33(1)) or a special limitation clause. In both these instances, the state should bear the onus of proving that the limitation is justifiable (see De Waal "A comparative analysis of the provisions of German origin in the interim bill of rights" 1995 *SAJHR* 26).

The currently prevailing law relating to outdoor advertisements may potentially infringe the following rights: (a) freedom of speech (commercial speech) – section 15(1); (b) free economic activity – section 26(1); (c) equality – section 8(1) and (2); and (d) property – section 28(1). The position in terms of the Working Draft of the final Constitution is, in essence, the same.

6 6 1 Freedom of speech

Section 15(1) of the interim Constitution provides that every person shall have the right to freedom of speech and expression, which includes freedom of the press and other media, and the freedom of artistic creativity and research.

Advertising is known under the American bill of rights and the Canadian Charter of Rights and Freedoms as "commercial speech" and falls under the scope of the First Amendment (see *Bigelow v Virginia* (1975) 421 US 809, 44 L Ed 2d 600, 95 S Ct 2222; *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Inc* (1976) 425 US 748, 48 L Ed 2d 346, 96 S Ct 1817) and section 2(b) (see *Ford v Quebec (Attorney-General)* (1988) 54 DLR (4th) 577 (SCC); *Irwin Toy Ltd v Quebec (Attorney-General)* (1989) 58 DLR (4th) 577 (SCC); *RJR-MacDonald Inc v Canada (Attorney-General)* (1995) 100 CCC 3d 449) respectively. This approach will most probably be followed in South Africa (Van der Westhuizen "Freedom of expression" in Van Wyk *et al Rights and constitutionalism: The new South African legal order* (1994) 264 291). Legislation which prohibits advertising along roads (even though exceptions are allowed) thus clearly infringes the right of advertisers to freedom of speech, although, as has been intimated above and will be shown below, this right may be limited.

6 6 2 Free economic activity

Advertising may also be regarded as an economic activity and its prohibition can thus be said to infringe this right (see Kommers *The constitutional jurisprudence of the Federal Republic of Germany* (1989) 386). This right may be limited either in terms of the general limitation clause or for the purposes set out in section 26(2). However, environmental conservation and road safety are not specifically included in these purposes and it therefore appears that the limitation cannot be brought within the scope of section 26(2).

6 6 3 Equality

As the provision in the ARRDA is presently phrased, it allows for a completely subjective exercise of discretionary powers, because no guidelines in this regard are laid down in the Act itself. The Constitutional Court has already indicated that rules which are inherently arbitrary or which must lead to arbitrary application, would be unconstitutional (*S v Makwanyane* 1995 6 BCLR 665 (CC) 726A–C).

6 6 4 Property

The Act imposes limitations upon the way in which property owners may utilise their land to their own benefit which implies that the right in property protected in section 28(1) is sought to be restricted. Subsections (2) and (3) allow for specific limitations on rights in property. A distinction is made between deprivation of rights (subs (2)) and expropriation (subs (3)). It is generally accepted that deprivation refers to the regulation of the utilisation of property (for which no compensation is payable) whereas expropriation refers to the case where rights in property are expropriated for public purposes against the payment of proper compensation (see Cachalia *et al Fundamental rights in the new Constitution* (1994) 93–95; Van der Walt "Notes on the interpretation of the property clause in the new Constitution" 1994 *THRHR* 198–199).

The following may be regarded as a deprivation of rights in property: (a) city and town planning and zoning; (b) nature conservation legislation; (c) rent control legislation; and (d) health regulations (Cachalia *et al* 94). The advertising control laws in question may therefore be regarded as a deprivation of rights in property which would generally be regarded as justifiable as long as they are aimed at a constitutionally permissible purpose and comply with the requirements of proportionality as explained in the next paragraph.

6 6 5 Justifiability

As has been mentioned, a limitation of fundamental rights may be justified either under special limitation clauses or under the general limitation clause (s 33(1)). The provisions of this latter clause are now discussed in greater detail.

6 6 5 1 A limitation by law

The "law" limiting or authorising a limitation of fundamental rights, must meet the requirements of accessibility and foreseeability before it will qualify as "law" for purposes of the Constitution (*African National Congress (Border Branch) v Chairman, Council of State, Ciskei* 1994 1 BCLR 145 (Ck) 160).

This means that Parliament has to make the fundamental decisions; it has to indicate the framework and objectives of the statutory order to be enacted. Only the regulation of questions of detail within the framework of the legislative programme may be delegated to the executive (see De Ville "Interpretation of the general limitation clause" 1994 *SA Public Law* 294). Provisions in a statute which grant a discretionary power to an administrative authority without laying down clear guidelines as to how and under which circumstances this power is to be exercised, will be declared null and void.

It is at this point that sections 2 and 3 of the ARRDA as well as section 14(2)(f) of the NRA fail the test. They do not comply with the requirement of foreseeability, as it is impossible to ascertain from the Acts themselves how the discretionary powers granted in the Acts are to be exercised.

6 6 5 2 Law of general application

Section 33(1) furthermore requires that the law limiting a fundamental right must apply generally and not to an individual case. Legislation must, in other words, refer to an unlimited number of concrete instances and be aimed at an unlimited number of addressees (De Ville 1994 *SA Public Law* 298; see also *Matinkinca v The Council of State of the Government of the Republic of Ciskei* 1994 4 SA 472 (Ck)). The Acts in question clearly comply with this requirement.

6 6 5 3 Reasonable and justifiable in an open and democratic society based on freedom and equality

It has been held that the application of this argument implies a proportionality test (*S v Makwanyane supra* 708B–G; *S v Bhulwana; S v Gwadiso* 1995 12 BCLR 1579 (CC) 1585G–1586C; *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 1 BCLR 1 (CC) 76B–F). The question whether the provisions comply with the requirements of proportionality must be answered with reference to the following considerations:

(a) What is the purpose the Act sets out to achieve – is it a constitutionally permissible objective? The protection of the natural beauty of the environment is clearly a constitutionally permissible objective in the light of the importance attached to the environment in section 29 of the Constitution. The second objective, namely to ensure road safety, can also be said to be a constitutionally permissible objective because of the importance accorded to the protection of the individual in the bill of rights in particular (cf s 9 (life), 10 (human dignity) and 11 (security of the person)).

(b) Is the law in question suitable to achieve the said purpose? Is it rational? The provisions in question may be said to be suitable to achieve the aim of protecting the environment. By preventing the erection of distracting advertisements along public roads it may also be said to be suitable to achieve road safety.

(c) Is it necessary in the sense that no lesser form of interference is available? The question here is whether other alternatives exist to achieve the above-mentioned aims. With regard to each of the fundamental rights that are limited, it has to be shown that no lesser form of infringement is possible. Some leeway is, however, usually given to the legislature in this regard (De Ville 1994 *SA Public Law* 304–305).

(d) Is it proportional in the sense that the severity of the infringement of the rights of the individual is properly balanced with the purposes the measure seeks to achieve? Is there a proper balancing of the different interests at stake? With regard to each of the fundamental rights, the relevant interests must be weighed up against one another.

6 6 5 4 Also necessary

Where the limitation of the right to freedom of expression relates to free and fair political activity, a "strict" necessity requirement will be applied. In other words, a limitation upon political expression will be permissible only in extraordinary circumstances (De Ville 1994 *SA Public Law* 307–308). A distinction must therefore be made between political advertising and purely commercial advertising. The restriction of the former will be subject to a more rigorous test.

6 6 5 5 The essential content of a fundamental right

A great deal of uncertainty exists about the interpretation of this phrase. It can, however, in the present context be accepted that the essential content of the right to

(a) freedom of expression is negated when a person is totally barred from advertising a product;

(b) free economic activity is negated when a person is totally debarred from trading or doing business;

(c) equality is negated when a person is completely debarred from competing on equal terms with other persons; and

(d) acquire and hold rights in property is negated when a person is totally debarred from acquiring and holding rights in property.

It is submitted that the laws in question do not negate the essential content of any of the fundamental rights referred to above.

6 6 6 Conclusion

The fact that the Acts do not comply with the requirement of foreseeability renders them unconstitutional, irrespective of the fact that they may comply with the other requirements in the Constitution. The only way in which this problem can be resolved, is to amend the Acts and to lay down clear guidelines as to how the rights in question may be limited.

7 Towards some solutions

7 1 Rationalisation of legislation

The basic provisions of control legislation may conceivably be contained in any of the following types of statute:

7 1 1 A general Transportation Act

Advertising along roads would then form only a small part of a comprehensive statute on transportation generally.

7 1 2 Roads Act

The NRA is an example of roads legislation which contains, *inter alia*, provisions governing advertisements along roads. As far as roads other than national roads are concerned, such provisions could conceivably have been contained in the different provincial Roads Ordinances.

7 1 3 Advertising along Roads Act

Legislation aimed at the control of advertising along roads is exemplified by the ARRDA. (This Act, however, does not deal exclusively with advertisements.)

7 1 4 Consolidated Advertising along Roads Act

It is conceivable that the provisions of the NRA and the ARRDA dealing with advertisements can be consolidated into one single statute which deals either with

- all roads (that is a comprehensive Roads Act encompassing the National Roads Act and the different provincial Roads Ordinances);
- or exclusively with advertising along roads only.

The subject of roads, according to the Constitution (schedule 6), falls within the concurrent legislative competence of the provinces and of Parliament.

The powers of Parliament to enact legislation with regard to advertising along roads is therefore not limited by the Constitution. The same may be said for the powers of the executive to enact regulations, should the matter with which such regulations deal, fall within the requirements of section 126(3)(a)–(e) of the Constitution.

If the provinces, however, pass laws which conflict with an Act of Parliament on advertising along roads, the question will arise which law will prevail. The general rule is that a provincial law will prevail (s 126(3)). However, if the Act of Parliament lays down uniform norms and standards for advertising along roads and if the Act is necessary for the protection of the environment, that Act would prevail in cases of conflict in terms of section 126(3)(b) and (d).

A further question is: what will happen if regulations (passed in terms of an Act of Parliament) conflict with an Act of a provincial legislature? The outcome will naturally depend upon the provisions of the Act of Parliament, the regulations and the provincial law in question. If the Act of Parliament authorises an executive authority to make laws setting "uniform norms or standards that apply generally throughout the Republic" (s 126(3)(b)), or regulations necessary for the protection of the environment (s 126(3)(d)), it is submitted that regulations providing for the above will prevail where they are in conflict with a provincial law. Where the regulations, however, go further than is required to set uniform norms or standards or further than is necessary for the protection of the environment and such a regulation conflicts with a provincial law, it is submitted that the provincial law will prevail.

In section 126(3) of the Constitution the words *prevail over* are used, which clearly indicates that the provincial law or Act of Parliament (depending on which one prevails in terms of section 126(3)) would be rendered inoperative to the extent of the inconsistency. A consequence of this is that the provincial law would be rendered inoperative only as long as the inconsistent Act of Parliament is in force. If the Act of Parliament is repealed, the provincial law will automatically revive, without any re-enactment by a provincial legislature.

In any case, there seems to be no indication that the current dichotomy between national and provincial roads will disappear. A problem with the containment of advertising control in roads legislation is that it would not relate to all outdoor advertising and would not be ideally applicable to urban areas.

7 1 5 Outdoor Advertising Act

Yet another strategy would be to include the provisions governing advertising along roads in a statute which comprehensively addresses outdoor advertising. It is unlikely that there will be agreement about extending the application of the provisions of a consolidated Advertising along Roads Act to include urban areas. It is more likely that advertisements in urban areas may be subjected to a general Outdoor Advertising Act. Moreover, outdoor advertising does not seem to be included in the list of subjects which are reserved for the provinces.

7 1 6 Environment Conservation Act

Although advertising along roads has an impact on road safety and may therefore be properly addressed in legislation dealing with roads, its impact on the environment – not only along roads – is at least equally severe. It is therefore a

subject which may justifiably qualify for inclusion in environmental legislation. The provisions of the Environment Conservation Act 73 of 1989 governing the declaration and enforcement of environmental policy (s 2 and 3) come to mind. These provisions, which will be discussed later (par 7 4 7), cannot, however, by themselves constitute the sole basis for control. Reliance will still have to be placed upon primary control mechanisms, such as those of the ARRDA. The declaration of a comprehensive national policy will nevertheless go a long way towards providing an enforceable set of guidelines to focus and structure primary controls.

7 2 Individual provisions of new legislation

Should fresh legislation be enacted to control outdoor advertising in accordance with the NCOP, it may be considered to include some of the following provisions:

7 2 1 Declaration of different types of outdoor advertising control areas

A provision which would authorise the controlling authority by notice in the *Government Gazette* to declare any area defined by it to be a specific type of outdoor advertising control area, that is, a natural area, a rural area or an urban area.

7 2 2 Prohibition on display of advertisements without permission

A provision, like that of the ARRDA (s 2), in terms of which the display of any outdoor advertisement is prohibited, unless displayed in accordance with the written permission of the controlling authority concerned. The concept of "outdoor advertisement" will have to be defined. Should it be deemed necessary to except certain types of outdoor advertisements from the above prohibition, such exceptions may be formulated as exceptions either to the prohibition or to the definition of "outdoor advertisement".

7 2 3 Principles

A provision containing the basic principles governing outdoor advertisements. Account may also be taken here of the different types of outdoor advertising control areas.

7 2 4 Permission subject to principles

A provision which determines that permission for the display of an outdoor advertisement may be granted only if the advertisement complies with the principles which have been laid down in the statute. It is important that the principles should be contained in the statute itself and not in a schedule or in regulations, because in the latter instances they may be subject to amendment and even to repeal by the controlling authority.

7 2 5 NCOP in regulations

A provision authorising the control authority to make regulations concerning issues addressed in the NCOP. Such regulations will be aimed at fleshing out the detailed rules relating to outdoor advertisements.

7 2 6 Sanctions

Provisions, like those in current legislation, prescribing the traditional criminal sanction and the administrative abatement notice procedure. It may also be considered expressly to authorise the controlling authority to obtain civil remedies like an interdict.

7 2 7 Appeals

A provision making allowance for appeals (see par 7 5).

7 2 8 State bound

A provision determining that the state (including the railway administration) is bound by the statute.

7 3 Reliance upon existing legislation

The enactment of new legislation is an expensive and time-consuming venture and may give rise to considerable controversy. It may prove to be wise rather to rely upon existing legislation (even if some amendments are required) to implement the NCOP, if this can be accomplished at all.

The NRA may perhaps serve as a satisfactory basis for control over advertisements along national roads. Such roads seem to be restricted mostly to natural and rural landscapes where maximum controls are to apply, according to the NCOP. Provided that relevant provisions of the NCOP can be accommodated as exceptions, it may suffice to rely upon the prohibition on the display of advertisements (s 14(1)). Alternatively, the definition of "advertisement" may be so worded as to exclude not only road traffic signs (as it currently does), but also informational signs such as those permitted in terms of the NCOP. The most satisfactory ruling may even prove to be that these latter signs are allowed only when they are erected and displayed by the controlling authority itself, comparable to the situation prevailing in respect of road traffic signs (except that provision would have to be made for payment by applicants of expenses incurred in constructing, erecting and maintaining the signs concerned.)

The ARRDA, being applicable outside urban areas, would also relate principally to natural and rural landscapes where advertisements, in the commercial sense of the word, are not favoured by the NCOP. Had this Act contained only a prohibition on advertisements, with some exceptions, it would have had the same potential as the NRA to accommodate the NCOP. However, since the Act also provides for permission in respect of advertisements, a satisfactory solution will have to be found to the problem of structuring the controlling authority's discretion. This issue is addressed in the next paragraph. Alternatively, and perhaps preferably, the provision which authorises the granting of permission for the display of advertisements may be repealed, thereby bringing the ARRDA in line with the NRA.

The great variety of legal provisions at local government level serves to underscore the need for a substantial degree of rationalisation, along the lines of the NCOP. It seems that the initiative will have to be taken at national level, probably through the Environment Conservation Act's provisions relating to environmental policy.

7 4 Structuring the controlling authority's discretion

The most formidable challenge facing the effective control of outdoor advertisements is not so much the subjection of individuals to control – important though this issue is – but an assurance that permission to display advertisements will not be granted by a controlling body where this would be contrary to the letter and the spirit of the NCOP.

There are different strategies by means of which the controlling authority's discretion to grant permission for advertisements may be bound in order to ensure that environmental factors will influence the relevant decisions.

7 4 1 Total prohibition

Of course, the most effective way in which the danger that permission to display advertisements along roads will be granted freely, may be eliminated, is via the repeal of any provision allowing the display of advertisements along roads with the permission of the controlling authority; in other words, through the enactment of a total prohibition on the display of advertisements along roads.

Such an approach would be too extreme, however, since there seems to be room for a certain amount of advertising along roads and outdoor advertising, at least in certain urban areas. It may also be in conflict with the proportionality requirement of the general limitation clause in section 33(1) of the Constitution, as has been shown.

7 4 2 Prohibition subject to exceptions

The approach of the NRA is to prohibit advertisements, subject to exceptions. The ARRDA follows a similar approach, save that it also provides for the authorisation of advertisements by the controlling authority. Should the latter provision be repealed, it would bring the ARRDA more in line with the NRA. It has been pointed out that the latter Act contains no provision authorising the controlling body in question to permit the display of advertisements. The only discretion which a provision such as the above would seem to confer upon the controlling authority, relates to whether or not the advertisement falls within an excepted category. However, in the event of a dispute, it would be for the courts finally to decide this issue.

A strategy which would, in effect, bring about the same result would be to provide exceptions to the definition of the concept of "advertisement" itself, rather than to the prohibition. For instance, signs with an informational tenor may be expressly exempted from the comprehensive definition of "advertisement" or may per definition be excluded from a more restricted definition which implies the public description or praise of the merits of products and services with a view to encouraging their sale or patronage.

7 4 3 Discretion subjected to jurisdictional facts

A strategy by means of which a controlling authority's discretion may be bound by the Advertising Control Act itself, so that an assurance would be provided that permission for the display of advertisements may be granted only if it is compatible with the needs of environmental conservation, would be to rely upon the enactment of jurisdictional facts in relation to the discretionary powers.

This may be done by providing in the Act that the controlling authority may grant the permission in question only if the advertisement concerned would not degrade the environment. Such a provision would leave ultimate control in the hands of the court in that non-degradation of the environment would qualify as a jurisdictional fact which may be examined by the court, should the controlling authority's grant of permission be taken on review. A more subjective phraseology of the jurisdictional fact in question, namely that the controlling authority should have reason to believe that the environment will not be degraded by the advertisement concerned, will leave less scope for review by the court, but will at least ensure that permission may not be granted freely. But "non-degradation of the environment" is a vague concept, and is a matter of degree. It could perhaps be replaced by more precise principles culled from the NCOP.

7 4 4 Discretionary powers and the NCOP

The proposed NCOP may conceivably be implemented through existing provisions such as sections 2(1) and 3 of the ARRDA. This involves a prohibition on the display of an advertisement in the relevant declared areas, except with the permission of the controlling authority. Since such permission may prescribe the specifications to which the advertisement relates, the period during which the permission will be of effect, the manner, place and circumstances in which and the conditions on which the advertisement may be displayed (s 3), it may encompass more or less all the requirements of the proposed NCOP.

The first problem is that the controlling authority will not automatically be under a legal obligation even to consult the NCOP when deciding whether or not to grant permission for the display of an advertisement, and, if permission were to be granted, particularly the conditions to which such permission should be subject. This shortcoming may be remedied by the inclusion in the Act of a provision to the effect that the controlling authority, in exercising its discretion, is obliged to consider the NCOP. However, this would constitute no guarantee that the authority will indeed abide by the NCOP.

The point is that the code of practice as such is not a binding document. In a situation like the above, the NCOP would fulfil very much the same function as would guidelines, or so-called quasi-legislation. Such guidelines, which have been established by controlling authorities that administer the ARRDA, and are relied upon by them, serve to structure the exercise of discretionary powers, but do not constitute binding rules. (The Western Cape policy and guidelines, for example, are contained in circular letter no R15/1994.) In general, the application of such guidelines in the exercise of discretionary powers will not invalidate such exercise, as long as the guidelines themselves are compatible with the enabling legislation and the controlling authority has not fettered its discretion by applying the guidelines as fixed rules. The authority should always be willing to consider exceptions to its guidelines in any particular instance.

7 4 5 Discretionary powers and regulations

Another strategy by which the NCOP may be rendered binding upon the controlling authority would be to authorise a superior authority such as the Minister of Transport or the Premier of the province concerned to enact provisions of the NCOP as regulations in terms of the statute dealing with advertisements along roads. It could be determined that no permission for the display of an advertisement in a particular area may be granted contrary to the provisions of the NCOP, as contained in the regulations.

Should the NCOP (or parts of it) be contained in regulations, one would have to ensure that no subjective discretionary powers are conferred upon authorities, such as a provision of the NCOP to grant an extension "at the discretion of the authority".

In so far as compliance of the NCOP with the bill of rights is concerned, the following factors should be taken into account:

7 4 5 1 Freedom of speech and free economic activity

The requirement in the NCOP that an advertisement may not in its content be objectionable, indecent or suggestive of indecency, prejudicial to the public morals or objectionable, may give rise to problems. These are vague criteria

which will not be accepted by a court of law as allowing limitations to be placed upon freedom of speech and free economic activity. They may also be regarded as unrelated to the purpose of the Act (protection of the environment, road safety).

The other limitations imposed upon freedom of speech in the NCOP seem to comply with the requirements of the limitation clause as set out above.

7 4 5 2 Property

The limitations on rights in property are not of a serious nature and it is doubtful whether any of the limitations imposed upon this right can be said not to comply with the requirements of proportionality.

7 4 5 3 Equality

The distinctions that are made in the NCOP relate to type of landscape and type of sign. No objection can be raised to these distinctions as they can be said to be rational in attaining the purposes of the Act, as well as proportional.

7 4 6 Discretionary powers and principles

A potentially more effective option to render the NCOP binding upon the controlling authority would be to include basic principles governing outdoor advertisements in the statute concerned, and to determine that permission for the display of outdoor advertisements may be granted only if the advertisement complies with such principles.

7 4 7 Discretionary powers subjected to environmental policy

Yet another strategy which may be employed to bind a controlling authority's discretion to permit advertisements, is presented by the Environment Conservation Act. The most important policy-related aspects of the NCOP may be contained in an environmental policy, declared in terms of this Act.

The Act authorises the Minister of Environmental Affairs and Tourism, after consultation with certain bodies (s 2(2)), by notice in the *Government Gazette* to determine the general policy to be applied with a view *inter alia* to the protection of the environment against defacement as a result of man-made structures (s 2(1)(c)). This provision seems to encompass outdoor advertisements. A comparison with the different environmental policies which have been laid down thus far (cf the general environmental policy (GN 51 of 1994-01-21) and especially the policies relating to vehicles in the coastal zone (GN 858 of 1994-04-29) and the classification of terrestrial and marine protected areas (GN 449 of 1994-05-09)), reveals that it may be possible to accommodate several provisions of the NCOP in an environmental policy. An attraction of this option is that outdoor advertising has profound environmental consequences and that it would therefore be appropriate for ultimate control over this phenomenon to vest in a ministry concerned with environmental affairs.

The determination of an environmental policy has important consequences. First, each minister, administrator (defined in s 1), local authority and government institution (defined in s 1) upon which any power has been conferred or to which any duty which may have an influence on the environment has been assigned by or under any law, must exercise such power and perform such duty in accordance with the policy in question (s 3(1)). This command would also bind authorities concerned with the control of outdoor advertising.

Secondly, the Director-General: Environmental Affairs and Tourism must ensure that the policy concerned is complied with by each of the bodies referred to above, and he may (a) take any steps or make any inquiries he deems fit in order to determine if the policy is being complied with; and (b) if in pursuance of any step so taken or inquiry so made, he is of opinion that the policy is not being complied with by any of the above-mentioned bodies, take such steps as he deems fit in order to ensure that the policy is complied with by these bodies (s 3(2)). One can hardly imagine potentially more effective provisions – at least, in theory – than the above, to ensure compliance by controlling authorities with the environmental policy in question.

7 5 Appeals

The traditionally available common law mechanism for control over administrative actions, namely judicial review, suffers from several shortcomings. It serves to review only the legality of the administrative action in question and it is in principle concerned only with the detection and setting aside of illegal administrative actions, not with prescribing correctives.

An administrative appeal, on the other hand, is a process whereby the wisdom or merits of an administrative decision – such as the merits of the grant or refusal of permission for the display of an advertisement – are reconsidered and determined by another decision-maker, at the request of an applicant. A comprehensive appeal on the merits involves a *de novo* reconsideration of the matter as if there had not been a previous decision, with no restriction on the material which the appeal body may consider and no restriction on the type of decision which that body may make. Such an appeal – which in effect amounts to substituting the appeal body for the original decision-maker – is a potentially far more effective control mechanism than judicial review. However, unlike judicial review, it is not a common law remedy which is generally available. It is available only if it has been specifically provided for in the legislation in question.

Consideration should be given to introducing a right of appeal into the legislation dealing with outdoor advertising control. Among some of the benefits associated with appeals, are the following:

- A right of appeal provides aggrieved individuals with an important safeguard, not only that administrative discretions will be exercised according to the law, but more particularly that such discretions will be reconsidered by a second decision-maker to determine whether they were exercised wisely. An appeal is intended to function as a safeguard against faulty decisions made on the basis of inadequate information, or resulting from flawed reasoning. The appellate body is able to exercise a calmer, more objective and reflective judgment. An appeal therefore provides an assurance that the final decision will have been subjected to more careful scrutiny, prolonged debate and sober reflection.
- Any system that relies upon human endeavour is prone to mistakes or abuse and for that reason alone requires correctives.
- An appeal may also be valuable to administrative bodies against whose decisions the appeal is launched. It affords them an opportunity to respond to allegations of corruption, bias or incompetence which are often made by persons if the substance of administrative decisions is not addressed and the dispute is limited to questions of legality.

- It may be assumed that the psychological impact on the part of the administrative body of a rule that its actions may be examined and reconsidered on their merits by an external body, should contribute to more cautious and probably improved decision-making.
- An appeal provides a mechanism for heightened accountability of the public body in question, since it is thereby rendered accountable not only for the legality but also for the wisdom of its decisions.

When the subject of appeals is considered, attention should also be given to the following issues:

- The appeal body should not be associated with the controlling body in any way but should be an independent tribunal.
- Allowance should be made for so-called third-party appeals.

An appeal is usually available only to a person whose application for a licence or some other type of authorisation, like permission to display an outdoor advertisement, is *refused* by the administrative body concerned, or if he or she is dissatisfied with the conditions to which the licence has been subjected or if the licence is suspended or cancelled. Although such licence or authorisation may concern an activity which may have a negative environmental impact, like outdoor advertising, concerned citizens cannot as a rule participate in such appeals by the unsuccessful licence applicant. This is obviously an unsatisfactory situation which serves to reinforce the applicant's position on appeal. (Legislation sometimes by way of exception provides an objector a right to be joined as a party to the appeal.)

Where a licence (or other authorisation) involving a potentially harmful environmental impact is *granted*, it is unlikely that the successful applicant will wish to appeal, except if he or she should object to the conditions to which the licence may be subject. However, conservationists may well be dissatisfied with the granting of the licence, but there is normally no provision for appeals by them. It is only in exceptional instances that legislation provides for appeals in these circumstances, usually referred to as third-party appeals. To the extent that no provision is made for third-party appeals and no person with *locus standi* is willing or able to apply for judicial review, the total custody of the public interest in environmental conservation is exclusively vested in the administrative body concerned.

In view of the above remarks, the introduction of a right of appeal, both for persons who are aggrieved at the refusal of permission to display an outdoor advertisement and for persons who are dissatisfied with the granting of such permission, should be considered (see generally on administrative appeals Rabie "Reflections on a general administrative appeals tribunal" in Joubert (ed) *Essays in honour of SA Strauss* (1995) 155).

8 Conclusion

Once final agreement is reached on the principles of the NCOP, the challenge would be to incorporate these principles into legislation. An attempt should be made to rely upon existing legislation, even if some amendments would be required. A uniform approach to the control of advertising along roads outside urban areas would require that the discrepancies between the ARRDA and the NRA be addressed. Moreover, care will have to be taken to ensure that the relevant provisions of these Acts comply with the Constitution. Consideration

should be given to laying down a general environmental policy in terms of the Environment Conservation Act in respect of outdoor advertisements, which would also cover urban areas.

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DIE SUID-AFRIKAANSE REGSKOMMISSIE SE VOORGESTELDE WYSIGING VAN ARTIKEL 138 VAN DIE MAATSKAPPYWET 61 VAN 1973

1 Inleiding en agtergrond

In 1986 het die Johannesburgse Aandelebeurs (hierna "JSE") aangedui dat probleme op die effektebeurs ondervind word met die regsbeginsel dat waar 'n eienaar se aandele gesteel word, hy dit kan opeis van wie ook al dit in besit het selfs al sou die besitter van die aandele dit te goeder trou gekoop het. Die standpunt van die JSE is egter dat die beskerming van die *bona fide* koper van aandele 'n belangrike komponent van die oordragproses is ten einde vertroue in die effektebeurs te skep, en bepleit 'n verandering in die reg ten einde sodanige koper te beskerm. (Die JSE se voorstel is vervat in die SA Regskommissie se verslag *Beskerming van 'n koper van effekte* (Mrt 1987).) Die Suid-Afrikaanse Regskommissie is versoek om die aangeleentheid te ondersoek. Ten spyte van die regskommissie se meerdere besprekingsdokumente en werkstukke wil dit voorkom of die ideale oplossing vir die probleem nog nie gevind is nie (kyk Vermaas *Aspekte van die dematerialisasie van genoteerde aandele in die Suid-Afrikaanse reg* (LLD-proefskrif Unisa (1995) 123–160 (hierna "Vermaas")).

'n Voorstel deur die verrekeningsbanke in 1989 aangaande die wysiging van artikel 138 van die Maatskappywet aan die Staande Advieskomitee oor Maatskappyereg is verwys na die regskommissie aangesien dit binne die algemene strekking van bogenoemde ondersoek na die beskerming van 'n koper van effekte val. Dié voorstel is in 1994 gepubliseer as 'n aanvullende verslag oor die beskerming van 'n koper van aandele en is getitel *Die beskerming van 'n koper van effekte: Voorgestelde wysiging van artikel 138 van die Maatskappywet 61 van 1973* (Projek 62 Mrt 1994) (hierna "Verslag")).

In beide bogenoemde ondersoeke deur die regskommissie word gehandel met aspekte van die statutêre oordragprosedure van genoteerde aandele op die JSE. Dié ondersoeke is gedoen net voor die onlangse Report of the Research Sub-Committee "The future structure of the Johannesburg Stock Exchange" (1994) (onder voorsitterskap van MM Katz) (hierna "Katz-verslag") oor die herstrukturering van die JSE. Hoewel die beskerming van die *bona fide* koper van aandele en die wysiging van artikel 138 van die Maatskappywet nie direk deur die Katz-verslag bespreek word nie, behoort dié voorstelle versoen te word met

die aanbevelings van die Katz-verslag. Die algehele werking van die JSE moet volgens die Katz-verslag gesien word teen die politieke, staatkundige, sosiale en ekonomiese ontwikkelings in die nuwe Suid-Afrika waarin wyer deelname van veral individuele beleggers in direkte aandeelhouding aangemoedig word. Enige voorstelle met betrekking tot die oordragprosedure moet aan die behoeftes van die algemene beleggerspubliek voldoen ten einde vertroue in die stelsel te wek. Daar moet terselfdertyd in gedagte gehou word dat die openbare belang slegs gedien kan word indien die Suid-Afrikaanse mark mededingend met ander wêreldmarkte bly (Katz-verslag 12–17).

2 Opsomming van die aanbevelings van die verslag

Artikel 138 van die Maatskappywet maak deel uit van die statutêre oordragprosedure van aandele (en skuldbriewe) wat in artikels 133 tot 140 van die Maatskappywet gereël word en wat op die uiteindelike verkryging van lidmaatskap in 'n maatskappy gemik is (onderskei hier die gemeenregtelike sessie van aandele). Artikel 138 skep eerstens 'n waarborg met betrekking tot die *egtheid* van die dokumente of stukke wat deur 'n persoon of instelling by die maatskappy of sy oordragsekretaris vir registrasie ingedien word, en tweedens 'n *vrywaring* deur sodanige persoon of instelling aan die maatskappy teen enige eis ingestel weens skade of verlies opgeloop deur die maatskappy ingevolge 'n oordrag wat deur die maatskappy geregistreer word van die sekuriteite waarna in die stukke verwys word.

Die Maatskappywet lê dus in artikel 138 'n skuldlose aanspreeklikheid op die persoon of instelling wat die stukke vir die oordrag van genoteerde sekuriteite van 'n maatskappy indien. Verder word die nalatigheid van die maatskappy wat die registrasie behartig glad nie in aanmerking geneem nie. Die statutêre waarborg en vrywaring beskerm klaarblyklik die maatskappy en sy oordragsekretaris teen die oploop van skade of verlies as gevolg van die registrasie van 'n ongeldige oordrag van sekuriteite. Die kommissie se voorgestelde wysiging van artikel 138 het ten doel om die integriteit van die finansiële markte te verseker deurdat die aanspreeklikheidsrisiko deur die "regte persone" in die sekuriteitsmarkte gedra word (kyk par 4 6 1 van die Verslag).

In die Verslag word aanbeveel dat artikel 138 gewysig word sodat die statutêre vrywaring nie toegepas word nie waar die indienende party bewys dat hy te goeder trou opgetree het en dat die maatskappy nalatig gehandel het in die registrasie van die oordrag. In die geval waar die maatskappy ook as gevolg van sy nalatigheid 'n mededader tot die skade of verlies is, moet die verhaalbare skadevergoeding deur die hof verminder word sodat 'n billiker verdeling van die risiko van skade of verlies kan geskied.

Verder word aanbeveel dat 'n sertifikaat of ander stuk wat bewys verskaf van die titel in die sekuriteite daarin vermeld, uitgesluit moet word van die statutêre waarborg.

3 Probleemstelling

Die aanbeveling dat die maatskappy vir sy nalatigheid aanspreeklik gehou behoort te word as sy handeling met betrekking tot die registrasie van die oordrag van sekuriteite afwyk van die handeling van 'n "redelike persoon" in sodanige omstandighede, kom billik voor. Die grootste beswaar uit die oogpunt van die maatskappy teen hierdie aanbeveling is waarskynlik die praktiese onuitvoerbaarheid daarvan (kyk ook Verslag par 4 4 2–4 4 4) en die feit dat die

maatskappy, anders as die indienende party, geen manier het om homself te kompenseer vir die koste van die strenger sorgsaamheidsplig nie (*idem* 4 4 5–4 4 6).

Ingevolge die aanbeveling van die Verslag berus die onus om sodanige nalatigheid van die maatskappy te bewys op die indienende party. Uit die oogpunt van die indienende party skep dit 'n uiters moeilike bewyslas omdat daar geen standaard is waarvolgens die optrede van die maatskappy beoordeel kan word nie. Die wysiging plaas ook geen verpligting op die maatskappy om te verseker dat die vorms wat vir die oordrag voorsien word, eg is nie (kyk Verslag par 4 4 7 4 4 10–4 4 11).

Afgesien van bogenoemde probleme, is die vraag of die voorgestelde wysiging van artikel 138 'n bydrae sal maak tot die algehele verbetering van die oordragprosedure. By beantwoording van die vraag moet die artikel in konteks geplaas en beoordeel word.

4 Inhoud van artikel 138

4 1 Die stukke wat betrekking het op die oordrag van genoteerde aandele

Die faset in die oordragprosedure waarop artikel 138 betrekking het, is die indiening van dokumente by die maatskappy vir die registrasie van die oordrag van aandele. Artikel 138 omskryf nie die betekenis van die frase "'n stuk wat betrekking het op daardie oordrag" nie, maar bepaal bloot dat die indienende party geag word daardie "stuk" as eg te gewaarborg het. Daar moet dus eerstens bepaal word op watter stukke die waarborg van toepassing is.

4 1 1 Oordragakte

'n Gepaste oordragakte ("proper instrument of transfer") word deur artikel 133(2) van die Maatskappywet vereis voordat 'n maatskappy die oordrag van aandele mag registreer. Die indien van 'n behoorlik voltooide oordragakte by die maatskappy kan dus beskou word as die voorvereiste vir registrasie in die lederegister. Die vereiste van 'n behoorlik voltooide oordragakte bied twee alternatiewe:

(a) oordrag deur middel van 'n *sekuriteite-oordragvorm* (kyk a 134(d) Maatskappywet vir die omskrywing van die begrip; vorm CM 42 soos vervat in Bylae 2 tot die Administratiewe Regulasies vir Maatskappye 1973, R1948 soos gewysig (makelaars verwys ook daarna as 'n "wit vorm")); en

(b) oordrag deur middel van 'n sekuriteite-oordragvorm en 'n *makelaarsoordragvorm* (kyk a 134(a) Maatskappywet vir die woordomskrywing; vorm CM 41 of die "blou vorm").

4 1 2 Aandelesertifikaat

In die Verslag word gewys op die onsekerheid of die sertifikaat of ander dokument wat bewys verskaf van die titel in die sekuriteite, ingesluit is in die betekenis van "'n stuk" in artikel 138 (par 2 4 4).

In die regskommissie se verslag oor die beskerming van die koper van effekte word aan die hand gedoen dat 'n aandelesertifikaat ingesluit word by die betekenis van die begrip (kyk par 8 4 6 Werkstuk 36 (1991) 30). Daar word aangevoer dat die wetgewer "'n stuk" sou omskryf het indien die sertifikaat van die begrip uitgesluit moet word. Die beswaar teen die insluiting van die sertifikaat by die waarborg is egter dat dit bykans onmoontlik vir die indienende party is om te weet of die stuk eg is al dan nie.

In die verduideliking van Cilliers en Benade (*Korporatiewe reg* (1992) 281 par 18 14) oor die statutêre waarborg word slegs na die *oordragakte* verwys sonder dat daar enige redes vir die uitsluiting van die aandelesertifikaat gegee word. In die lig van hierdie "onvolledige" interpretasie van die skrywers moet die rol van die aandelesertifikaat van naderby beskou word. Die Verslag verwys na die advies van 'n senior advokaat wat ook aanvoer dat die sertifikaat by die betekenis van "'n stuk" ingesluit is. Daar word verklaar (par 2 4 6):

> "If a share certificate or other document of title to the 'security' is lodged with the company for the purposes of transfer, it plainly falls within the ambit of the expression 'any document relating to the transfer'."

Hoewel dit nie uitdruklik in die Maatskappywet vermeld word nie is dit die verkoper se plig om aan die koper die titelbewys (aandelesertifikaat) saam met die oordragakte van sy aandele te oorhandig (a 133(2) bepaal slegs dat 'n "gepaste oordragakte" by die maatskappy ingedien moet word). Die Maatskappywet maak egter uitdruklik voorsiening vir die uitreiking van "nuwe" sertifikate by die oordrag (a 140) en by implikasie moet die "ou" sertifikate ingehandig word vir kansellasie. Verder bepaal die Maatskappywet

> "dat die nodige stukke betreffende die sekuriteite wat in die oordragakte genoem word, by die maatskappy ingedien is en dat dit uit bedoelde stukke blyk dat die titel in bedoelde sekuriteite gehou word deur die oordraggewer in bedoelde oordragstukke genoem" (a 136(2)(a)).

Die Maatskappywet maak in artikel 136 voorsiening vir die sertifisering van die oordragakte waar die aandelesertifikaat by die maatskappy ingedien is. Die sertifisering is 'n voorstelling deur die maatskappy dat die nodige stukke betreffende die sekuriteite wat in die oordragakte genoem word, by die maatskappy ingedien is en dat dit daaruit blyk dat die titel in die sekuriteite gehou word deur die oordraggewer in die stukke genoem. Uit bogenoemde kan dus afgelei word dat die aandelesertifikaat in die reël die oordragakte moet vergesel.

Soos aangedui sal word (par 6 1), bepaal die Maatskappywet dat aandele oordraagbaar is op die wyse wat deur die wet én die statute van die maatskappy bepaal word. Hierdie inbegrepe verpligting in die Maatskappywet dat die oordragakte vergesel gaan van die titelbewys, word gebruiklikerwys uitdruklik in die statute van maatskappye vervat (kyk Tabel A 13(b) en Tabel B 14(b) Maatskappywet).

In geval van genoteerde aandele word die verpligting rakende die lewering van die aandelesertifikaat verder bevestig. Die reëls van die JSE bepaal dat "goeie lewering" die lewering van elke dokument, met inbegrip van die titelbewys, beteken wat die koper benodig om sonder die verdere bystand van die verkoper die gekoopte effekte op sy naam te laat oordra (reël 5 70 2 2; vgl par 4 3 1 hierna). Sekere inligting wat op die oordragvorms in gebruik op die JSE aangebring moet word, verwys direk na die aandelesertifikaat, byvoorbeeld die naam van die uitreiker van die effekte "soos op die sertifikaat aangegee" en die ruimte gelaat vir die "sertifikaatnommer". In die praktyk beteken dit dat die inligting op die aandelesertifikaat vergelyk word met dié op die oordragakte. Die feit dat die oordragakte vergesel gaan van die titelbewys is derhalwe ook belangrik vir kontroledoeleindes.

By gebrek aan 'n andersluidende gerapporteerde hofbeslissing oor die uitleg van artikel 138, is ek van mening dat die aandelesertifikaat wel "betrekking het op daardie oordrag" en daarom as 'n stuk binne die betekenis van die artikel beskou moet word.

4 2 Statutêre waarborg

Ingevolge artikel 138 word 'n persoon wat stukke indien wat betrekking het op die oordrag van genoteerde sekuriteite *geag* daardeur te *waarborg* dat sodanige stukke eg is.

Soos in die Verslag (par 2 4 16) aangedui, het die uitdrukking "word geag" nie 'n definitiewe tegniese of eenvormige betekenis nie. Die woord "waarborg" is 'n begrip wat dikwels in 'n kontrak gebruik word om aan te dui dat iemand kontraktueel instaan vir sekere stellings. Indien 'n waarborg (uitdruklik of stilswyend) deel uitmaak van 'n kontrak, kan die party wat die waarborg nie gestand doen nie aanspreeklik gehou word vir kontrakbreuk. In die geval van 'n koopkontrak kan die koper met die *actio empti* skadevergoeding (positiewe interesse) van die verkoper eis en in gepaste omstandighede ook uit die ooreenkoms terugtree en skadevergoeding eis (kyk De Wet en Van Wyk *Die Suid-Afrikaanse kontraktereg en handelsreg* (1992) 339 ev).

Die effek van die statutêre waarborg moet uit die konteks en die gewone reëls van wetsuitleg vasgestel word. Dit beteken dat vir doeleindes van die Maatskappywet enige persoon wat die betrokke stukke indien ingevolge die betrokke artikel gereken word te verseker dat sodanige stukke eg is. In die Verslag (par 2 4 17) word aan die hand gedoen dat sodanige stukke nie eg sal wees as hulle op enige manier "wetlik defektief" is nie. Anders gestel, die betrokke stukke word geag regsgeldig te wees. Dit beteken dat die titelbewys of ander stukke nie gesteel of vervals mag wees nie.

4 3 Statutêre vrywaring

Die Maatskappywet plaas in artikel 138 'n verpligting op die persoon wat stukke indien om enigeen te vergoed vir verlies of skade deur hom opgeloop of 'n eis teen hom ingestel uit hoofde van 'n oordrag deur die maatskappy geregistreer. Die statutêre vrywaring geld nie net waar die stukke vervals of gesteel is nie. Dit is so dat die maatskappy statutêr (a 137 Maatskappywet) onthef word van die plig om navraag te doen oor die oordraer of die oordragnemer se handelingsonbevoegdheid. Dit is dus die gevalle waar die stukke vervals of gesteel is, of die oordraggewer of oordragnemer nie die kontraktuele bevoegdheid het om oordrag te gee of te neem nie.

Statutêre vrywaring kan gevolglik slegs geskied *nadat* registrasie van oordrag plaasgevind het. Die skade of verlies is immers die gevolg van die registrasie van stukke wat nie eg of regsgeldig is nie. Hiervolgens is artikel 138 nie van toepassing nie in die geval waar dit tot die maatskappy se oordragsekretaris se kennis kom dat die stukke nie eg is nie en daarom weier om die oordrag te registreer (Verslag par 2 4 20 en a 139 Maatskappywet).

Artikel 115 van die Maatskappywet bepaal dat daar by die hof aansoek gedoen kan word om die regstelling van die lederegister indien die naam van iemand sonder voldoende rede in 'n lederegister van 'n maatskappy aangeteken of daaruit weggelaat is, of daar nie aangeteken is dat iemand opgehou het om lid te wees nie. Die hof kan dan beveel dat die register reggestel word en dat die skade wat 'n betrokke persoon gely het deur die maatskappy of 'n direkteur of beampte van die maatskappy betaal word.

Die statutêre vrywaring in artikel 138 beteken derhalwe dat die persoon wat die stukke indien, die maatskappy vrywaar wanneer dit skade of verlies oploop as gevolg van 'n suksesvolle eis teen hom vir die regstelling van die lederegister ingevolge artikel 115 van die Maatskappywet.

5 Doel van artikel 138

In die Verslag word tot die gevolgtrekking gekom dat die doel van die artikel is om die maatskappy en sy oordragsekretaris te beskerm teen die oploop van skade of verlies as gevolg van die registrasie van 'n ongeldige oordrag van sekuriteite (kyk par 2 3). Die rede vir artikel 138 blyk te wees dat sodra die titelbewys van die sekuriteite deur 'n maatskappy uitgereik is, die maatskappy geen beheer het oor die "omstandighede" waarin die sekuriteite gekoop en verkoop word nie (par 2 3 1). Die maatskappy word bevoordeel omdat dit baie moeilik is vir die maatskappy om hieroor ondersoek in te stel voor elke registrasie van 'n oordrag van genoteerde sekuriteite. Ingevolge artikel 138 van die Maatskappywet is die maatskappy derhalwe ook nie aanspreeklik waar die partye nie die vereiste kontraktuele bevoegdheid het nie, maar sal die makelaar wat indien aanspreeklikheid teenoor die maatskappy opdoen vir gelede skade as gevolg van so 'n ongeldige oordrag.

Die belang van artikel 138 kan slegs bepaal word wanneer alle maatreëls rakende die oordragprosedure nagegaan word. Die "omstandighede" waarin die oordrag van genoteerde aandele plaasvind, word egter nie slegs deur die werking van die Maatskappywet bepaal nie.

6 Prosedure by oordrag van genoteerde aandele

6 1 Algemeen

Die Maatskappywet en die statute van 'n maatskappy bepaal die wyse waarop die aandele of ander belang wat 'n lid in die maatskappy het, oorgedra moet word (a 91 Maatskappywet). Daar kan in hoofsaak drie noodsaaklike oordragstappe geïdentifiseer word (*Inland Property Development Corporation (Pty) Ltd v Cilliers* 1973 3 SA 245 (A) 251; kyk Vermaas 82–122 vir 'n volledige omskrywing). Die oordragnemer kom ten eerste met die oordraggewer ooreen oor die verkryging van aandele. Dit geskied meestal deur middel van 'n mondelinge koopkontrak tussen makelaars ten behoewe van hul onderskeie kliënte. Hierna is dit tweedens die plig van die oordraggewer om aan die oordragnemer 'n oordragakte en aandelesertifikaat te lewer om die oordrag te bewerkstellig. Wanneer die oordraggewer hierdie plig nagekom het, volg daar derdens registrasie van die oordragnemer se naam in die lederegister van die betrokke maatskappy. Die oordraggewer hou gevolglik op om 'n lid van die maatskappy te wees en die oordragnemer word 'n volwaardige geregistreerde aandeelhouer en lid van die maatskappy.

Die aandele van 'n publieke maatskappy kan op 'n effektebeurs verhandel word as dit 'n genoteerde maatskappy is ingevolge die betekenis van artikel 16 van die Wet op Beheer van Effektebeurse (1 van 1985 wat onlangs gewysig is deur die Wysigingwet op Beheer van Effektebeurse 54 van 1995). Die komitee van die JSE is by magte om die prosedure en dokumentasie van lewering in beurstransaksies voor te skryf (kyk *Johannesburg Stock Exchange Manual* (1985) 40 ev; reël 5 70 5; Cilliers en Benade *Korporatiewe reg* 280 par 18.10–18.14; Malan en Oosthuizen "Brokers, their customers and the transfer of securities 1988 *TSAR* 480). Die Maatskappywet maak ook verder spesiaal voorsiening vir die oordrag van genoteerde aandele (kyk a 134–140 waar die begrip "sekuriteite" gebruik word wat genoteerde effekte beteken soos dit omskryf word in a 1 Wet op Beheer van Effektebeurse 7 van 1947 (soos vervang deur Wet 1 van 1985); kyk ook a 134(c) Maatskappywet). Indien die Wet op Beheer

van Effektebeurse nagegaan word, is daar ook talryke bepalings rakende die oordrag van aandele (kyk a 1 12 22–29 37)).

Die wyse waarop bogenoemde drie oordragstappe in samehang met ander handelinge in die praktyk geskied, en die gebruike, maatreëls, voorskrifte en regsvereistes daaromtrent, is 'n gekompliseerde proses wat nie hier verder bespreek kan word nie. Artikel 138 het betrekking op die indiening van bepaalde stukke by die maatskappy vir die registrasie van die oordrag van aandele. Daarom word dit kortliks bespreek.

6 2 Oordrag van genoteerde effekte

6 2 1 Uitvoering van gepaste oordragakte

Die uitvoering van die gepaste oordragakte speel 'n belangrike rol met betrekking tot die oorgang van die regte in aandele en die verkryging van lidmaatskap in 'n maatskappy. Uitvoering in hierdie verband beteken dat sowel die oordraggewer as die oordragnemer die oordragakte moet onderteken voordat die maatskappy die oordragnemer as lid in sy lederegister sal aanteken (kyk a 133(2) Maatskappywet).

Die sekuriteite-oordragvorm bestaan uit 'n "A"- en "B"-gedeelte. Die "A"-gedeelte word deur die oordraggewer voltooi en onderteken. Die naam van die oordragnemer word blanko gelaat en daar word gemeld dat die sekuriteite oorgedra word aan diegene wat genoem sal word in deel "B" van die vorm of makelaarsoordragvorm.

Die makelaarsoordragvorm word deur die makelaar voltooi en onderteken. Die oordraggewer (verkoper) se handtekening word nie vereis nie maar wel dié van die makelaar. Laasgenoemde metode word gewoonlik gebruik waar oordrag geskied aan verskeie oordragnemers en slegs een sekuriteite-oordragvorm en aandelesertifikaat beskikbaar is of waar die oordraggewer slegs sommige van die aandele soos gemeld op die aandelesertifikaat oordra en die oorblywende aandele behou. 'n Afsonderlike makelaarsoordragvorm kan gebruik word ten opsigte van elke oordragnemer (a 135(1)(b)(iii)).

Die gedeelte ten opsigte van die oordragnemer van albei bogenoemde oordragvorms word eers voltooi wanneer die oordrag in die naam van 'n bepaalde oordragnemer geregistreer gaan word. Die Maatskappywet bevat geen bepaling wat registrasie van die oordrag verplig na elke verkoop en lewering van aandele nie. Dieselfde oordragakte (voor registrasie) kan dus wanneer dit blanko geëndosseer is, in opeenvolgende verkope van aandele gebruik word (die feit dat die oordragakte blanko voltooi word en saam met die aandelesertifikaat gelewer word, skep 'n sekuriteitsrisiko: kyk Vermaas 123 ev). Gevolglik is talle aandele selfs oor lang periodes in omloop sonder dat dit ooit vir statutêre oordrag ingedien word. Die gevolg hiervan is dat die geregistreerde aandeelhouer nie meer reghebbende van die aandele is nie (omdat hy sy aandele verkoop het), maar steeds as die aandeelhouer deur die maatskappy beskou word. Die geregistreerde aandeelhouer is geregtig om die aandeelhouersregte uit te oefen. Wanneer 'n koper dus besluit dat aandele in sy naam geregistreer moet word en die toepaslike gedeelte van die oordragvorm voltooi, kan die dokumentasie nie langer gesirkuleer word nie en moet dit by die oordragkantoor ingehandig word vir registrasie. Indien die koper van die aandele byvoorbeeld 'n algemene vergadering wil bywoon, of persoonlik 'n stem wil uitbring, of voor die dividendverklaring as lid geregistreer wil word, moet die aandele vir registrasie aangebied word.

6 2 2 Registrasie as lid in lederegister

Die verkoper se deelname in die oordragproses word met die indiening van die oordragakte en ander gepaardgaande stukke afgehandel. Die oordragproses eindig egter nie hier nie. Die ontvangende lid (wat 'n makelaarslid kan insluit) dien vervolgens die aandelesertifikaat saam met die voltooide oordragvorm by die oordragkantoor van die maatskappy vir registrasie in. Die oordragkantoor van die maatskappy kanselleer die aandelesertifikaat of ander titelbewys en hou dit daar. Die oordragakte word vervolgens geëndosseer om aan te dui dat die aandelesertifikate by die maatskappy ingedien is. By die indiening van die aandelesertifikaat en oordragakte reik die oordragkantoor van die maatskappy gewoonlik 'n oordragkwitansie aan die makelaar uit. Sodra die nuwe sertifikaat gereed is vir aflewering bied die makelaar die oordragkwitansie aan in ruil daarvoor.

Die koper is nog nie 'n lid van die maatskappy nie. Die makelaar moet toesien dat die kliënt se naam in die lederegister van die maatskappy geregistreer word. Die kopende makelaar se funksie is dus eers voltooi sodra die koopprys betaal is en die nuwe aandelesertifikate aan die kliënt gelewer is. 'n Persoon wat onderneem om lid van 'n maatskappy te word en wie se naam in die lederegister ingeskryf is, is lid van daardie maatskappy (a 103(2) Maatskappywet). Sodra die oordragnemer se besonderhede in die lederegister opgeteken is, tree hy in 'n regsverhouding met die maatskappy en word die regsverhouding tussen die maatskappy en die vorige lid beëindig.

7 Diverse beskermingsmaatreëls vir die koper van genoteerde aandele op die effektebeurs

Die reëls van die JSE tref verdere maatreëls ter beskerming van die koper van sekuriteite op die effektebeurs.

Elke lid moet sy sake op 'n regverdige en billike wyse doen en elke transaksie moet uitgevoer word ooreenkomstig die bepalings van die Wet op Beheer van Effektebeurse, die reëls en voorskrifte van die JSE, en komiteebesluite en JSE-gebruike wat van krag is wanneer die transaksie aangegaan en uitgevoer word (kyk reël 5 50 1). Die kopende lid is teenoor 'n verkopende lid (en omgekeerd) aanspreeklik vir die behoorlike uitvoering van alle effektetransaksies wat tussen hulle aangegaan word (reël 5 50 3). 'n Lid is ook teenoor sy kliënt aanspreeklik vir die behoorlike uitvoering van alle effektetransaksies wat namens hom uitgevoer word (reël 5 50 4).

Verder blyk dit dat die waarborg aangaande die egtheid van die oordragstukke nie slegs in artikel 138 van die Maatskappywet voorkom nie, maar ook in die reëls van die JSE. 'n Lid of gebruiker is verantwoordelik vir die egtheid en reëlmatigheid van elke dokument (insluitend die titelbewys) wat deur hom in die beurstransaksie gelewer word (reël 5 70 1). Dit is dan die plig van die verkoper om seker te maak dat goeie lewering van effekte gedoen word en dit is die plig van die koper om namens die kliënt goeie lewering aan sodanige kliënt of aan sy opdragontvanger te doen, en dié weer aan sy kliënt (reël 5 70 2 1). Die reëls van die JSE insake "goeie lewering" beskerm dus die koper van effekte op die effektebeurs. Die lid verifieer deur middel van sy handtekening die handtekening van die oordraggewer op die sekuriteite-oordragvorm. Die verskyning van die effekte-oordragstempel van die lid op oordragvorms en ander dokumente dien as waarborg deur die lid of agent teenoor sy kliënt vir die egtheid van die oordraggewer se handtekening, sy bevoegdheid om te teken en te kontrakteer, die

geldigheid van 'n volmag en die magtiging van die ondertekenaars van 'n maatskappy om namens die maatskappy te teken (reël 5 70 10 1). Hierdeur vrywaar die lid die oordragkantoor van die maatskappy teen verliese en skade wat kan voortvloei uit die ongeldige oordrag. Die lid het op sy beurt weer 'n regresreg teen alle vorige partye tot die transaksie, insluitende die oordraggewer (Cilliers en Benade *Korporatiewe reg* 281 par 18.14). Die verkopende lid word ingevolge die reëls aanspreeklik gehou teenoor die kopende lid aan wie hy die defekte of bedorwe sekuriteitbewyse gelewer het. Die verkoper is gevolglik verplig om die defekte stukke deur egte stukke te vervang. Die verkoper se aanspreeklikheid is absoluut.

Die reëls lê verder 'n plig op die lid om wanneer hy vermoed dat 'n titelbewys gesteel of andersins wanaangewend is, dit aan die hoofbestuurder van die JSE te rapporteer (reël 5 70 7). Alle betrokke inligting in verband met dié effekte word in die nuusblad van die JSE gepubliseer ten einde die lede daarvan in kennis te stel. Lede moet vervolgens onmiddellik hulle registers en ander aantekeninge laat deursoek. Indien die betrokke titelbewys in hulle besit of deur hulle hanteer is, moet die hoofbestuur daarvan in kennis gestel word en van die toepaslike inligting voorsien word (reël 5 70 7). Die lid wat defekte of bedorwe effektebewyse (skrip) ontvang, het 'n verhaalsreg teen die lid wat sodanige bewyse gelewer het (reël 5 70 8 1). Waar die lid tot 'n "wanbetaler" verklaar is, vervang die JSE sodanige effektebewyse aan die makelaarsfirma wat dit eerste ontvang het, teen (a) lewering aan die JSE van die betrokke titelbewyse en oordragaktes en (b) sedering aan die JSE van alle regte van die makelaarsfirma wat eerste die effektebewyse ontvang het teen die makelaarsfirma wat gelewer het of daardie firma se versekeraars (reël 5 70 8 2; reël 5 70 3 onthef die JSE-vereffeningstelsel van die verantwoordelikheid om defekte of bedorwe titelbewyse wat daaraan gelewer is, reg te stel of te verseker dat dit reggestel word).

Dit is duidelik uit die reëls van die JSE dat die koper van genoteerde effekte 'n verhaalsreg teenoor die lid het waar "defekte of bedorwe" effektebewyse aan hom gelewer word. Die beskerming aan die koper van effekte strek ook verder. Die Wet op Beheer van Effektebeurse bepaal dat 'n fonds gestig en in stand gehou moet word waaruit 'n effektemakelaar wat uitgewin is se verpligtinge uit die koop en verkoop van effekte betaal kan word (a 30(1)–(3); kyk ook reëls 9 10–9 20 van die JSE oor die werking van die waarborgfonds).

8 Evaluering

Soos hierbo aangedui, lê sowel die Maatskappywet as die reëls van die JSE 'n sorgsaamheidsplig op 'n bepaalde wyse op die indienende lid ten opsigte van dié stukke wat betrekking het op die oordrag van genoteerde aandele. Hierdie verantwoordelikheid word in sommige kringe as onbillik beskou en 'n wysiging van die bestaande artikel 138 van die Maatskappywet word deur die regskommissie voorgestel. Die vraag is wie behoort die sorgsaamheidsplig uit te oefen ten opsigte van die stukke wat betrekking het op die oordrag. (Kyk in die algemeen oor die sorgsaamheidsplig van die effektemakelaar Van Zyl *Aspekte van beleggersbeskerming in die Suid-Afrikaanse reg* (LLD-proefskrif Unisa (1991) 95–96; Oosthuizen "Die rol van die effektemakelaar in beleggersbeskerming op die Johannesburgse Effektebeurs" 1990 *TSAR* 90 279.)

Indien die *status quo* gehandhaaf word, geniet die maatskappy vrywaring teen die eis om skadevergoeding wat ingevolge artikel 115 van die Maatskappywet teen 'n maatskappy toegestaan kan word. Die maatskappy kan ingevolge die

vrywaring waarvoor in artikel 138 voorsiening gemaak word, skadevergoeding eis van die persoon wat die stukke tot die oordrag ingedien het. Die maatskappy hoef nie te beweer dat die indienende party nalatig was nie, want die aanspreeklikheid van die indienende party is gebaseer op die outomatiese statutêre vrywaring.

Die gevolg van die huidige artikel 138 is dat die maatskappy en sy oordragsekretaris in bogenoemde situasie beskerm word ten koste van die indienende lid. Die feit dat die maatskappy wat die aandelesertifikaat uitgereik het geen beheer het oor die omstandighede waarin die sekuriteite gekoop en verkoop word nie, onthef dit, soos gesê, van gemelde aanspreeklikheid (Verslag par 2 3 1).

Die vraag is vervolgens of daar met die waarborg en statutêre vrywaring wat maatskappye geniet, weggedoen behoort te word. Die effek hiervan sal wees dat maatskappye, as gevolg van die werking van artikel 115 van die Maatskappywet, elke oordraggewer en oordragnemer moet opspoor ten einde te verseker dat die oordragstukke nie vervals of gesteel is nie. Die probleem is egter dat die genoteerde maatskappy nie in die praktyk daartoe in staat is om die geldigheid van die oordragstukke te verifieer nie omdat hulle geen direkte kontak het met die persone wat aandele koop en verkoop nie. Die reëling sou daarom onprakties wees.

Verder moet daar in gedagte gehou word dat die reëls van die JSE ook 'n waarborg deur die verkopende lid ten opsigte van die stukke skep (kyk par 7 hierbo). Sodanige wysiging in die Maatskappywet sal dus die sorgsaamheidsplig dupliseer aangesien twee partye dieselfde inligting moet verifieer. Die gevolg hiervan sal wees dat die partye hulself teen dieselfde risiko moet verseker wat weer die koste van die oordragprosedure sal verhoog (kyk Verslag par 4 4 5 oor die gelde wat die lid ontvang ter vergoeding van die risikokomponent).

'n Ander moontlikheid is die behoud van die waarborg en statutêre vrywaring met die byvoeging van 'n "versagtingselement" ter wille van billikheid. Die voorgestelde wysiging deur die regskommissie pas hier in (kyk par 2 hierbo). Die toets van nalatigheid is ingevoer sodat die vrywaring nie sal geld nie indien die indienende party kan bewys dat hy te goeder trou opgetree het en dat die maatskappy nalatig gehandel het. Waar die skade deels aan die nalatigheid van die maatskappy en deels aan die nalatigheid van die indienende party te wyte is, word die skadevergoeding deur die hof verminder.

Die invoering van die gemeenregtelike begrip nalatigheid in die voorgestelde wysiging van artikel 138 skep probleme aangesien die statutêre waarborg nie uitgesluit word nie. Hiervolgens sal maatskappye dus nie hoef te verseker dat die oordragstukke eg is nie. 'n Genoteerde maatskappy kan dus nie aanspreeklik gehou word in die geval waar die stukke vervals of gesteel is nie. In die lig van die feit dat daar geen positiewe plig op die maatskappy geplaas word om te verseker dat die oordragstukke eg is nie, sal die bewys van nalatigheid aan die kant van die maatskappy baie moeilik wees. Dit is ook nie duidelik welke standaard van optrede van die maatskappy verwag gaan word in die gebruikmaking van die toets van die redelike persoon (maatskappy) in sodanige omstandighede nie. Die praktiese uitvoerbaarheid van die gewysigde artikel word ook betwyfel indien in ag geneem word dat die indienende party waarborg dat die stukke eg is, maar terselfdertyd die maatskappy van nalatigheid moet "beskuldig" in die registrasie van die oordrag. Die indienende party word dus met die bykans onmoontlike bewyslas opgesaal om te bewys dat die maatskappy

nalatig opgetree het waar dit juis, op grond van die waarborg dat die stukke eg is, 'n oordrag geregistreer het.

Die invoering van die beginsel wat betrekking het op verdeling van skadevergoeding kan ook baie gekompliseerd raak. Die voorgestelde wysiging maak spesifiek daarvoor voorsiening dat die hof uitsluitsel moet gee in gevalle van bydraende nalatigheid. Die gevolg hiervan is dat partye gedwing word om in duur en tydsame hofgedinge betrokke te raak waarvan die eindresultaat onseker is (kyk Verslag par 4 4 7).

Hierbo is gewys op die onsekerheid rakende die interpretasie van die begrip "stukke" (par 4 1). Indien die waarborg en die statutêre vrywaring onveranderd bly geld, sal dit nietemin verwelkom word indien die aandelesertifikaat (of ander titelbewys) uitdruklik van die begrip "stukke" uitgesluit word. Die egtheid van die aandelesertifikaat val immers uitsluitlik in die kennisveld van die uitreikende maatskappy of sy oordragsekretaris wat redelike stappe kan doen om die egtheid van die sertifikaat te verifieer. Daar word tereg ook in die Verslag aangedui dat die regsvergelykende studie wat gedoen is nie die voorstel steun dat die indienende party aanspreeklik gehou moet word waar skade gely is as gevolg van 'n vervalste titelbewys nie (par 4 5 6, 3 1–3 4 4; kyk ook Pennington *Company law* (1990) 352–354).

9 Gevolgtrekking

Die regskommissie se hoofverslag weeg die beskerming van die *bona fide* koper van genoteerde aandele op teen die regte van die eienaar ten einde te bepaal of wetgewing vir 'n nuwe of gewysigde oordragprosedure vir die *bona fide* koper voorsiening moet maak. Die aanvullende verslag van die regskommissie weeg die regte en verpligtinge van die indienende party teen dié van die betrokke maatskappy op met betrekking tot die statutêre waarborg en statutêre vrywaring in die oordrag van genoteerde effekte. Uit beide ondersoeke blyk duidelik dat 'n billiker stelsel vir die oordrag van genoteerde aandele slegs meegebring kan word deur 'n fyn balansering van die belange van die betrokkenes in die oordragprosedure.

Die regskommissie is van mening dat die invoeging van gemeenregtelike nalatigheid en die toepassing van die beginsel van verdeling van skadevergoeding in die voorgestelde wysiging van artikel 138 'n billike oplossing vir die probleem bied. Ek is egter van mening dat die koste van die strenger sorgsaamheidsplig vir die maatskappye die oordragprosedure duurder sal maak. Ek is ook oortuig dat die aanwending van die toets van nalatigheid die prosedure gekompliseerd en omslagtig sal maak.

Aan die ander kant word die voorstel van die regskommissie om die aandelesertifikaat van die statutêre waarborg uit te sluit, verwelkom. Aangesien daar tot op hede geen gerapporteerde beslissing oor die uitleg van artikel 138 is nie, en die regskommissie in beide genoemde ondersoeke bevind het dat die aandelesertifikaat wel deel uitmaak van die "stukke" wat betrekking het op die oordrag, is dit belangrik dat die wetgewer die posisie aanspreek. Dit is immers nie billik dat die indienende lid geag word die egtheid van die titelbewys te waarborg waar dit in werklikheid slegs die uitreikende maatskappy is wat oor die ware feite beskik nie.

Die wysiging (op welke wyse ook al) van artikel 138 van die Maatskappywet bied slegs 'n korttermynoplossing vir die probleme in die Suid-Afrikaanse papiergebaseerde oordragprosedure. Dit is my oorwoë mening dat artikel 138 in

die breë raamwerk van die herstrukturering van die oordragprosedure hersien behoort te word; dit is vir enige party 'n onbenydenswaardige taak om die verantwoordelikheid vir die aandelesertifikaat en ander "stukke" in die bestaande oordragprosedure te dra. Die kern van die probleem lê in die veelvuldige hantering en fisiese beweging van die dokumente. In die ontleding van die oordragprosedure op die JSE kan gemerk word dat die proses vir kontrole en reguleringsdoeleindes grootliks steun op die gebruik van dokumentasie. Voordat daar nie hieraan aandag geskenk word nie bly die sorgsaamheidsplig ten opsigte van die stukke 'n netelige saak (kyk ivm die proses van immobilisasie of dematerialisasie as oplossings Vermaas 401–435).

Daar word aan die hand gedoen dat artikel 138 van die Maatskappywet, met uitsondering van die uitsluiting van die aandelesertifikaat, in sy huidige vorm behou word omdat die geldende regsposisie die meeste sekerheid aan die partye verskaf, die goedkoopste oordrag verseker en die eenvoudigste proses daarstel.

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GEGRONDE REDES BY DIE WYSIGING VAN ONDERHOUDSBEVELE: ENKELE GEDAGTES OOR VERANDERDE OMSTANDIGHEDE EN INFLASIE

1 Inleiding

In die onlangs gerapporteerde uitspraak *Beukes v Beukes* 1995 4 SA 429 (O) beslis die hof dat *gegronde rede* soos dit vir wysiging van 'n bestaande onderhoudsbevel uit hoofde van artikel 4(1)(b) van die Wet op Onderhoud 23 van 1963 vereis word, ook in stygende lewenskoste geleë is in die geval waar kinders die onderhoudsgeregtigdes is. Hierdie aangeleentheid word hierin verder vergelykenderwys met die posisie waar gewese eggenote aansoek vir wysiging van 'n onderhoudsbevel doen, onder die loep geneem. Die Wet op Onderhoud vereis dat daar *gegronde rede* vir die vervanging of opheffing van 'n onderhoudsbevel moet bestaan, maar bied self geen aanduiding van 'n verskil in benadering in die geval waar kinders en gewese gades onderskeidelik vir sodanige wysiging aansoek doen nie. Om doelmatigheidsredes word daar in die verdere bespreking slegs na dié situasie verwys waar daar 'n skikkingsooreenkoms tussen gades bereik is wat daarna in 'n hofbevel vervat is.

In casu het die huwelik tussen die partye in 1988 ontbind. Respondent is gelas om R200 per maand vir die onderhoud van die partye se (toe 11-jarige) seun by te dra. Die bedrag is later verhoog en appellante eis nou weer in die onderhoudshof vir verhoging van die bedrag op grond daarvan dat "appellante getuig . . . dat sy nie meer kan uitkom met die onderhoud nie" (431C). Na die afhandeling van haar getuienis het albei partye se regsverteenwoordigers betoog en die landdros het daarna in effek absolusie van die instansie gegee sonder dat respondent getuig het.

In die afwysing van appellante se eis verduidelik die onderhoudshof dat hy nie 'n ander hof se bevele na willekeur kan hersien nie en dat daar bewys moet word

dat die omstandighede van die partye sodanig verander het dat dit 'n ingryping regverdig (431G). Appellante het haar nie van hierdie bewyslas gekwyt nie en die onderhoudshof bevind dat sy nie bewys het dat haar finansiële posisie sodanig verander het dat daar met die bestaande bevel ingemeng moet word nie. Haar getuienis was eenvoudig dat lewenskoste op die datum van verhoor (1994) baie hoër was as in 1988 toe die bevel gemaak en die seun 11 jaar oud was.

In appèl word die bevel van die onderhoudshof tersyde gestel en na die onderhoudshof vir verdere ondersoek terug verwys. Ter motivering van die bevel verduidelik die hof dat dit

> "nie moeilik is om in te sien wat dit vandag kos om selfs 'n klein huishouding aan die gang te hou nie en om in die behoeftes van 'n 16-jarige seun te voorsien nie. Daar kan sekerlik kennis geneem word van die feit dat die lewenskoste vandag baie hoër is as wat dit in 1988 was" (431H–I).

Die hof maak dit duidelik dat gegronde rede nie noodwendig net veranderde omstandighede behels nie en stel hom daarmee dus ondubbelsinnig op die standpunt dat inflasie as sodanig (en die daarmee gepaardgaande verhoging in lewenskoste) gegronde rede vir die aanpassing van 'n onderhoudsbedrag kan bied waar die belange van kinders ter sprake is. Teenoor hierdie standpunt, wat geykte reg is in die geval waar die belange van kinders ter sprake is, blyk dit dat die benadering van die howe in die geval waar gewese eggenote hulle op inflasie as gegronde rede beroep, nie eenduidig is nie.

2 Inflasie as gegronde rede by beoordeling van aansoeke om wysiging van onderhoudsbevele

2 1 Wysiging van onderhoudsbevele in die geval van gewese gades

In die geval van aansoeke om wysiging van onderhoudsbevele tussen eertydse gades, is die howe enigsins terughoudend om inflasie as gegronde rede te beskou. In *Louis v Louis* 1973 2 SA 597 (T) verduidelik die hof dat 'n verhoging in die lewenskoste op sigself nie 'n gegronde rede vir die verhoging van 'n onderhoudsbevel is nie, want as dit die geval sou wees, sou die howe oorstroom word met aansoeke vir verhoging van onderhoud (599A–B). Gesag vir hierdie standpunt vind die hof in *Hossack v Hossack* 1956 3 SA 159 (W). Daar word gesê dat die korrekte uitleg van artikel 10(1) en (2) van die Wet op Huweliksaangeleenthede 37 van 1953, wat eweneens 'n gegronde rede vereis, beteken dat "[t]here must be something more than the financial position of the parties alone" wat 'n hof in aanmerking sal neem alvorens 'n wysiging aan 'n bestaande hofbevel aangebring word (165C). Verdere gesag vir hierdie benadering word in *Van Wyk v Van Wyk* 1954 4 SA 594 (W) en *Stone v Stone* 1966 4 SA 98 (K) gevind. In laasgemelde saak verduidelik die hof dat indien "a material change in the circumstances" nie plaasgevind het nie, dit maklik tot 'n situasie kan lei dat 'n gade eenvoudig onophoudelik sal probeer om verhoging/verlaging van 'n onderhoudsbevel te kry.

'n Soortgelyke benadering word in *Copelowitz v Copelowitz* 1969 4 SA 64 (K) gevind. Die hof stel dit daar dat tensy daar "special circumstances" ontstaan die oorspronklike onderhoudsbedrag gehandhaaf moet word.

Bovermelde benadering word enigsins genuanseer in *Levin v Levin* 1984 2 SA 298 (K), 'n gewysde wat eweneens oor die wysiging van 'n bestaande onderhoudsbevel tussen gewese gades handel. Die hof verduidelik dat *Louis* en *Copelowitz* nie verstaan moet word as sou hulle neerlê dat inflasie nooit op sigself 'n gegronde rede vir die verhoging van 'n onderhoudsbevel kan wees nie.

In die periode 1969–1973 toe dié gewysdes beslis is, was die bestaan van inflasie iets waarmee die gemeenskap moes saamleef – "the gradual depreciation over the years in the value of money was one of the facts of life" (304F). Die partye moet dus bewus van hierdie fenomeen gewees het en dat lewenskoste stadig maar seker sou styg. Wanneer hulle dan om onderhoud beding het, moet aanvaar word dat hulle hierdie feit in berekening gebring het. Die hof gee derhalwe ter oorweging dat dit die rede was hoekom daar in die vermelde beslissings tot die gevolgtrekking geraak is dat inflasie op sigself genome onvoldoende rede vir die verhoging van onderhoud aan 'n geskeide gade bied.

Die posisie is egter anders waar die effek van inflasie nie deur die kontrakterende partye voorsien is of redelikerwys voorsien kon word nie. Ter illustrasie van dié argument haal die hof die deskundige getuienis aan wat in *Ex parte Sidelsky* 1983 4 SA 598 (K) aangevoer is:

> "In my view, no economist, let alone a prudent businessman, foresaw or could have possibly foreseen anything like the inflation that has incurred since 1945 as it was simply unheard of in South African economics at that time, since nothing like this had occurred in South Africa, even during the Second World War" (304I).

Die hof konkludeer vervolgens dat geen makro-ekonoom in 1974 (toe die bevel gemaak is) die gevolge van die oliekrisis in 1973, en meer spesifiek die steeds opwaartse neiging in die lewenskoste as gevolg van 'n "rampant inflation" kon voorsien nie. Dit kon derhalwe ook nie van die partye betrokke in 'n egskeidingsgeding verwag word om dit te voorsien nie. Sou die partye egter oor die onderhoudsaangeleentheid geskik het terwyl die "ravages of inflation" aan hulle bekend was, of verwag kon word aan hulle bekend te wees, sou die situasie anders daar uitsien en sou inflasie op sigself genome nie 'n veranderde omstandigheid bied nie (305A–D).

Hierdie benadering strook breedweg met dié in *Roos v Roos* 1945 TPD 84 soos dit in *Hancock v Hancock* 1957 2 SA 500 (K) nagevolg is. In dié beslissings word van die standpunt uitgegaan dat

> "variation will be ordered not only in case of breach by either party, but because there had been such a change in the conditions that existed when the order was made that it would now be unfair that the order should stand in its original form" (501G).

Dit is enersyds dus duidelik dat daar in bogemelde beslissings in beduidende mate by die beginsel van *pacta servanda sunt* gehou word by die oorweging van sodanige aansoeke, en andersyds dat die posisie soos dit bestaan het voor die Wet op Huweliksaangeleenthede 37 van 1953, naamlik dat 'n hof nie 'n bevel kon wysig wat 'n skikkingsooreenkoms tussen gades beliggaam het nie (Hahlo *South African law of husband and wife* 4 uitg 442 vn 94), steeds in hierdie uitsprake neerslag vind.

Teenoor bogenoemde trant van argument word dié gevind dat veranderde omstandighede nie noodwendig as gegronde rede vereis word in die geval waar 'n gewese eggenoot aansoek doen vir die wysiging van 'n onderhoudsbevel nie. In *Havenga v Havenga* 1968 2 SA 438 (T) word die posisie byvoorbeeld soos volg verduidelik:

> "As algemene uitgangspunt kan dit gestel word dat in die afwesigheid van 'n wesenlike verandering van omstandighede daar nie gegronde redes kan bestaan vir die vervanging of opheffing van 'n onderhoudsbevel nie. Veranderde omstandighede is egter nie 'n statutêre voorvereiste nie. Daar kan omstandighede wees waar daar gegronde redes is vir die vervanging of opheffing van 'n onderhoudsbevel sonder dat daar 'n wesenlike verandering van omstandighede plaasgevind het" (445D).

Sonder om enigsins in 'n debat te verval oor die uitleg van veranderde omstandighede soos in artikel 4 van die Wet op Onderhoud uiteengesit, word ter oorweging gegee dat die benadering in *Havenga* die posisie korrek weergee. Veranderde omstandighede word nie in artikel 4(1) vereis nie en is inderdaad niks meer nie as 'n praktyksreëling wat ontstaan het. Daar word aan die hand gedoen dat die wetgewer hom doelbewus op so 'n wye omskrywing gestel het ten einde aan die onderhoudshof die verpligting op te lê om met 'n breë perspektief na die betrokke aansoek te kyk. Die benadering dat dit "unfair" moet wees dat die bevel in sy oorspronklike formaat moet bly voortbestaan (*Roos supra*) en dat "moral and ethical reasons apart from the financial needs of the parties which appear to necessitate the alteration of the order" (*Jacobs v Jacobs* 1955 1 SA 235 (W); *Barnard v Barnard* 1970 3 SA 161 (O)) as gegronde rede vir die wysiging van 'n onderhoudsbevel aanvaar kan word, lyk korrek. Daarom kan inflasie, as die besondere omvang daarvan nie voorsien kon word deur die partye tydens skikkingsonderhandelinge nie, wel as gegronde rede vir die wysiging van die bestaande bevel dien.

2 2 Wysiging van onderhoudsbevele waar kinders die onderhoudsgeregtigdes is

Waar aansoek gedoen word om die wysiging van 'n onderhoudsbevel waar kinders die onderhoudsgeregtigdes is, is die posisie duidelik uitgeklaar. In *Vedovato v Vedovato* 1980 1 SA 772 (T), waarna die hof in *Beukes supra* verwys, word kort en bondig verduidelik dat lewenskoste so snel styg dat wat voorheen as 'n buitengewoon hoë onderhoudsbedrag geag kon word, vandag nie meer as sodanig beskou kan word nie. Die hof sê:

> "This is a case of a father having to support his children, and their needs must inevitably be assessed against the rising cost of making provision for them" (775E–F).

Die "rising cost" is derhalwe op sigself 'n grond vir wysiging van 'n onderhoudsbevel vir kinders aangesien hulle veranderende behoeftes sodanige aanpassing noodsaak. Hierdie benadering strook met alledaagse realiteit en kan kwalik bevraagteken word. Die grondslag vir die onderhoudsbevel is in hierdie geval nie die aanvanklike ooreenkoms wat tussen partye bereik is nie, maar eerder die behoefte van die kind. Stygende lewenskoste word derhalwe ondubbelsinnig as gegronde rede vir die wysiging van 'n onderhoudsbevel gesien (774F–G; vgl ook *Prophet v Prophet* 1948 4 SA 325 (O) 329). Die beste belang van die kind is die deurslaggewende faktor in hierdie omstandighede en die kriterium vir die vasstelling van die onderhoudsverpligting is juis die onderhoudspligte se "station in life" (*Prophet supra* 329; *Herfst v Herfst* 1964 4 SA 127 (W) 130E–F).

Regter Ludorf stel die situasie in *Hossack supra* myns insiens in die regte perspektief waar hy verduidelik dat

> "'good cause' which an applicant must show in an application for the variation of an order for the maintenance of minor children . . . may differ materially from 'good cause' which an applicant must show in an application (by a divorced wife) . . . In the former type of application an applicant need usually only show an ability on the part of the respondent to pay more and a need that more should be paid. In my view, something more will have to be shown in most cases where a divorced spouse wishes to vary an agreement for maintenance entered into . . ." (163H).

3 Slot

Dit blyk dat waar kinders die onderhoudsgeregtigdes is, eenstemmigheid bestaan dat veranderde omstandighede nie vereis word vir die wysiging van 'n bestaande

onderhoudsbevel nie. Inflasie is derhalwe as sodanig 'n grond vir die wysiging van sodanige bevel. In die geval waar 'n skikkingsooreenkoms tussen gades 'n bevel van die hof gemaak is en daar om wysiging van daardie bevel aansoek gedoen word, is die posisie enigsins meer gekompliseerd daar die beginsel van *pacta servanda sunt* en die historiese aanloop ten aansien van die wysiging van sodanige aansoeke in beduidende mate 'n oorweging by sommige howe is. Daarom word daar gevind dat sommige gewysdes wel veranderde omstandighede vereis (*Stone* en *Louis supra*), dat ander dié benadering genuanseerd navolg deur te vereis dat dit "unfair" moet wees dat die oorspronklike bevel gehandhaaf word (*Levin supra*), en dat ander beslissings veranderde omstandighede nie noodwendig as vereiste sien nie (*Havenga supra*). Die benadering jeens veranderde omstandighede sal die siening aangaande inflasie as gegronde rede raak. Dit is gevolglik te verstane dat die hof in *Levin* inflasie as gegronde rede sou sien. In *Havenga* sou dit klaarblyklik ook as gegronde rede beskou word. Daarteenoor sou dit nie die geval in *Louis* wees nie daar die partye aan hulle ooreenkoms (wat in 'n bevel van die hof vervat is) gehou word behalwe as daar gegronde rede vir die wysiging daarvan bestaan.

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ARTIKEL 2(3) VAN DIE WET OP TESTAMENTE 7 VAN 1953 EN SUBSTANSIËLE NAKOMING VAN FORMALITEITE: VIER UITSPRAKE IN PERSPEKTIEF

1 Inleiding

Die Suid-Afrikaanse erfreg het verskeie ingrypende (en welkome) veranderings ondergaan met die inwerkingtreding op 1 Oktober 1992 van die Wet tot Wysiging van die Erfreg 43 van 1992. Hierdie wet het onder andere heelwat vernuwende bepalings in die Wet op Testamente 7 van 1953 ingevoeg. Die ingrypendste van hierdie bepalings is sekerlik artikel 2(3) wat ten doel het die verligting van die streng formalistiese benadering van die verlede wat 'n testament (of die wysiging daarvan) tot ongeldigheid verdoem het vanweë gebrekkige nakoming van die formaliteite vir testamentsverlyding en/of -wysiging (wat in artikel 2(1)(a) en (b) vervat word). Hierdie doel word bereik deur verlening van 'n kondonasiebevoegdheid aan die hof ingevolge waarvan dit die meester kan gelas om 'n dokument (of wysiging daarvan) wat deur die opsteller daarvan as testament (of wysiging) bedoel was, as sodanig te aanvaar, ten spyte van die feit dat dit nie aan al die voorgeskrewe formaliteite voldoen nie. Die volledige 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 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 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."

Soos met enige nuwe wetgewing het verskeie kommentatore reeds voor inwerkingtreding van Wet 43 van 1992 heelwat vrae gehad oor die inhoud en toepassing van etlike artikels in dié wet. Artikel 2(3) was geen uitsondering nie. Een van die tergendste vrae is of 'n hof sy kondonasiebevoegdheid kan uitoefen ten opsigte van 'n dokument wat aan geen vormvereistes hoegenaamd voldoen nie. Anders gestel: behoort substansiële nakoming van formaliteite, oftewel 'n drempelvereiste (by uitstek ondertekening deur die erflater), nie 'n *sine qua non* te wees nie alvorens 'n hof ingevolge artikel 2(3) kan optree? Op hierdie vraag is geen konsekwente antwoord onder die onderskeie kommentatore te vind nie en daar is gevolglik met groot afwagting uitgesien na die eerste geleentheid vir ons howe om oor hierdie aangeleentheid te beslis. In 1995 is vier uitsprake gerapporteer waarin die hof die onderhawige kwessie onder die loep geneem het: *Horn v Horn* 1995 1 SA 48 (W), *Logue v The Master* 1995 1 SA 199 (N), *Ex parte Maurice* 1995 2 SA 713 (K) en *Letsekga v The Master* 1995 4 SA 731 (W).

In hierdie bydrae word bogenoemde vier uitsprake ontleed ten einde 'n antwoord op die gestelde probleemvraag te probeer vind. Daar word ook getoon in welke mate die hof se hantering van die aangeleentheid strook met die voorgestelde benadering van die onderskeie kommentatore.

2 Die noodsaaklikheid van formaliteite en die rol van 'n kondonasiebevoegdheid

Daar word algemeen aanvaar dat die aandrang op nakoming van formaliteite by verlyding en wysiging van testamente bestaan ten einde die egtheid van die testament te waarborg deur bedrog of vervalsing tydens die verlydings- en wysigingsproses uit te skakel (*Ex parte Naidu* 1958 1 SA 719 (D); *Philip v The Master* 1980 2 SA 934 (D) 937F). 'n Onbuigsame toepassing van formaliteitsvereistes bring egter mee dat selfs 'n onbeduidende vormgebrek die geldigheid van 'n testament in gedrang bring. Die onbillike resultaat van 'n starre toepassing van formaliteitsvereistes is in ons reg op die spits gedryf in *Kidwell v The Master* 1983 1 SA 509 (OK) toe die hof 'n testament ongeldig bevind het vanweë 'n te groot spasie tussen die laaste bepalings van die testament en die testateur se handtekening. Laasgenoemde handtekening het dus nie "aan die end" van die testament verskyn nie soos vereis deur artikel 2(1)(a)(i) van die Wet op Testamente. Die hof kom tot hierdie beslissing ten spyte van die feit dat geen twyfel oor die egtheid van die testament bestaan het en geen bedrog by die verlyding daarvan gepleeg is nie. Regter Kannemeyer spreek sy frustrasie met hierdie resultaat soos volg uit (514F):

> "The conclusion to which I have come is unfortunate for the applicant and may frustrate the testator's intention. This is the result of a failure to observe a statutory requirement for the validity of wills which is peremptory."

Hierdie (en soortgelyke) probleme word nou ondervang deur die kondonasiebevoegdheid in artikel 2(3) verleen: ten spyte van nie-nakoming van vormvereistes kan 'n hof die meester gelas om steeds die betrokke dokument as testament te aanvaar.

Die feite van die *Horn*-uitspraak *supra* bied 'n goeie illustrasie van die aanwending van artikel 2(3). Die oorledene het op die dag van sy selfmoord in 1993 'n dokument in sy eie handskrif geskryf en onderteken waaruit 'n laaste

wilsbeskikking oor sy bates geblyk het. Hierdie wilsbeskikking het afgewyk van dié vervat in 'n geldige testament in 1986 verly. Eersgenoemde dokument is egter nie in die teenwoordigheid van enige ander persoon deur die oorledene onderteken nie en geen getuie het uiteraard die dokument mede-onderteken nie. Die bevoordeeldes ingevolge die 1993-dokument doen aansoek dat dié dokument as die oorledene se laaste testament erken word. Die hof staan die aansoek toe.

In die loop van sy uitspraak merk regter Flemming op dat die oorledene inderdaad die dokument onderteken het, dat die dokument homself 'n testament noem en dat dit in al die omstandighede die "strekking en toon" van die dokument is dat dit bedoel is om as testament te funksioneer (49I). Hierdie omstandighede bied die ideale aanwendingsgebied vir artikel 2(3) aangesien sodoende verseker word dat die oorledene se laaste wilsuiting oor die beskikking van sy bates nie deur 'n vormgebrekkige testament gefrustreer word nie.

3 Substansiële nakoming van formaliteite as vereiste?

Regter Flemming maak in *Horn v Horn supra* enkele opmerkings in verband met die vraag of substansiële nakoming van formaliteite vereis word alvorens 'n hof sy kondonasiebevoegdheid mag uitoefen. Alhoewel hierdie opmerkings streng gesproke *obiter* is, is die regter se denkrigting tog insiggewend. Die algemene strekking van regter Flemming se opmerkings spreek ten gunste van substansiële nakoming van formaliteitsvereistes. Hy fokus veral op die gebruik van die woord "al" in artikel 2(3) ("ofskoon nie aan *al* die vormvereistes vir die verlyding van testamente ... voldoen is nie"). Die feit dat die wetgewer hierdie woord in artikel 2(3) ingevoeg het, sinspeel na die regter se mening op die oorweging dat ten minste aan 'n sekere minimum- of drempelvereiste ten opsigte van formaliteite voldoen moet word alvorens 'n hof 'n vormgebrekkige testament mag kondoneer (94F). Die relevante drempelvereiste hier is klaarblyklik dat die oorledene die betrokke dokument ten minste moet onderteken het. Hierdie oorweging is egter nie vir die hof in die *Horn*-saak 'n struikelblok op die weg na sy beslissing ten gunste van kondonasie nie aangesien die dokument *in casu* wel deur die oorledene onderteken is.

Bogaande standpunt van regter Flemming strook met dié van Jamneck (1994 *THRHR* 598) wat betoog dat die betrokke dokument minstens op die een of ander manier, hetsy by wyse van 'n handtekening of by wyse van 'n merk, as die wilsbeskikking van die oorledene geïdentifiseer moet kan word alvorens 'n hof ondersoek sal instel na die vraag of die dokument inderdaad as testament bedoel was.

Daar word ter oorweging gegee dat regter Flemming en Jamneck se standpunte ten gunste van 'n drempelvereiste nie navolgenswaardig is nie. Jamneck se uitgangspunt dat ondertekening deur die erflater vir identifikasiedoeleindes vereis moet word, is klaarblyklik gewortel in die oorweging dat formaliteitsvereistes as 'n effektiewe skans teen bedrog dien. Ondertekening deur die erflater is dus, ten spyte van die hof se kondonasiebevoegdheid, 'n minimum vereiste ten einde die egtheid van die wilsuiting te bepaal en die moontlikheid van bedrog uit te skakel. Hierdie standpunt sneuwel na my mening om twee redes:

(a) Daar word allerweë aanvaar dat die feit dat 'n handtekening op 'n dokument voorkom, geen waarborg bied ten opsigte van die egtheid daarvan nie. In *Horn v Horn supra* 490 merk regter Flemming byvoorbeeld op dat die getuienis van handskrifdeskundiges in hierdie verband van groot waarde is – dermate dat die

rol van getuies wat by verlyding van 'n testament die handtekening van die erflater bevestig, 'n "misbare funksie" is. Getuienis deur deskundiges of ander toelaatbare getuienis omtrent die omstandighede waarin die betrokke dokument opgestel is, bied moontlik beter beskerming teen bedrog as die aandrang op ondertekening deur die erflater. Daar word verder ter oorweging gegee dat selfs waar 'n hof gevra word om 'n dokument as testament te kondoneer wat die handtekening van die (beweerde) erflater bevat, die hof steeds na gelang van die omstandighede op verdere getuienis moet aandring ten einde homself te vergewis van die egtheid van die dokument.

(b) Indien aanvaar word dat Jamneck se standpunt tog meriete inhou, moet dit konsekwent deurgevoer word. Dit beteken dat nie alleen ondertekening aan die end van die dokument deur die erflater (ooreenkomstig a 2(1)(a)(i)) as drempelvereiste gestel moet word nie, maar, indien die dokument uit meer as een bladsy bestaan, ook elke ander bladsy as dié waarop dit eindig deur die erflater (ooreenkomstig a 2(1)(a)(iv)) onderteken moet word ten einde die egtheid van die hele dokument te waarborg.

Die uitspraak in *Logue v The Master supra* toon duidelik dat hierdie standpunt nie water hou nie. *In casu* het die oorledene ook 'n handgeskrewe dokument nagelaat waarin hy sy laaste wilsbeskikking ten opsigte van sy bates openbaar het. Dié dokument het uit twee bladsye bestaan en is op die laaste bladsy deur die oorledene onderteken. Niemand het egter as getuie geteken nie en die oorledene het ook nie die eerste bladsy onderteken nie. Die aansoek dat hierdie dokument as testament van die oorledene erken word, word toegestaan.

Ten opsigte van die afwesigheid van getuies tydens verlyding van die dokument, bevind die hof by monde van regter Booysen (soos in *Horn v Horn*) dat die bevestiging van die erflater se handtekening deur getuies in der waarheid weinig beskerming teen bedrog bied. Nie-voldoening aan hierdie formaliteitsvereiste is daarom kondoneerbaar, mits aan die ander voorskrifte van artikel 2(3) voldoen word (202D–H). Die hof sien nie die afwesigheid van die oorledene se handtekening op die eerste bladsy van die dokument as 'n struikelblok op die weg na kondonasie nie, aangesien die hele dokument in die oorledene se handskrif is (dit is nie in die hof betwis nie maar sou klaarblyklik deur 'n deskundige bevestig kon word) en dit 'n effektiewe skans teen moontlike bedrog bied (202I; sien ook Sonnekus 1992 *THRHR* 161). Die egtheid van die hele dokument as laaste wilsbeskikking van die oorledene is dus gewaarborg nie alleen deur ondertekening nie, maar veral deur die feit dat hy dit self geskryf het.

Regter Flemming se standpunt in *Horn v Horn* oor die gebruik van die woord "al" in artikel 2(3) is moeiliker te beantwoord as dié van Jamneck. Dié woord suggereer kennelik dat 'n hof slegs ingevolge artikel 2(3) kan handel indien wel aan sommige vormvereistes voldoen is. Wat die onderhawige aangeleentheid des te meer problematies maak, is die feit dat die wetgewer klaarblyklik afgewyk het van die aanbeveling van die Suid-Afrikaanse Regskommissie soos blyk uit die *Verslag oor hersiening van die erfreg* van Junie 1992 (par 2.20–2.22). Hierin spreek die regskommissie hom uit ten gunste van 'n kondonasiebevoegdheid wat "nie gekniehalter moet word deur 'n reël wat wesenlike voldoening aan testamentsformaliteite vereis nie". Die enigste vereiste wat die regskommissie stel, is dat die betrokke dokument op skrif gestel moet wees, met die implikasie dat selfs 'n dokument wat nie deur die erflater onderteken is nie, gekondoneer mag word.

Wat die uitwerking van die woord "al" op ons howe se toepassing van artikel 2(3) gaan wees, sal die tyd moet leer. Daar word egter ter oorweging gegee dat 'n hof hom nie blind moet staar teen dié woord nie, veral nie in die lig van die oorheersende bedoeling wat artikel 2(3) onderlê nie, naamlik om uitvoering te gee aan die bedoeling van die erflater sonder dat 'n vormgebrekkige testament hierdie bedoeling kniehalter. Indien "al" inderdaad geïnterpreteer word as sou dit 'n drempelvereiste vir kondonasie daarstel, sal dit opsigtelik onbillike resultate in die volgende situasie meebring:

'n Erflater wil 'n testament laat opstel en nader sy prokureur met besonderhede omtrent die inhoud daarvan. Die prokureur stel die dokument op maar op die dag waarop die erflater die dokument sou onderteken, sterf hy voordat aan enige formaliteitsvereistes voldoen kan word. Ten spyte van 'n totaal vormgebrekkige testament kan die prokureur bevestig dat die dokument bedoel is om die laaste en egte wilsuiting van die erflater ten opsigte van die verdeling van sy bates te wees. Daar word ter oorweging gegee dat die wetgewer nouliks kon bedoel het dat die hof wat om kondonasie van bogenoemde dokument genader word, dit kan weier bloot omdat 'n drempelvereiste ten opsigte van formaliteite nie nagekom is nie terwyl aan al die ander voorskrifte van artikel 2(3) voldoen en die egtheid van die dokument bevestig kan word. (Sien Sonnekus 1995 *TSAR* 361–362 wat oortuigend betoog dat, in die lig van moderne verlydingstegnieke en die bewoording van a 2(3), die kondonasiebevoegdheid nie beperk is tot eiehandiggeskrewe dokumente nie maar ook geld vir dokumente deur 'n ander opgestel.)

Sonnekus 363 betoog in hierdie verband dat die Wet op Testamente geen enkele formaliteitsvereiste belangriker as die ander ag nie. Die argument hou dus nie water nie dat 'n dokument by ontstentenis aan dáárdie bepaalde vereiste daarom nie langer kondoneerbaar is nie. Ook ondertekening deur die erflater is geen drempelvereiste vir die uitoefening van 'n hof se kondonasiebevoegdheid nie. Die interpretasie en toepassing van hierdie aangeleentheid is egter in die hande van ons howe en daar kan met Sonnekus saamgestem word dat dit "sekerlik die spilpunt in die toekomstige aanwending van die kondoneringsbevoegdheid [sal] vorm".

4 Beperking op die omvang van die kondonasiebevoegdheid

Die standpunt dat 'n hof ingevolge artikel 2(3) mag optree selfs ten opsigte van 'n dokument waarin aan geen enkele formaliteit voldoen is nie, beteken egter nie dat 'n algeheel ongebreidelde kondonasiebevoegdheid ten opsigte van enige vormgebrekkige wilsuiting bestaan nie. Die wetgewer het 'n effektiewe beperking in dié artikel ingebou, naamlik dat dit die oorledene se bedoeling moet wees dat die betrokke dokument inderdaad as testament moet funksioneer. Dit beteken dat 'n vormgebrekkige dokument wat bloot as konsep- of ontwerpdokument deur die oorledene bedag was, nie tot testament verhef kan word deur die kondonasiebevoegdheid van artikel 2(3) nie.

'n Goeie illustrasie van wat 'n hof se benadering in so 'n geval moet wees, is te vinde in *Ex parte Maurice supra*. Die oorledene het na sy aftrede verskeie dokumente saam met 'n brief aan sy opvolger by 'n bouvereniging gestuur. Dié dokumente het 'n uiteensetting bevat van sy laaste wilsbeskikking ten opsigte van sy bates. In die brief gee hy opdrag aan sy opvolger om die dokumente deur te lees, "[to] knock it into shape" en "to put it into 'legal jargon'". Aansoek word gedoen dat bogenoemde dokumente as die oorledene se testament erken word

ten spyte van die feit dat dit aan geen formaliteite vir die verlyding van 'n testament voldoen nie.

Die hof, by monde van regter Selikowitz, sit die regsposisie soos volg uiteen (716J–717B):

> "Had the Legislature intended to empower the Court to give a document which simply expressed the testator's wishes for the distribution of his estate to be treated as his will, the Legislature would have said so and would have focused upon the document having to reflect the testator's distribution intentions rather than his/her intention in regard to the status of the document as his/her will. Of course, to treat a document which simply reflects or expresses the testator's disposition intention as his will negates the need for testamentary formalities and allows any expression of intention to be treated as a will. The continued retention by the Legislature of the formal requirements for the validity of a will in section 2(1) of the Wills Act is inconsistent with the adoption of any alternative interpretation of section 2(3)."

Op die feite is regter Selikowitz tereg van mening dat die oorledene nie die betrokke dokumente as sy testament bedoel het nie – die dokument wat deur sy opvolger opgestel sou word met behulp van die inligting in eersgenoemde dokumente vervat, sou in die oorledene se oë as sy testament funksioneer (717F–G). Die hof weier gevolglik om sy kondonasiebevoegdheid uit te oefen en die aansoek word van die hand gewys.

Daar dien op gelet te word dat die regter se aandrang op die nakoming van vormvereistes soos blyk uit die laaste gedeelte van bogaande *dictum*, nie 'n poging is om substansiële nakoming van dié vereistes tot *sine qua non* vir uitoefening van die kondonasiebevoegdheid te verhef nie. Die fokus op formaliteite dien klaarblyklik eerder as meganisme om die oorledene se bedoeling vas te stel dat die betrokke dokument testamentêre status moet geniet in teenstelling met 'n bedoeling dat dié dokument bloot instruksies ten opsigte van die inhoud van die uiteindelike testament bevat en dus konsepstatus moet geniet. Sodanige nakoming is weer eens nie die enigste aanduiding van die oorledene se bedoeling nie – dié bedoeling kan ook deur middel van ander getuienis vasgestel word. (Let weer op die vb in par 3 *supra* bespreek.)

In *Letsekga v The Master supra* kom die hof tot 'n soortgelyke beslissing. Ook in hierdie geval het die oorledene, naas 'n bestaande geldige testament, 'n dokument nagelaat met bepaalde instruksies ten opsigte van die verdeling van sy bates. Hierdie dokument is deur die oorledene self opgestel maar het aan geen van die voorgeskrewe formaliteite voldoen nie. Aansoek word gedoen dat laasgenoemde dokument as wysiging van die geldige testament moet funksioneer soos in artikel 2(3) beoog. Met 'n beroep op die uitspraak in *Ex parte Maurice supra* wys regter Navsa die aansoek van die hand omdat die betrokke dokument bloot as konsepdokument gereken word. Die regter neem die volgende feite in aanmerking ten einde dié beslissing te bereik:

- die handgeskrewe dokument is sonder titel – geen aanduiding dus dat dit as selfstandige testament of wysiging van die bestaande testament moet funksioneer nie (735G);
- die bewoording en struktuur van die handgeskrewe dokument dui daarop dat dit as konsep bedoel is van wysigings wat later aan die bestaande testament aangebring moet word (735I–736G);
- die oorledene het nie die handgeskrewe dokument onderteken nie en daar bestaan geen ander aanduiding van 'n bedoeling aan sy kant dat dié dokument die status van 'n finale wilsbeskikking moet geniet nie (736I); en

- die oorledene was klaarblyklik 'n uitgeslape besigheidsman met 'n grondige kennis van die reg wat sou toesien dat daadwerklike wysigings aan sy bestaande testament aan die voorgeskrewe formaliteite voldoen (736I–J).

Die vraag na die erflater se bedoeling ten opsigte van die status van 'n vormgebrekkige dokument as óf 'n testament óf 'n blote konsepdokument het nie op die feite van die *Maurice*- en *Letsekga*-uitspraak veel probleme opgelewer nie. Die uitspraak in *Logue v The Master supra* bied egter 'n blik op 'n probleemsituasie wat in hierdie verband kan ontstaan. Die oorledene het 'n eiehandiggeskrewe dokument nagelaat, deur homself onderteken, waarin hy oor sy bates beskik het. Na die mening van die hof het die oorledene waarskynlik dié dokument geskryf met die doel om dit te laat tik. Dit word afgelei uit instruksies ten opsigte van, onder andere, die lettertipe wat die oorledene op die dokument aangebring het. Die dokument is ook deur die oorledene onderteken en gedateer met 'n pen wat verskil het van dié waarmee die dokument geskryf is. Op hierdie feite wil dit voorkom of die oorledene die dokument aanvanklik as konsepdokument opgestel het maar dit later onderteken en dateer het met die bedoeling dat dit as laaste wilsbeskikking ten opsigte van sy bates moet funksioneer (201G–I). Dit was dus na ondertekening nie meer 'n blote konsepdokument in sy oë nie. Aangesien aan al die voorskrifte van artikel 2(3) voldoen is, oefen die hof wel sy kondonasiebevoegdheid uit.

Die vraag wat onmiddellik ontstaan, is of die hof tot 'n soortgelyke beslissing sou kon kom indien die oorledene steeds sy bedoeling ten opsigte van die status van die dokument verander het maar nie die dokument onderteken of dateer het om dit aan te dui nie. Daar word ter oorweging gegee dat die antwoord op hierdie vraag positief moet wees mits die hof oortuig is van (i) die egtheid van die dokument en (ii) die oorledene se bedoeling dat dit as testament moet funksioneer. Beide kan deur middel van toelaatbare getuienis bevestig word en is nie uitsluitlik afhanklik van ondertekening van die dokument deur die oorledene nie.

5 Gevolgtrekking

Ten spyte van meningsverskil onder kommentatore wil dit voorkom of 'n hof se kondonasiebevoegdheid ingevolge artikel 2(3) van die Wet op Testamente nie beperk is tot gevalle waar daar wel substansiële nakoming van formaliteite geskied nie. Daar word egter aan die hand gedoen dat 'n hof wat om kondonasie genader word in 'n geval waar aan geen formaliteite hoegenaamd voldoen is nie, sy bevoegdheid met groot omsigtigheid moet uitoefen en homself deeglik moet vergewis van (i) die egtheid van die dokument en die afwesigheid van bedrog by die opstel daarvan en (ii) die oorledene se bedoeling dat die betrokke dokument inderdaad as testament moet funksioneer. Sodoende word die oogmerk van artikel 2(3) verwesenlik, naamlik dat 'n bewese en egte wilsuiting van 'n erflater ten opsigte van die beskikking oor sy/haar bates nie deur 'n (selfs algeheel) vormgebrekkige testament gekniehalter word nie.

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DELIKTUELE AANSPREEKLIKHEID VAN DIE STAAT VIR FOUTE VAN DIE REGSPREKENDE GESAG: IS DIE OERVADER UITEINDELIK ONTHEILIG?

1 Inleiding

Op 19 Desember 1991 het die Belgiese *Hof van Cassatie*, in die sogenaamde *Anca-arrest*, beslis dat die staat in die algemeen aanspreeklik is vir skade veroorsaak deur jurisdiksionele handelinge van die regsprekende gesag (Cass 19 December 1991, Rev Reg Dr 1991, 411–418 – saamgevat deur Storme "De rechterlijke macht" 1993 *NJB* 917). Hierdie beslissing staan uit nie slegs as 'n baken in die (moderne) ordeningsgeskiedenis van die menslike gemeenskap nie maar ook in die sosio-emosionele evolusieproses van die mens. Hierdeur word die regsprekende gesag deliktueel verantwoordelik gestel teenoor die regsonderdane.

Dit is 'n bekende historiese feit dat ongekontroleerde mag die voedingsbron van tirannie en onderdrukking is (Tuttle en Russell "Preserving judicial integrity: Some comments on the role of the judiciary and the 'blending' of powers" 1988 *Emory LJ* 587). Die regsprekende gesag vervul 'n belangrike kontrolefunksie ten aansien van die wetgewende en uitvoerende gesag (sien Althouse "How to build a separate sphere: Federal courts and state power" 1987 *Harvard LR* 1485). In 'n onlangse artikel het ek verskeie "buite-juridiese" en "juridiese" kontrolemeganismes van die regsprekende gesag geïdentifiseer ("Tussen onafhanklikheid en tirannie: Opmerkinge oor die kontrolemeganismes van die regsprekende gesag" 1993 *De Jure* 347). In die *Anca-arrest* kom 'n verdere kontrolemeganisme ter sprake, naamlik deliktuele kontrole. Hiervolgens dien die regsonderdaan (die beslissingbetrokkene) se reg tot deliktuele aksie as kontrolemeganisme van die handelinge van die regsprekende gesag. Die regsprekende gesag word deur mense beman en mense toon oral die neiging om foute te maak. Kontrolemeganismes is juis daarop gerig om foute en benadeling te voorkom of reg te stel. Oor regterlike foute verklaar Kortmann ("Wie betaald de rekening?" 1993 *NJB* 921) soos volg:

> "Rechterswerk is mensenwerk. Ook door rechters worden fouten gemaakt. Zo zijn in de jurisprudentie voorbeelden te vinden van fouten waaroor de justiabele de toegang tot de appelrechter werd onthouden of bemoeilijkt. Ik noem hier als voorbeelden het niet tijdig voor het einde van de appeltermijn toesturen van de uitspraak aan de betrokkenen, het vermelden van een onjuiste appeltermijn in de uitspraak en het verkeerd beoordelen van de appelgrens in een geval waarin de appelabiliteit wordt bepaald door de optelsom van de vorderingen in conventie en reconventie. Ook de rechter die verzuimt aan zijn hoorplicht te voldoen of het beginsel van hoor en wederhoor niet in acht neemt, maakt zich schuldig aan een misslag. Rechterlijke fouten kunnen voorts veroorzaakt worden door slordigheden. Bijvoorbeeld het verzuim de beslissing uitvoerbaar bij voorraad te verklaren, hoewel dit de bedoeling van de rechter was; vermelding van een verkeerd bedrag in het dictum; het bezigen van verkeerde namen in een rechterlijke beslissing. Naast deze procedurele en slordigheidsfouten kan men voorts denken aan onjuiste juridische oordelen" (sien ook Verougstraete "De rechter en de macht" in Storme (red) *Recht en macht* (1990) 182; Eckhoff "Impartiality, separation of powers, and judicial independence" 1965 *Scandinavian Studies in Law* 22).

Die publiek is minder ingelig oor die regsprekende gesag as oor ander afdelings van die staatsgesag (Gordon "The judicial image: Is a facelift necessary?" 1985 *Justice System J* 315). Hierdie toedrag van sake is vinnig besig om te verander. Trouens, daar is al in die VSA voorgestel dat 'n meganisme of kanaal geskep word om die publiek se navrae oor regsgedinge en hofuitsprake te beantwoord (Johnson "Equal access to justice" 1989 *Alabama LR* 1). Die Supreme Court in die VSA bied 'n duidelike ondersteuning vir die belangstelling van die publiek in die aktiwiteite van die regsprekende gesag (howe) deur *in camera*-verhore slegs in uitsonderlike gevalle te onderskryf (*Globe Newspaper Co v Superior Court of the County of Norfolk* 449 US 894, 66 L Ed 2d 124, 101 S Ct 259 (1982)). Namate die regsonderdane meer kennis aangaande die regsprekende gesag bekom, sal ook meer kritiese vrae daaroor gevra word en sal die tipiese mensdimensie daarvan toenemend ontbloot word. Die aandrang op kompensasie vir en regstelling van foute, soos orals waar mense funksioneer, sal onvermydelik volg.

In die onderhawige bydrae word die deliktuele aanspreeklikheid van die staat vir foute van die regsprekende gesag kortliks onder die loep geneem.

2 Historiese perspektief

In dié verband is dit vir beter begrip nodig om die volgende onderskeid te maak:

2 1 Antropologiese geskiedenis en sosio-emosionele oorsprong

Soos dikwels nog in die diereryk voorkom, is die vroegste menslike gemeenskap deur die *pater* (tropleier; koning) met fisieke mag (en later ook met psigiese vernuf) regeer. Volgens Freud, en tereg ook, het die vroegste mens begeer om deur onbegrensde mag regeer te word (*Complete psychological works* vol 18 (vertaal deur Strachey, 1971) 127–135). Die *pater* is beide gevrees en bewonder. Hy is gevrees omdat die magsonderdanigheidsinstink van die dierelewe nog sterk in hom teenwoordig was. Hy is bewonder omdat hy as almagtig belewe is (Labuschagne "Die voorrasionele evolusiebasis van die strafreg" 1992 *TRW* 28–29). Hy het 'n almagtige en heilige status gehad (en is so beleef) en kon gevolglik nie foute maak nie, so is geglo (Sagan "Religion and magic: A developmental view" 1979 *Sociological Inquiry* 107; Labuschagne "Geloof in toorkuns: 'n Morele dilemma vir die strafreg?" 1990 *SAS* 252). Die onderhawige problematiek en ontwikkelinge kan in sy kern slegs teen dié sosio-emosionele agtergrond verstaan word.

2 2 Regshistoriese agtergrond

Omdat ons reg, veral ook in staatsregtelike verband, deur die Engelse reg beïnvloed is, moet die volgende onderskei word:

(a) Die Romeins-Europese reg

Hoewel die stelreël *princeps legibus solutus est* in die Romeinse reg aangetref word (*D* 1 3 31), blyk dat die *princeps* hom in die praktyk tog aan die wette gebonde geag het (sien *I* 2 17 8; *C* 1 14 4; Labuschagne "Die uitlegsvermoede teen staatsgebondenheid" 1978 *TRW* 44). 'n Aksie was egter wel beskikbaar teen 'n *iudex* wat op grond van partydigheid, nalatigheid of onkunde fouteer of 'n onbillike beslissing gegee het (*I* 4 5*pr*; *D* 44 7 5 4; *D* 50 13 6 soos bespreek in *Moeketsi v Minister van Justisie* 1988 4 SA 707 (T) 711). Die *actio iniuriarum* kon egter nie teen 'n gesagsdraer ingestel word nie (*D* 47 10 13 6). Regter Van Zyl sê ten aansien van laasgenoemde teks die volgende:

> "Hoewel hierdie teks handel oor die Romeinse *magistratus*, soos die *praetor* of *aedilis curulis*, het dit waarskynlik aanleiding gegee tot die meer genaakbare houding wat in die gemenereg teenoor regterlike amptenare geopenbaar is" (*Moeketsi supra* 711).

Die Romeinsregtelike stelreël *principes legibus solutus est* het nie in die Romeins-Europese fase van die ontwikkeling van ons gemenereg toepassing gevind nie (*Minister of Law and Order v Thandani* 1991 4 SA 862 (A) 872; Joubert "Die gebondenheid van die soewereine wetgewer aan die reg" 1952 *THRHR* 17; Labuschagne 1978 *TRW* 44–47). In dié fase is 'n regter slegs aanspreeklik gehou vir uitsprake wat hy bedrieglik gelewer het (*Moeketsi supra* 711–713 en die verwysings daarin opgeneem).

(b) Die Engelse reg

Oor die staatsregtelike posisie van die soewerein in Engeland verduidelik Kerr, Lawson en Bentley (*Cases in constitutional law* (1979) 72) soos volg:

> "A distinction was drawn in the first place between the natural and politic capacities of the King, the latter of which was made the personification of the State. To this politic capacity were attached certain qualities which could not without absurdity be predicated of a natural man, such as perpetuity and perfection. The former of these qualities might be made to have its practical uses in obviating the difficulties caused by the demise of the Crown, though few practical consequences flowed from it. Clearly, however, the latter had the greatest immediate importance. It was expressed in the maxim that the King can do no wrong. This maxim lost its medieval significance and came to mean first that no intention of abusing his power can be attributed to him, and finally that whatever he does is right. The renewal at this point of the medieval injunction against separating the natural and politic capacities of the King resulted inevitably in the attribution to the monarch as an individual of the qualities of omnipotent and infallible sovereignty."

Die koning is in die lig hiervan beskou as die fontein van geregtigheid (De Smith, Street en Brazier *Constitutional and administrative law* (1983) 144–145). Hy het egter reg gespreek deur sy regters, genoem "King's judges" (sien die argument van St John in *R v Hampden* (The case of ship money) (1637) 3 St Tr 825; Kerr, Lawson en Bentley 78; Labuschagne "Die vraagstuk van onpartydigheid by administratiefregtelike besluitneming" 1992 *SA Publiekreg* 130). Deur die *Star Chamber* het hy inderdaad die regspleging beheer (Kerr, Lawson en Bentley 72 96). Die almag en onfeilbaarheid van die koning is aanvanklik ook aan die regters toegeskryf, synde sy verteenwoordigers. Hierdeur word duidelik aansluiting gevind by die hierbo genoemde sosio-emosionele heilige status van die oervader of koning. Trouens, dit is klaarblyklik steeds gefundeer in dieselfde oeremosionele struktuur wat diep in die mens se gees geanker is. Gedingvoering teen die koning (soewerein) was, in die lig hiervan, ook nie toelaatbaar nie en selfs ondenkbaar. Die howe het voortdurende pogings aangewend om dié reël op 'n rasionele basis te plaas. So het die Amerikaanse Supreme Court by geleentheid verduidelik:

> "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends" (*Kawanakoa v Polyblank* 205 US 349 353 (1907); Goldman "Can the king do no wrong? A new look at the discretionary function exception to the Federal Tort Claims Act" 1992 *Georgia LR* 837).

In 'n onlangse saak *M v Home Office* [1993] 3 All ER 537 (HL) 541 is bevind dat 'n staatsminister wat 'n hofbevel verontagsaam het in sy amptelike hoedanigheid aanspreeklik is vir minagting van die hof (sien Barrie "Accountability

of cabinet ministers and civil servants for contempt of court" 1993 *TSAR* 532 wat dié saak in 'n vroeër appèlfase bespreek).

3 Deliktuele aanspreeklikheid van die staat

Dat die staat deliktueel vir optrede van die staatsadministrasie (uitvoerende gesag) aanspreeklik gehou kan word, word in beginsel tans oral erken. (Sien Kerr, Lawson en Bentley 97; Hogg *Constitutional law of Canada* (1985) 229–230; Foster-Nolan "Government liability" 1989 *Duquesne LR* 161; Goldman 837.) In Suid-Afrika word veral hoë eise aan die polisie en ander "regshandhawingsmagte" gestel (sien Dendy "When the force frolics: A South African history of state liability for the delicts of the police" 1989 *Acta Juridica* 20; Labuschagne "Deliktuele beskerming van bewegingsvryheid: 'n Volkeregtelike dimensie by onregmatigheid?" 1992 *De Jure* 510). In 'n onlangse saak (*Tödt v Ipser* 1993 3 SA 577 (A)) het die appèlhof selfs beslis dat afwesigheid van wederregtelikheidsbewussyn nie deliktuele aanspreeklikheid weens onregmatige vryheidsontneming verskoon nie (sien verder Labuschagne "Wederregtelikheidsbewussyn by deliktuele aanspreeklikheid weens vryheidsontneming" 1994 *THRHR* 341). In die bespreking wat volg, word die regsposisie ten aansien van die aanspreeklikheid van die staat vir foute deur die regsprekende gesag gemaak kortliks, met verwysings ook na ander regstelsels, onder die loep geneem.

3 1 Die Suid-Afrikaanse reg

Ons howe het uit die staanspoor aansluiting gevind by die Romeins-Europese reg in dié verband (*Cooper v The Government* 1906 TS 436 439; *Tilonko v The Governor, A Judge, and the Attorney-General of Natal* 1908 NLR 70 73; *Clark v Gadd* 1910 EDC 278; *Matthews v Young* 1922 AD 492 509; *Penrice v Dickinson* 1945 AD 6 14–15; *Groenewald v Minister van Justisie* 1973 3 SA 877 (A) 883–884). 'n Interessante saak in dié verband is *Moeketsi v Minister van Justisie* 1988 4 SA 707 (T). 'n Streeklanddros het gedurende hofverrigtinge gelas dat eiser, 'n polisieman, wat die verrigtinge van die hof blykbaar versteur het, gearresteer, na die hofselle geneem en daar aangehou word. Eiser stel vervolgens 'n deliktuele eis vir onregmatige vryheidsontneming teen die minister en die streeklanddros in. Genoemde streeklanddros (tweede verweerder) het kragtens artikel 178(2) van die Strafproseswet 51 van 1977 opgetree en volgens die hof 'n regterlike funksie vervul. Regter Van Zyl wys in sy uitspraak daarop dat die landdros se optrede onredelik en onregverdig was en vervolg:

> "Onredelikheid lê die skuldvorm van nalatigheid ten grondslag en sou onder normale omstandighede tot deliktuele aanspreeklikheid aanleiding kon gee. In die geval van 'n regterlike beampte soos die tweede verweerder is nalatigheid in die uitvoering van sy judisiële bevoegdhede egter nie voldoende om hom met deliktuele aanspreeklikheid te belas nie. Die gesag is duidelik dat daar *mala fides*, kwaadwilligheid of bedrieglike optrede aanwesig moet wees. Die getuienis het nie bewys dat die tweede verweerder hom aan enige sodanige optrede skuldig gemaak het nie, hoe onredelik sy optrede ook al mag gewees het. Dit volg dan dat die eiser se vordering nie kan slaag nie" (714; sien vir kritiek op die terminologie van Van Zyl R, Neethling "Amptelike bevoegdheid: Die aanspreeklikheid van 'n regterlike beampte vir onregmatige vryheidsberowing" 1989 *THRHR* 466).

Hierdie drastiese benadering dien beslis nie 'n hoë vlak van geregtigheid nie, veral nie in 'n gemeenskap waar burgerlike vryhede hoog aangeslaan word nie. Blykens artikel 7(1) van die Grondwet van die Republiek van Suid-Afrika 200 van 1993 geld fundamentele regte van burgers nie ten aansien van die regsprekende gesag nie.

3 2 Die reg in die VSA

Die staat is, in ooreenstemming met die Engelsregtelike tradisie, nie aanspreeklik vir genoegdoening of skadevergoeding vir 'n handeling verrig deur 'n regter in sy hoedanigheid van regter nie. (*Butz v Economou* 438 US 478 (1978); Cass "Official liability in America: Actors and incentives" in Bell en Bradley (reds) *Government liability: A comparative study* (1991) 132; Chase "Liability for false imprisonment predicated upon institution of, or conduct in connection with, insanity proceedings" 30 ALR 3d 523 534 (annotasie tot *Crouch v Cameron* (1967) 30 ALR 3d 520 (Kentucky CA). Sien ook ten aansien van Kanada *Mackeigan v Hickman* (1989) 2 SCR 796; Mullan "The law of Canada" in Bell en Bradley 75.) Die onregverdigheid van dié benadering blyk treffend uit die feitestel in die Oklahoma-saak *Quindlen v Hirschi* ((1955, Okla) 284 P2d 723; Chase 534). Die eiseres is deur 'n regter na 'n hospitaal vir geesteskrankes verwys waar sy vir ongeveer 10 jaar 'n inwoner was. Sy het aangevoer dat dié verwysing onregmatig was aangesien sy nie vooraf van die verrigtinge kennis gekry het nie, 'n *curator ad litem* nie vir haar aangestel is nie en sy in geen stadium geesteskrank was nie. Die hof beslis dat 'n regter volgens die Konstitusie van Oklahoma 'n judisiële amptenaar is, dat hy jurisdiksie in dié saak gehad het en dat dit gevestigde reg is dat 'n judisiële amptenaar nie privaatregtelik vir sy judisiële handelinge aanspreeklik is nie.

3 3 Die Duitse reg

Kragtens artikel 839(2) van die *Bürgerliches Gesetzbuch* (*BGB*) is 'n regsprekende beampte by skending van 'n ampsplig slegs deliktueel aanspreeklik indien die pligskending op 'n misdaad neerkom. Die pligstrydige weiering of vertraging van ampsuitoefening is nie hier van toepassing nie (Von Staudinger *Kommentar zum bürgerlichen Gesetzbuch* (1986) 981). Von Staudinger wys daarop dat enigeen wat in stryd met die voorskrifte van artikel 839 *BGB* gearresteer word 'n reg tot kompensasie ingevolge artikel 5(5) van die Europese Verdrag vir die Regte van die Mens (EVRM) het (977). Artikel 839(3) *BGB* bepaal uitdruklik dat 'n deliktuele eis nie begrond word indien die benadeelde opsetlik of nalatig versuim het om benadeling deur die aanwending van 'n beskikbare regsmiddel te voorkom nie.

Blykens die Bundesgerichtshof word regters in die lig van die bepalings van artikel 839 *BGB* teen, wat genoem kan word, gewone foute beskerm (BGH Urt v 11/3/1966 1968 *NJW* 989 990). Dit geld vir alle regterlike dadighede (BGH Urt v 10/2/1969 1969 *NJW* 876; BGH Urt v 27/4/1993 1993 *NStZ* 493).

3 4 Die Belgiese reg

Die feite van die bogenoemde *Anca-arrest* was in 'n neutedop soos volg: Hoewel die Anca-bedryf aan die Regbank van Koophandel in Brussels besonderhede van sy finansiële posisie verskaf het, word bevind dat hy versuim het om dit te doen nadat die getuienis van 'n skuldeiser in sy (die bedryf se) afwesigheid aangehoor is. Meer as 10 maande later word die bevel van die hof in hoër beroep verander. Laasgenoemde hof beslis dat die beginsels van "openbaarheid en tegensprekelijk debat" deur die verhoorhof geskend is. Intussen het die Anca-bedryf egter skade gely. Die Belgiese staat word vervolgens vir die skade veroorsaak deur die regterlike fout aangespreek. Die Hof van Cassatie beslis in finale sin dat die staat, soos die burgery, aan die reg onderworpe is en ooreenkomstig artikels 1382 en 1383 van die Belgiese Burgerlike Wetboek (*BW*) aanspreeklik is vir skending van die regte en belange van regsubjekte. Die staat

is egter slegs vir skade verantwoordelik nadat die benadeelde ander regsmiddels uitgeput het (Storme 918–920). Storme 920 verklaar samevattend oor dié revolusionêre beslissing:

> "Hoewel het revolutionaire Anca-arrest de logische voleinding is van de aansprakelijkheidscyclus van de overheid, toch denk ik persoonlijk niet dat wij een cascade van aansprekelijkheidsgedingen zullen meemaken."

Die staat sal volgens hom nie in duie stort nie aangesien daar weinig onoordeelkundige uitsprake in België voorkom.

3 5 Die Nederlandse reg

In die Nederlandse reg is ook reeds weggebreek uit die tradisionele verstardheid ten aansien van die aanspreeklikheid van die staat vir foute van die regsprekende gesag. Die Hoge Raad het reeds in 1971 beslis dat die staat kragtens artikel 140 *BW* aanspreeklik is indien by die voorbereiding van 'n regterlike beslissing so 'n fundamentele beginsel verontagsaam is dat van 'n eerlike en onpartydige behandeling van die saak nie sprake is nie en geen ander regsmiddel teen die beslissing beskikbaar is nie (HR 3 Des 1971 *NJ* 1971 137). Die aanspreeklikheid van die staat word deur die Hoge Raad gekoppel aan artikel 6 *EVRM* wat die staat verantwoordelik stel vir skade veroorsaak deur staatsoptrede. In 'n onlangse saak het die Hoge Raad 'n eis weens onregmatige vryheidsontneming teen die staat toegestaan waar die regter nagelaat het om regsverteenwoordiging by 'n verwysingsondersoek na 'n hospitaal vir geesteskrankes beskikbaar te stel en die verwysing inderdaad plaasgevind het (HR 12 Feb 1993 1993 *NJ* 524; sien ook Labuschagne "Deliktuele aanspreeklikheid van die staat weens onregmatige vryheidsontneming as gevolg van 'n regterlike fout" 1994 *THRHR* 169; sien verder HR 19 Jan 1990 *NJ* 1990 442). Die Hoge Raad het hierdie beginsels ook van toepassing gemaak op die administratiewe regbank (HR 17 Maart 1978 *NJ* 1979 204; HR 8 Jan 1993 *NJ* 1993 558; HR 24 Mei 1991 *NJ* 1991 646). Die uitgangspunt is deurgaans dat owerheidsoptrede op 'n regmatige grondslag moet berus (HR 27 Junie 1986 *NJ* 1987 898). Kortmann 922 wys daarop dat aangeleenthede soos die nie-voldoening aan die vereistes vir motivering van 'n uitspraak, die nie-tydige lewering van 'n beslissing en die nalaat van die stel van 'n spesifieke datum vir die afhandeling van 'n geskil, nie tot aanspreeklikheid van die staat aanleiding kan gee nie. Hy is egter persoonlik ten gunste van die benadering van die Belgiese Hof van Cassatie in die *Anca-arrest*.

4 Konklusie

Reeds in 1803 het die Amerikaanse Supreme Court in die saak *Marbury v Madison* (5 US (1 Cranch) 137 (1803); Jackson "The Supreme Court, the Eleventh Amendment, and state sovereign immunity" 1988 *Yale LJ* 126) verklaar dat die essensie van burgerlike vryhede, binne regstaatlike verband, die beskikbaarheid van 'n regsremedie teen die staat vir skending van burgerregte is. Hierdie opmerking is myns insiens ook vir die regsprekende gesag waar.

Daar is 'n duidelike en onafgelope proses van erodering van die heilige en almagstatus van bogenoemde oervadersfiguur in die menslike gemeenskap aan die werk en dit sal ook die regsprekende gesag moet tref. Die privaatregtelike verantwoordingstelling van die regsprekende gesag teenoor die burgery is hiervolgens onvermydelik (sien Richter "Die Rolle des Richters" 1974 *JZ* 345). Die fantasie van die heiligheid, almagtigheid, onskendbaarheid en onfeilbaarheid van die regsprekende gesag, met sy sosio-emosionele oorsprong in genoemde oervadersfiguur, kan nie meer standhou teen die groeiende menslike rede nie. In

die meer verfynde en ontwikkelde regstelsels van Noord-Europa, waarin die Belgiese Hof van Cassatie in dié verband die leiding geneem het, is genoemde fantasie reeds op sy sterfbed, hoewel dit duidelik is dat dit sosio-emosioneel 'n uitgebreide en stormagtige sterwensproses gaan wees. Die heilige oervader blyk toe ook maar 'n mens te wees! Dat hierdie ontwikkeling, hoewel miskien (aanvanklik) in 'n meer geartikuleerde vorm, uiteindelik ook by ons sal uitkom, is myns insiens onvermydelik aangesien dit in sy diepste wese natuurgefundeerd is. So 'n ontwikkeling sal die hoë aansien en voortreflike tradisie van ons regbank eerder bevorder as ondergrawe. Magsvertoon beïndruk in elk geval in 'n toenemende mate nie meer die redelike mens nie (sien Labuschagne "Minagting in *facie curiae*. Het so 'n misdaad werklik bestaansreg?" 1991 *SALJ* 405; "Minagting in *facie curiae* en regterlike onpartydigheid" 1994 *De Jure* 207). Doeltreffendheid, regverdigheid, begrip en insig beïndruk wel. Menslike feilbaarheid moet aangespreek word, nie ontken word nie.

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DIE EINDE VAN SIVIELE GEVANGESETTING IN SUID-AFRIKA

1 Inleiding

Tot onlangs het die hof die bevoegdheid gehad om 'n skuldenaar wat in gebreke gebly het om uitvoering te gee aan 'n vonnis of bevel wat die betaling van 'n skuld in paaiemente beveel, tot gevangesetting te beveel of tot periodieke gevangenisstraf te vonnis. Dit was die sogenaamde artikel 65-prosedure (sien veral a 65A en 65F(1) van die Wet op Landdroshowe 32 van 1944, soos gewysig). Die bevel ter gevangesetting is verleen op grond van die vonnisskuldenaar se *minagting van die hof*. Minagting was geleë in sy versuim om te voldoen aan 'n vonnis wat die hof gevel het vir die betaling van 'n bedrag geld of die bevel om die bedrag in paaiemente te betaal. Die grondwetlike hof het egter bevind dat sommige bepalings van artikel 65 onversoenbaar is met die bepalings, gees en strekking van die Grondwet van die Republiek van Suid-Afrika 200 van 1993, en bogenoemde prosedure ongeldig verklaar. Die doel van hierdie aantekening is om vas te stel welke voorstelle ter vervanging of verbetering van die artikel 65-prosedure gemaak kan word.

2 Ontstaan

Siviele gevangesetting vir onvoldoende skuld is nie die breinkind van die Suid-Afrikaanse wetgewer nie. Dit het waarskynlik sy afkoms vanuit die *legis actio per manus iniectionem*-prosedure (sg Antieke tyd ± 753–250 vC) van die Romeinse reg (Van Zyl *Geskiedenis en beginsels van die Romeinse privaatreg* (1977) 369; Wenger *Institutes of Roman law of civil procedure* (1955) 233). Hierdie prosedure het die tenuitvoerlegging van 'n regterlike beslissing behels (Van Zyl 371; Sherman *Roman law in the modern world* (1937) 398). Die prosedure was gerig teen die persoon self en nie teen sy vermoë nie (Van Zyl 371; Wenger 223; Buckland *A manual of Roman private law* (1928) 374; Hockly *The law of insolvency* (1968) 1).

Die eerste wetgewing waarop hierdie aksie gebaseer was, is in die *Twaalf Tafels* te vinde (Smith *The law of insolvency* (1988) 5; Hockly 1). Die prosedure het soos volg verloop: Die skuldenaar is die geleentheid gegun om sy skuld binne 30 dae te vereffen. Doen hy dit nie is hy gearresteer en in die gevangenis geplaas ten einde voor die regterlike beampte te verskyn (Hunter *A systematic and historical exposition of Roman law* (1903) 18 1034; Hockly 1; Wenger 223). Indien die skuldenaar steeds versuim het om sy skuld te vereffen en niemand na vore getree het om vir sy skuld in te staan nie, was die skuldeiser by magte om die skuldenaar te neem en hom met kettings of rieme vas te bind (Hunter 18 1034; Hockly 1; Smith 5; Buckland 375).

Gedurende die tyd dat die skuldenaar in kettings vasgebind was, moes die skuldenaar en skuldeiser 'n ooreenkoms aangaande die skuldenaar se skuld bereik het. Indien geen ooreenkoms bereik kon word nie, is die skuldenaar vir 60 dae aangehou. Na afloop van die periode van 60 dae is die skuldenaar voor die *praetor* gebring. Die *praetor* het dan gewoonlik beveel dat die omvang van die skuldenaar se skuld op drie opeenvolgende markdae in die publiek openbaar gemaak moes word (Buckland 375; Wenger 224; Hunter 18; Thomas *Textbook of Roman law* (1986) 79).

Indien niemand ingetree het om die skuldenaar van sy skuld te bevry nie, is die skuldenaar na afloop van die derde markdag met die dood gestraf (Hunter 18; Hockly 1; Dannenbring *Roman private law* (1984) 400). Alternatief kon hy as slaaf *trans Tiberim* verkoop word (Van Zyl 372; Hunter 18; Hockly 1; Thomas 79; Dannenbring 400). Sommige skrywers betwyfel of dit in die vroeë Romeinse tye aanvaarbaar was om 'n skuldenaar vir nie-betaling tot die dood te veroordeel (Hunter 1034; Smith 5). Siviele gevangesetting vir die nie-betaling van skuld het egter wel plaasgevind.

Die *Lex Poetelia* (326–313 vC) het 'n verslapping in die streng prosedure van die *legis actio per manus iniectionem* meegebring (Wenger 225; Thomas 79; Dannenbring 401). Die *lex Poetelia* het 'n verbod op die vasketting en doodmaak van 'n skuldenaar geplaas. Dit het verder ook die verkoop van 'n skuldenaar as slaaf verbied (Buckland 375; Hockly 1; Wenger 225; Hunter 1035; Thomas 79). Die beginsel onderliggend aan die *lex Poetelia* was dat vryheid onaantasbaar is (Hunter 1035; Thomas 79; Dannenbring 401; Borkowski *A textbook of Roman law* (1994) 65). Daar is egter ook standpunte dat gevangesetting steeds moontlik was en inderdaad plaasgevind het (Ledlie *Sohm's Institutes of Roman law* (1907) 287).

3 Misbruik van die artikel 65-prosedure

Die artikel 65-prosedure was 'n baie gerieflike middel vir 'n skuldeiser om uitstaande skuld in te vorder maar het nietemin probleme opgelewer. Laasgenoemde sal met die bespreking van *Matiso v Commanding Officer, Port Elizabeth Prison* 1994 3 SA 899 (SOK), 1994 4 SA 592 (SOK) toegelig word.

In hierdie saak het Matiso 'n aansoek gebring vir haar onmiddellike vrylating uit die gevangenis, hangende die uitslag van 'n aansoek wat aan die grondwetlike hof gerig sou word. Sy is gearresteer en aangehou uit hoofde van artikel 65F(1) en 65H van die Wet op Landdroshowe op grond van die versuim om aan 'n skuld te voldoen wat sy aan die tweede respondent verskuldig was. Matiso het aangevoer dat die betrokke artikels en sekere ander bepalings ingevolge die Grondwet ongrondwetlik was. Sy het ook aansoek gedoen om 'n bevel vir die

onmiddellike vrylating van alle ander vonnisskuldenare wat om dieselfde rede in aanhouding en onder beheer en toesig van die eerste respondent was.

Ten opsigte van die eerste aansoek het die hooggeregshof (by monde van Melunsky R) bevind dat die oorwig van waarskynlikheid vir 'n ongeldigverklaring duidelik in Matiso se guns is. Die bevel van die landdroshof is opgeskort en haar onmiddellike vrylating beveel. Met betrekking tot die ander vonnisskuldenare wat ingevolge artikel 65 in die gevangenis is, het die hof beveel dat hulle in die aansoek gevoeg kon word indien hulle so sou verkies. Dit is gedoen en 'n bevel *nisi* is uitgereik om ook oor daardie aansoek te beslis. Op die keerdag van die bevel *nisi* het die hooggeregshof (by monde van Froneman R) weer eens bevind dat daar 'n redelike vooruitsig was dat die grondwetlike hof die betrokke bepalings van die Wet op Landdroshowe ongeldig kon verklaar. Bygevolg is die bevel *nisi* bevestig. Sodoende is die opskorting van verskeie lasbriewe tot gevangesetting deur landdroshowe bekragtig. Die onmiddellike vrylating van die vonnisskuldenare op dieselfde voorwaardes as die eerste aansoek is beveel.

Ter wille van volledigheid word daarop gewys dat die uitspraak van die hooggeregshof tegnies nie korrek is nie. Die effek van die uitspraak is om die bepalings van 'n wet van die parlement (Wet op Landdroshowe) ten opsigte van die applikant en ander betrokkenes op te skort. 'n Hooggeregshof is nie by magte om dit te doen nie – nie deur middel van die gemenereg óf wetgewing nie. Artikel 229 van die Grondwet bepaal duidelik dat die hooggeregshof alle wette moet toepas totdat dit deur bevoegde gesag gewysig of herroep is (sien oa *Podlas v Cohen and Bryden* 1994 4 SA 662 (T); *Bux v Officer Commanding, Pietermaritzburg Prison* 1994 4 SA 562 (N)). Inderdaad was die applikante dus nie geregtig op 'n bevel vir die onmiddellike vrylating uit die gevangenis hangende die uitslag van die aansoek by die grondwetlike hof nie.

Wat laasgenoemde betref, was die regsvraag voor die grondwetlike hof in *Coetzee v the Government of the Republic of South Africa*; *Matiso v The Commanding Officer, Port Elizabeth Prison* 1995 4 SA 631 (CC) of die bepalings van artikel 65A tot 65M van die Wet op Landdroshowe geldig is ingevolge die Grondwet.

Die hof beslis dat artikel 65A tot 65M inbreuk maak op die fundamentele reg op vryheid en veiligheid van elke persoon soos omskryf deur artikel 11 van die Grondwet. Gevangesetting plaas 'n beperking op hierdie fundamentele reg. Die vraag was voorts of siviele gevangesetting binne die beperkings van artikel 33(1) van die Grondwet val. Die hof beslis dat 'n wet of aksie wat 'n beperking op die reg op vryheid plaas, 'n redelike doel moet hê. Die wyse waarop hierdie doel bereik moet word, moet ook redelik wees. Die doel van artikel 65A tot 65M is 'n metode om 'n bevel vir die betaling van siviele skuld af te dwing. Die hof beslis dat die doel redelik is maar die wyse waarop die doel bereik word, onredelik.

Volgens die hof is die bepalings van artikel 65A tot 65M ontoereikend en wel om die volgende redes:

(a) Die bepalings is gerig teen daardie skuldenaar wat nie bereid was om te betaal nie. Ongelukkig het dit ook die skuldenaar getref wat vir redes buite sy beheer glad nie sy verpligtinge kon nakom nie.

(b) Die bepalings het tot gevolg dat die skuldenaar in die gevangenis geplaas kon word sonder dat hy kennis van die oorspronklike vonnis of die ondersoek gehad het. Persoonlike betekening van kennisgewing was volgens die bepalings

van die wet nie 'n vereiste nie. Die eerste kennis wat die skuldenaar van die saak teen hom opgedoen het, was wanneer die lasbrief vir gevangesetting uitgevoer word. (In die praktyk is die onredelikheid van dié prosedure reeds in 1986 aangespreek. In hierdie tyd, na aanbevelings van die SA Regskommissie, is stappe deur die howe gedoen om die onredelikheid van die prosedure te verlig. Landdroste het bv persoonlike betekening van 'n a 65-kennisgewing vereis voordat 'n lasbrief vir arrestasie en gevangesetting uitgereik is.)

(c) Uit hoofde van artikel 65A is van die skuldenaar verwag om die redes te verstrek waarom hy nie betaal het nie. Artikel 65A self het niks gemeld van die verwere wat tot die skuldenaar se beskikking was nie. Die gevolg hiervan was dat die skuldenaar steeds in die gevangenis geplaas kon word omdat hy nie van die verwere tot sy beskikking bewus was nie. Die verwere word wel in artikel 65F uiteengesit maar slegs artikel 65A word in die kennisgewing soos deur landdroste vereis aangehaal. Daarom die bewering dat die skuldenaar oningelig was.

(d) Die bewyslas om "onvermoë om te betaal" aan te toon, het op die skuldenaar gerus. Alhoewel die skuldenaar in beginsel wel hierdie onvermoë kon aantoon, is die bepalings so wyd ingeklee dat dit ook die skuldenaar getref het wat eerlik nie kon betaal nie.

(e) Artikel 65F(3) het die verwere wat tot die skuldenaar se beskikking was, bevat. Hierdie bepaling is volgens die hof egter onredelik wyd. Die bewysbaarheid daarvan was moeilik en die skuldenaar het onder verdenking gebly. Daarom is die hof van mening dat die bepaling onredelik swaar gestraf het. Daar het ook geen plig op die landdros gerus om die skuldenaar in te lig oor sy bewyslas en die verwere tot sy beskikking nie.

(f) Om 'n skuldenaar vir siviele skuld swaarder te straf as vir 'n kriminele oortreding kan nie regverdig word nie. Artikel 25 van die Grondwet vereis 'n regverdige verhoor wat voorsiening maak vir prosessuele veiligheidsmaatstawwe.

(g) Ten slotte het artikel 65L geen voorsiening gemaak vir 'n beroep op 'n hoër instansie nadat 'n lasbrief vir gevangesetting uitgereik is nie. Selfs die skuldenaar teen wie 'n lasbrief tot gevangesetting *in absentia* toegestaan is, het geen beroep op enige hof gehad nie. (Alhoewel dit die geval is, is daar in die praktyk wel aan die skuldenaar wat so versoek het, die geleentheid gegee om voor 'n landdros gebring te word vir opskorting van die lasbrief tot gevangesetting.)

Dit is belangrik om aan te toon dat die hof sy uitspraak hoofsaaklik baseer op die feit dat daar geen voorsiening gemaak is vir 'n alternatiewe prosedure in die geval waar 'n skuldenaar sonder sy toedoen of skuld eerlik nie kan betaal nie. Hierdie argument word ondersteun. Die hof se redes soos hierbo uiteengesit, is teoreties korrek, maar die wyse waarop die artikel 65-prosedure en ander bepalings van die betrokke wet in die alledaagse praktyk deur landdroste geïmplementeer en toegepas is, is nie altyd in aanmerking geneem nie. Die onderliggende beginsel, naamlik dat 'n persoon nie vir siviele skuld in die gevangenis geplaas mag word nie, moes eerder ter ondersteuning van die afskaffing van artikel 65 aangevoer word as om die artikel bepaling vir bepaling te isoleer, te ondersoek en te kritiseer. Die vraag waaroor dit in werklikheid gaan, is of siviele gevangesetting inbreuk maak op 'n persoon se fundamentele regte soos in die Grondwet vervat.

4 Voorstelle van die Suid-Afrikaanse Regskommissie soos vervat in die verslag van Maart 1995

Klousule 19 van die Aanbevole Wetsontwerp ter Wysiging van die Wet op Landdroshowe beoog om artikel 65A te wysig deur voorsiening te maak vir 'n dagvaarding waarin die verweerder aangesê *kan* word om, indien hy nie die skuld kan betaal nie of nie verskyning aanteken nie, op 'n bepaalde datum voor die hof te verskyn vir 'n ondersoek na sy finansiële toestand. Die versuim om vir die ondersoek aan te meld, word strafbaar gestel. Hierdie prosedure is heelwat korter en minder omslagtig as die artikel 65-prosedure. Die gebruik van die woord *kan* hierbo het verder tot gevolg dat hierdie korter prosedure nie verpligtend is nie. Behalwe bogenoemde is die enigste sanksie wat die skuldenaar kan tref, die volgende:

(a) Indien hy 'n skriftelike onderneming gee om skuld af te betaal, kan sodanige onderneming 'n hofbevel gemaak word (kl 11 van die wetsontwerp maak a 58 van die Wet op Landdroshowe hier van toepassing). As die skuldenaar nou versuim, kan die verrigtinge uit hoofde van artikel 65E herhaaldelik op die rol geplaas word. Dit sal die skuldenaar nie loon om die kennisgewing om in die hof te verskyn, te ignoreer nie. Die voorgestelde artikel 65A(6) bepaal dat, as die skuldenaar versuim om te verskyn en dit duidelik is dat hy kennis van die verhoor gehad het, die hof op aansoek van die skuldeiser 'n lasbrief mag uitreik wat die bode magtig om die skuldenaar te arresteer en hom op die vroegste moontlike geleentheid voor die hof te bring. Dit word gedoen om die hof in staat te stel om die ondersoek kragtens artikel 65A(1) uit te voer. Die skuldenaar gaan dus nie na arrestasie direk gevangenis toe nie. Hy word voor die hof gebring. Hierdie bepaling bring 'n praktiese probleem na vore wat nêrens aangespreek word nie, naamlik waar word die skuldenaar aangehou totdat hy voor die hof gebring word? Die ondersoek na sy finansiële posisie kan nie vermy word nie. Dit is die hoofdoel van die artikel 65-prosedure. Die las is op die skuldeiser om seker te maak dat sodra die skuldenaar voor die hof is, die ondersoek produktief is. Voorgestelde wysigings van artikel 106 maak voorsiening vir 'n strafsanksie van 'n boete tot R500 of gevangesetting tot 6 maande vir enige persoon wat opsetlik nie 'n vonnis of bevel van die hof gehoorsaam of nakom nie. Die kwessie oor wat gebeur as die skuldenaar nie betaal nie, word nie pertinent aangeraak nie. Daar kan geredeneer word dat die skuldenaar wat niks het nie, niks sal betaal nie. Dit impliseer egter dat so 'n skuldenaar dan in die gevangenis geplaas word. In verband met die strafsanksie kom die Wet op die Aanpassing van Boetes 101 van 1993 dadelik in gedagte. Hou dit in dat, met verwysing na die 6 maande gevangenisstraf, die boete tans R10 000 kan wees? 'n Skuldenaar wat dus versuim om te verskyn, sal gearresteer en voor die hof gebring word waar hy die landdros sal moet oortuig dat sy versuim nie opsetlik was nie.

(b) 'n Lasbrief vir eksekusie teen roerende en onroerende eiendom kan uitgereik word. Voorsiening word ook daarvoor gemaak dat die skuldenaar bates privaat mag verkoop as hy op hierdie wyse 'n beter prys kan beding. Die lasbrief vir eksekusie omvat ook artikel 72 van die Wet op Landdroshowe, naamlik dat daar voorsiening gemaak word vir beslaglegging op skulde van die skuldenaar.

Die probleem is dat hierdie wysiging byna dieselfde bepalings as dié van die huidige artikel 65 bevat. Dit verminder net die sanksies wat die skuldenaar kan tref en spreek nie soseer al die probleme aan wat deur die regskommissie uitgewys is nie. Die verwysing na "onroerende" eiendom hierbo sal verdere

omslagtigheid meebring aangesien daar sekerlik getuienis vereis sal word dat sodanige eiendom onbelas is.

Daar word aan die hand gedoen dat die moontlikheid ondersoek en oorweeg moet word of, indien daar meerdere eise teen 'n skuldenaar bestaan, 'n verpligte administrasiebevel in hierdie stadium nie meer effektief aan die oplossing van die probleem sal meewerk nie. Dit sal in die eerste plek doeltreffender kontrole en vinniger afhandeling van die skuldinvorderingsproses verseker. Daarby kan byvoorbeeld bepaal word dat alle gelde wat ingevolge die administrasiebevel betaalbaar is, by die klerk van die hof inbetaal word. Sodoende word die prosedure uit die hande van prokureurs geneem en die koste van administrasie verminder. Behoorlike ondersoek en ondervraging van die skuldenaar kan dan geskied. Dit sal die skuldeisers beter geleentheid gee om op die finansiële ondersoek te konsentreer aangesien hulle slegs bevoordeel kan word waar die ondersoek behoorlik en deeglik hanteer word.

Klousule 9 van die wetsontwerp het ten doel om 'n artikel 55A te skep wat voorsiening maak vir "skuldinvordering" by wyse van aansoek. Hier word spesifiek na 'n eis vir die betaling van 'n som geld verwys. Dit kan slegs die geval wees indien die skuldenaar terselfdertyd aansoek doen om 'n bevel van beslaglegging op goed ingevolge artikel 32, of om die uitsetting van die respondent uit 'n perseel, of om teruggawe van goed in die respondent se besit. In dringende gevalle wat deur artikel 55A vermeld word, mag die hof na oorweging van artikel 55A(3) afstand doen van die voorgeskrewe vereistes van vorm, wyse en tydperk van betekening. Laasgenoemde bevoegdheid leen hom tot uitbuiting aangesien alle gevalle nou as "dringend" aangemerk sal word. Sodoende sal die proses vir billike en regverdige skuldinvordering in die wiele gery word. Benadeling van die skuldenaar en selfs ook ander skuldeisers is moontlik.

5 Gevolgtrekking

Hoewel dit so is dat die stelsel van siviele gevangesetting 'n baie kras maatreël was wat daarop uit was om die vonnisskuldenaar tot die maksimum te verontrief, sit 'n mens tans steeds met die probleem van 'n kultuur van wanbetaling. Daar bestaan ook groot bedrae van oningevorderde skuld wat 'n nadelige invloed op inflasie en die ekonomie het – aldus die regskommissie se bevinding in 1992. Die groot vraag is of hierdie nuwe maatreël werklik tot gevolg sal hê dat onvoldane skuld vereffen word. Die oogmerk is tog die betaling van siviele skuld.

Die vraag is ook of die voorgestelde metodes van skuldinvordering die knelpunte wat deur die regskommissie uitgewys is, gaan verlig. Die voorgestelde metodes is veronderstel om: (a) die proses meer koste-effektief te maak; (b) sake te bespoedig; (c) 'n stel reëls te skep wat eenvormige aanwending in die howe sal vind; en (d) 'n nuwe proses daar te stel wat werklik minder omslagtig en ingewikkeld is. Of dit inderdaad die geval is, sal slegs die toekoms leer.

'n Verdere probleem wat beslis aangespreek moet word, is die feit dat hier steeds geen onderskeid gemaak kan word tussen daardie persone wat op onskuldige wyse, deur byvoorbeeld 'n personeelvermindering, in die skuld beland en diegene wat roekeloos skulde aangaan soms selfs met die bedoeling om nie te betaal nie. Daar behoort 'n plig op die landdros geplaas te word om 'n onverdedigde skuldenaar ten volle oor sy verwere en regsposisie in te lig, sodat hy byvoorbeeld bewus is van die feit dat hy die landdros moet oortuig dat sy versuim nie opsetlik was nie. Die grootste probleem wat egter voorsien word, is dat

oorvol hofrolle nie tyd vir volledige ondersoeke laat nie. Hierdie is 'n probleem wat spoedig aandag sal moet kry veral omdat die fokus nou op die finansiële ondersoek geplaas word.

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VONNISSE

PRIVAATHEIDSKENDING EN DIE TOESTEMMINGSVEREISTE BY BLOEDTOETSING VIR VIGS

C v Minister of Correctional Services saakno 8579/94 1995 (T)

Toestemming tot geneeskundige ingrepe is 'n aangeleentheid wat dwarsoor die wêreld in toenemende mate die aandag van howe geniet. Veral in die VSA is daar oor die afgelope aantal dekades talle uitsprake oor die een of ander aspek van toestemming in geneeskundige verband gelewer. Ook in Engeland is belangrike uitsprake gelewer. In Suid-Afrika daarenteen het die onderwerp dusver weinig aandag deur die howe geniet. Die eerste uitvoerige en, met die verskuldigde eerbied gesê, deeglik beredeneerde uitspraak wat te lande gelewer is, is dié van die volbank van die Kaapse Afdeling van die Hooggeregshof (by monde van Ackermann R) in *Castell v De Greef* 1994 4 SA 408 (K).

Castell staan in die teken van twee kenmerke van die tweede helfte van hierdie eeu: eerstens, die beweging vanaf geneesheerpaternalisme na pasiënte-outonomie en, tweedens, die toenemende erkenning en beklemtoning – ook in die sogenaamde Derde Wêreld – van grondliggende menseregte. In *Castell* het die hof as 't ware 'n *quantum*-sprong gemaak (as dié gonswoord van ons tyd my vergun sal word) deur die geneesheer-georiënteerde norm van die mate van inligting wat 'n pasiënt van sy geneesheer kan vereis, prys te gee vir 'n pasiëntgeoriënteerde norm.

Daardeur het die hof onomwonde erkenning verleen aan die begrip ofte wel leerstuk van ingeligte toestemming. Interessant genoeg was die Engelse howe dusver nie bereid om daardie sprong te maak nie, wat hulle in lyn sou bring met die gedagtegang in sekere Noord-Amerikaanse jurisdiksies en ander Westerse lande. In *Sidaway v Bethlem Royal Hospital Governors* [1985] 1 All ER 643 (HL) het die House of Lords in 'n meerderheidsbeslissing die standpunt ingeneem dat die leerstuk van "informed consent" soos toegepas in sekere Noord-Amerikaanse jurisdiksies nie deel van die Engelse reg is nie.

Anders as in die geval van toestemming tot handelinge en aanvaarding van risiko's wat deel van die alledaagse lewe uitmaak en die aard waarvan elke normale mens reeds sedert kindsbeen, of minstens vanaf vroeë volwassenheid, begryp, moet toestemming tot geneeskundige ingrepe noodwendig 'n ingeligte toestemming wees. Dit beteken eenvoudig dat daar 'n (positiewe) plig op die geneesheer rus om aan die pasiënt 'n redelike mate van inligting oor die wesenlike aard van die voorgestelde ingreep en die belangrikste gevolge, newegevolge en risiko's daarvan te verstrek. Na gelang die trefwydte van moderne geneesmiddele en die verskeidenheid en ingewikkeldheid van operasies en vorme

van behandeling al groter, en vir die leek tegnies steeds meer onverstaanbaar, geword het, het die behoefte aan verstaanbare inligting by die pasiënt al groter geword. Daar kan geen sprake van ware toestemming wees nie tensy die pasiënt vooraf betekenisvol deur die deskundige, dit wil sê die geneesheer of ander gesondheidswerker, ingelig is. In beginsel rus daar 'n plig op die praktisyn wat die ingreep uitvoer, om die pasiënt in te lig.

Die VIGS-epidemie wat die wêreld sedert die vroeë tagtigerjare teister, en in besonder ook in Suid-Afrika tans rampspoedige afmetings begin aanneem, het 'n nuwe dimensie aan die geneeskundige "toestemmingsleer" verleen. Die belangrikheid van HIV-toetsing het spoedig op die voorgrond getree. Ofskoon VIGS van die staanspoor af geblyk het ongeneeslik te wees, en geen doeltreffende teenmiddel of immuniseringstof dusver ontwikkel is nie, is bepaling van sy HIV-status vanselfsprekend van die grootste belang vir die pasiënt om hom of haar voor te berei vir die onafwendbare en om – hopelik – sy of haar lewenstyl aan te pas in belang van mense aan wie hy of sy moontlik die virus kan oordra. Dit is ook van groot belang onder andere vir sy of haar eggenote of eggenoot, ander "seksmaats", onmiddellike gesinslede, werkgewer, medewerknemers en die gesondheidswerkers wat hom of haar behandel.

Die vraag het dus spoedig ontstaan welke mate van inligting aan die persoon van wie 'n bloedmonster met die oog op toetsing vir HIV onttrek word, vooraf verstrek moet word. (Talle ander vrae het ook opgeduik, byvoorbeeld hoe daar te werk gegaan moet word om die uitslag van 'n positiewe HIV-toets aan die betrokke persoon oor te dra en aan wie dit bekendgemaak mag of moet word, maar hierdie vrae is nie ter sake vir doeleindes van die onderhawige bespreking nie.) Twee verskillende standpunte is gestel.

Enersyds is daar die siening dat bloedtoetsing in die geval van krankes al lankal 'n algemene metode van geneeskundige ondersoek geword het. Dikwels word 'n bloedmonster aan 'n verskeidenheid toetse onderwerp. Dit is nie gebruiklik vir geneeshere om vooraf die pasiënt in te lig aangaande al die soorte toestande waarvoor die bloed getoets gaan word nie. So-iets sal in iedere geval die pasiënt waarskynlik net die skrik op die lyf jaag. Al wat nodig is, so leer voorstanders van dié siening, is dat die pasiënt toestemming (uitdruklik of stilswyend) moet verleen het tot die (fisiese) handeling van onttrekking van 'n bloedmonster met die wete dat dit vir geneeskundige doeleindes ontleed gaan word.

Andersyds is daar die siening dat aangesien VIGS 'n ernstige, ongeneeslike siekte is wat 'n dodelike gevolg het, en dit boonop 'n siekte is wat ernstige sielkundige en maatskaplike implikasies inhou vir die lydende asook vir ander mense, toestemming veel meer moet inhou as instemming tot bloedonttrekking self en inderdaad gegrond moet wees op voldoende inligting vooraf verstrek by wyse van oordeelkundige en deskundige raadgewing aan die pasiënt.

'n Mens kan nie sê dat daar juis 'n heftige debat rondom die twee standpunte gevoer is nie. Sommer spoedig het laasgenoemde siening internasionaal oorweldigende steun onder etici en juriste gewen. (Vgl Van Wyk *Aspekte van die regsproblematiek rakende VIGS* (LLD-proefskrif Unisa 1991) 141 ev; Gunase *Aids, privacy and autonomy – Legal issues in consensual and non-consensual HIV antibody testing* (LLM-verhandeling Wits 1992) 75; SA Regskommissie *Aspekte van die reg wat betrekking het op VIGS* (Werkstuk 58 Projek 85 1995) 43 ev.)

Nou is die eerste hofuitspraak in Suid-Afrika oor hierdie aangeleentheid gelewer. *C v Minister of Correctional Services* handel oor 'n gevangene in 'n Johannesburgse gevangenis wat 'n skadevergoedingseis vanweë beweerde privaatheidskending ingestel het. Die eiser is deur die verhoorregter, regter Kirk-Cohen, beskryf as 'n intelligente mens wat gematrikuleer en aan 'n hoër inrigting studeer het met die oog op 'n loopbaan as onderwyser; hy het egter sy studie na 'n ruk laat vaar. Hy was by die ter sake dienende tye in die gevangenis vanweë diefstal.

In September 1993, terwyl hy in die gevangeniskombuis werksaam was, is 'n bloedmonster van die eiser geneem. Dit is na die Suid-Afrikaanse Mediese Navorsingsinstituut gestuur en vir HIV getoets. Die uitslag was positief. Die weergawe van getuies wat by die verhoor getuig het oor die omstandighede betreffende die neem van 'n bloedmonster was in verskeie opsigte botsend. Dié omstandighede is van belang vir hierdie bespreking en word vervolgens kortliks uiteengesit.

Die eiser het getuig dat ene sersant P, wat in bevel van die kombuis was, lede van die kombuispersoneel gelas het om na die hospitaalafdeling te gaan vir bloedtoetse. Agt of tien name is uitgeroep. C was een van hulle en is aangesê om onverwyld na die hospitaalafdeling te gaan. Niemand het gesê waarvoor die toetse uitgevoer sou word nie. By die hospitaal aangekom het ene sersant K op hulle gewag. Hy het in die fisioterapeut se kamer gesit wat ook as spreekkamer gebruik is. Volgens C het hy saam met die ander gevangenes tougestaan met die oog op bloedtoetsing. Toe hy die kamer binnegekom het, is hy deur K versoek om sy arm so te hou dat bloed getrek kon word. K het hom voor die neem van die bloedmonster niks vertel nie. Hy was verplig om sy "arm te gee". Nadat bloed getrek is, het K niks verder gesê nie en het C weer by die tou aangesluit en na die kombuis teruggekeer.

C getuig dat die deur na die kamer die heeltyd oop was. Hy het gesien wat met die ander gevangenes gebeur het en ook gehoor wat daar gesê is. Geen melding is gemaak van welke soorte toetse uitgevoer sou word nie en niemand het gemeld dat die bloed getoets sou word vir oordraagbare siektes nie. In besonder is daar nie gemeld dat die bloed vir HIV getoets sou word nie. C het niks vir K of enigiemand anders gevra nie. 'n Paar dae later, getuig C, het die gevangenis se mediese beampte hom meegedeel dat hy positief getoets is vir een of ander geslagsiekte. Die beampte het gesê dit was sifilis. Hy is voorts meegedeel dat hy nie toegelaat sou word om voedsel voor te berei nie totdat hy die geneesheer gesien het en behandeling kry. 'n Tydjie later is hy gesien deur dokter V, 'n distriksgeneesheer. Sy het 'n lêer voor haar gehad, afgekyk na die lêer en "koelbloediglik" gesê dat hy positief getoets is vir HIV.

Sersant K se weergawe was soos volg: Dokter V het gelas dat toetse uitgevoer moes word op die kombuispersoneel. Hy, K, is aangesê om bloedmonsters te neem. Die toetsing was beperk tot "voedselhanteerders". K het getuig dat hy die gevangenes aangesê het om in die gang tou te staan. Hy het hulle meegedeel dat toetse vir HIV en seksueel oordraagbare siektes op hulle uitgevoer sou word en dat hulle die reg gehad het om te weier om die toetse te ondergaan. Hy het hulle ook meegedeel dat weiering moontlik hul "posisie in die kombuis" kon beïnvloed. Op daardie tydstip (1993) was dit gevangenisbeleid dat slegs mense wat HIV-negatief was, toegelaat is om voedsel te hanteer.

In die hof verklaar K dat hy C kon onthou. C was "bewerig" en dit het gelyk of hy bang was. K het met hom daaroor gepraat en gesê dit is nie seer om bloed

te trek nie. Hy het C ook gevra of hy enige beswaar het teen toetsing vir HIV en seksueel oordraagbare siektes. C het sy kop geskud en "nee" gesê. Nadat bloed getrek is, het hy aan C gesê om 'n paar minute te sit sodat hy nie flou word nie. Volgens K was die deur na die spreekkamer toe terwyl gevangenes beurtelings die vertrek binnegekom het. Dit is 'n houtdeur en 'n mens kon nie buite hoor wat binne die vertrek gesê is nie.

K was met verlof toe die toetsuitslag ontvang is. Na sy terugkeer, so getuig K, het hy gesprekke met C gevoer om hom te kalmeer. Laasgenoemde was ontsteld en het K meegedeel dat hy nie verwag het dat die toetse positief sou wees nie. 'n Afspraak vir C is by die HIV-kliniek van die algemene hospitaal gemaak sodat hy die beste naberading-behandeling kon kry. K het voorts getuig dat C te gener tyd gekla het oor die wyse van neem en versending van monsters nie. K was ook nooit betrokke by 'n struweling of konfrontasie tussen hom en C nie.

Ten tyde van die neem van bloedmonsters was D, ook 'n gevangene, saam met K in die spreekkamer. Hy was werksaam as skoonmaker in die hospitaalafdeling en dit was sy taak om die gebruikte naalde weg te gooi in 'n "vernietiger" en om die gevangenes een vir een in te roep. D se getuienis was baie dieselfde as dié van K. Hy het die hof meegedeel dat hy en K nie vriende was nie. Hul verhouding was die normale tussen 'n beampte van die departement en 'n gevangene.

In sy uitspraak merk regter Kirk-Cohen op dat C se geheue hom telkemale in die steek gelaat het. Telkens was sy getuienis duidelik onbetroubaar. By geleentheid het hy teruggedeins vir die waarheid. Terwyl hy sy getuienis in hoof aangebied het, het hy byvoorbeeld geen melding gemaak van die feit dat hy homoseksueel ("gay") was nie. Tydens kruisondervraging maak hy melding van 'n enkele homoseksuele verhouding alvorens hy gevange geset is. Die volgende dag van die verhoor erken hy onder verdere kruisondervraging dat hy betrokke was by drie homoseksuele verhoudings voor gevangesetting. Hy voeg daaraan toe dat hy sy maat vertrou het. Die regter bevind dat hy 'n leuen vertel het ten einde te vermy om te erken dat hy besef het, of kon gedink het, dat hy meer blootgestel was aan die moontlikheid om met HIV besmet te word.

In sy getuienis het C gesê dat hy geen benul had van die doel van die toets en dat dit hom nie opgeval het dat hy kon vra nie. Toe daar egter tydens kruisondervraging druk op hom uitgeoefen is, het hy toegegee dat hy "dalk gedink het dat dit toetse vir geslagsiektes was". Gevra "Watter geslagsiekte?", antwoord hy: "Ek het moontlik [aan] sifilis gedink. Vandag aanvaar ek geslagsiektes sluit in VIGS. Ek het nie toe daaraan gedink nie." Die hof beoordeel hierdie antwoorde as onwaarskynlik en in werklikheid gefabriseer. C se getuienis betreffende sodomie of verkragting gepleeg ten aansien van hom in die gevangenis was in dieselfde trant. In besonder was daar sy getuienis dat hy nie gedink het dit kon moontlik tot HIV-infeksie lei nie. In die lig van sy getuienis in geheel genome, beskou die regter hierdie antwoord as onwaarskynlik en onoortuigend.

Bygevolg, verklaar die regter, moet die saak beoordeel word op die grondslag dat die eiser meegedeel is dat, eerstens, die toets vir HIV of ander oordraagbare siektes was en, tweedens, dat hy die reg had om te weier om die toets te ondergaan, in welke geval hy nie getoets sou word nie. Die toestemming moet "ingeligte toestemming" wees, soos in die *Castell*-saak *supra* beslis. In *Seetal v Privatha* 1983 3 SA 427 (N) is beslis dat 'n bloedtoets uitgevoer sonder toestemming regtens as privaatheidskending beskou word.

"[W]ith the ever growing scourge of the HIV virus and AIDS," vervolg die regter, "much thought has been given to what the minimum requirements of consent, with particular reference to blood tests for the HIV virus should be. This too has been referred to almost universally as informed consent.

Speaking generally, it is axiomatic that there can only be consent if the person appreciates and understands what the object and purpose of the test is, what an HIV positive result entails and what the probability of AIDS occurring thereafter is. Evidence was led in this case on the need for informed consent before the HIV test is performed. Members of the medical profession and others who have studied and worked with people who have tested HIV positive and with AIDS sufferers have developed a norm or recommended minimum requirement necessary for informed consent in respect of a person who may undergo such a blood test. Because of the devastation which a positive result entails, the norm so developed contains as a requirement counselling both pre- and post-testing, the latter in the event of a positive result. These requirements have become almost universal in the Republic of South Africa."

Dokumente wat die hof voor hom gehad het, was onder meer die aanbevelings van die Suid-Afrikaanse Geneeskundige en Tandheelkundige Raad en 'n brosjure, geborg deur 'n groot lewensversekeraar, oor die hantering en behandeling van VIGS. Van besondere belang vir die hof was die feit dat die departement van korrektiewe dienste self die begrip "ingeligte toestemming" as 'n voorvereiste vir toetsing van gevangenes aanvaar het en bepaal het wat die norme is. Die regter vestig die aandag daarop dat hierdie norme op een lyn is met die sienings en aanbevelings van al die belangrikste bydraers in Suid-Afrika. Die departement se brosjure getitel *Management strategy: AIDS in prisons* beklemtoon en bevat uitvoerige voorskrifte oor berading van gevangenes sowel vóór toetsing as daarna.

Onder meer het die departement 'n ernstige beroep gedoen op streekskommissarisse om 'n (skriftelike) toestemmingsvorm vir doeleindes van HIV-toetsing te gebruik, 'n ontwerp waarvan versprei is. Die departement het dit as 'n beleidsaak van die grootste belang beskou om te besef dat die keuse om 'n toets te ondergaan al dan nie, die gevangene s'n was. Daardeur is te kenne gegee dat 'n gevangene nie verplig kon word om die vorm te onderteken nie. Die beleid van die departement was reeds van toepassing in Maart 1993, meer as vyf maande voordat die eiser getoets is. Die norm is bepaal deur die departement, verklaar die regter, en as 'n gevangene was die eiser geregtig om aan te dring op ingeligte toestemming soos vasgelê deur die departement wat sy inkerkering in die gevangenis beheer het. "It was not granted to him and it is obvious to what extent the consent obtained fell short of the informed consent laid down by the department itself", verklaar die regter. Onder meer is die betrokke gevangenes nie 'n redelike tyd gegun in die spreekkamer alvorens hulle gevra is of hulle tot die toets toestem nie.

"In these circumstances", beslis die regter, "the deviation from the accepted norm of informed consent, including the fact that there was no precounselling, was of such a degree that the deviation, in my view, was material and wrongful."

Die hof bevind voorts dat die vereiste *animus iniuriandi* teenwoordig was. Met 'n beroep op vroeëre regspraak en regskrywers wys die regter daarop dat vir doeleindes daarvan om 'n opsetlike privaatheidskending te bewys, dit nie nodig is om *mala fides*, wrewel of 'n bose motief aan te toon nie; trouens vir bepaalde vorme van *iniuriae* met betrekking tot perke gelê op persoonlike vryheid, kan aanspreeklikheid ontstaan selfs by ontstentenis van wederregtelikheidsbewussyn.

Die hof oorweeg die omstandighede wat ter sake dienend is by bepaling van 'n gepaste bedrag skadevergoeding. As die gevangene die voorafberading vereis vir ingeligte toestemming ontvang het, sou die emosionele slag vir hom kleiner gewees het. Dit moet opgeweeg word teen die feit dat hy, as 'n intelligente mens, *de facto* toegestem het toe hy meegedeel is waarvoor die toets was en dat hy 'n keuse had of hy hom aan die toets wou onderwerp al dan nie. Die hof neem ook in aanmerking dat uiteindelike berading, ná die toets, gegee deur 'n maatskaplike werker van die departement, blykbaar geslaagd was. In die lig hiervan bevind die regter dat die eiser geregtig was op nominale skadevergoeding en word die bedrag van R1 000 opgelê, asook betaling van sy koste deur die verweerder.

Hierdie belangrike – en met eerbied gesê – uitnemend billike uitspraak beklemtoon die belangrikheid van die verkryging van ingeligte toestemming tot VIGS-toetsing. Dit geld eweseer vir geneeskundige ingrepe oor die algemeen. Hier was nie 'n geneesheer betrokke by die ingreep nie. Wat beslis is ten aansien van die neem van 'n bloedmonster deur 'n gevangenisbeampte, geld egter in gelyke mate vir geneeshere, verpleegkundiges en ander gesondheidswerkers. Van groot belang ook is die onderskeid tussen blote instemming (*de facto*-inwilliging) en juridiese of ingeligte toestemming. Dit is denkbaar dat dié onderskeid ook ander gebiede van menslike doenigheid kan raak waarby die risiko net vasstelbaar is langs die weg van uiteensetting deur 'n deskundige. Dit is geykte reg dat toestemming twee kernaspekte behels: kennis en inwilliging. Waar besondere kundigheid nodig is om kennis en begrip tot die benadeelde te bring, kan stilswyende toestemming ook gewaagd wees en sou dokumentêre bewys van uitdruklike instemming raadsaam wees.

Die uitspraak dien ook as 'n goeie voorbeeld van die rol wat gewoonte, openbare beleid en etiese kodes van gerespekteerde beroepsliggame by regsvorming kan speel. (Vgl *Jansen van Vuuren v Kruger* 1993 4 SA 842 (A) 849–850 waarin die appèlhof ook deeglik kennis geneem het van geneeskundig-etiese beskouings.)

Interessantheidshalwe kan gemeld word dat 'n Zimbabwese regter, regter Robinson, in 1992 aan die hand gedoen het dat alle veroordeelde gevangenes vir HIV getoets – en aan hertoetsing onderwerp word – sodat dié wat seropositief is in afsonderlike selle as dié van ander gevangenes geplaas kan word. Die regter was van mening dat so 'n praktyk nie as 'n skending van gevangenes se menseregte beskou kan word nie (*S v Marachi* 1993 2 SASV 36 (Z)). Dit is nie bekend of enigiets van hierdie voorstel in die praktyk tereggekom het nie.

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INVESTIGATION OF SERIOUS ECONOMIC OFFENCES ACT 1991

Park-Ross v Director: Office for Serious Economic Offences 1995 2 SA 148 (C)

In *Park-Ross v Director: Office for Serious Economic Offences* the court had to consider whether certain sections in the Investigation of Serious Economic Offences Act 117 of 1991 (the Act) violated the fundamental rights contained in,

inter alia, sections 13, 28 and 25 of the Constitution of the Republic of South Africa Act 200 of 1993 (the Constitution). The germane sections deal with inquiries by the Director: Office for Serious Economic Offences (s 5); search and seizure (s 6); and disclosure, with the Director's permission, of information obtained by inquiry and search and seizure (s 7). (The matter came before the court in terms of s 101(6) of the Constitution.)

The court held sections 5 and 7 to be constitutional, but section 6 to be unconstitutional, as it conflicted with the right to privacy entrenched in section 13 of the Constitution. In consequence of this finding the Act was amended. These amendments are considered in the concluding section below.

Section 5

Section 5(1)(a) provides:

> "If the Director has reason to suspect that a serious economic offence has been or is being committed or that an attempt has been made or is being made to commit such an offence, he may hold an inquiry on the matter in question . . ."

For the purpose of such inquiry, the Director may summon any person who is able to furnish information on the subject of the inquiry or has in his possession any book, document or other object relating to the inquiry, to attend the inquiry to be questioned or to produce such book, document or object.

In terms of subsection 8(a), a person who is summoned to such inquiry "shall not be entitled to refuse to answer any question upon the ground that the answer would tend to expose him to a criminal charge", while subsection (8)(b) provides that "[n]o evidence regarding any questions and answers contemplated in para (a) shall be admissible in any criminal proceedings . . ."

Counsel for the applicants contended that section 5, and particularly section 5(8)(a) violated the right to a fair trial in section 25 of the Constitution and, more particularly, the right to remain silent protected by section 25(2)(a) and 25(3)(c) of the Constitution. Section 25(2)(a) provides, *inter alia*, that every *arrested* person has the right to remain silent, while section 25(3) provides that "every *accused* person" shall have the right to a fair trial including, in section 25(3)(c), the right "to remain silent during plea proceedings or trial" (emphasis added). The court therefore had to consider whether section 25 applies to a person who is compelled to give information but who is neither arrested nor accused. Tebbutt J held that it does not. He held that the very specific wording of section 5 confines the rights contained in it to the criminal process. He stated (163D–E) that the Constitution deals with the right to silence in a narrow and precise fashion and limits it to arrested persons and to accused persons during plea proceedings and trial. He stated further that it does not lend itself to a wider general interpretation applicable to investigations and inquiries *dehors* criminal proceedings of arrest and trial (163E):

> "To hold that a wide interpretation, for which applicants contend, exists, this Court would have to search for and find it in some general consideration and disregard the specificity of the framers of the Constitution in enacting s 25. Those framers, too, must have been aware of the interrogation procedures provided for in, for example, such statutory enactments as s 65 of the Insolvency Act 24 of 1936; ss 415 and 417 of the Companies Act 63 of 1973; . . . and s 6 of the Banks Act 94 of 1990. Should they have wished to extend the right to remain silent to those, one would have expected a provision to that effect instead of the very specific reference to such right in ss 25(2)(a) and 25(3)(c) only" (163E–H).

Tebbutt J could find no justification either from the wording of section 25 or generally to extend the scope of the right to remain silent to an inquiry such as the one provided for in section 5 of the Act. The *use* of evidence given by a person at such an investigation or inquiry in any subsequent criminal trial of that person, would, however, constitute a violation of his right to remain silent in terms of section 25(3)(c) (164I). While there is authority for the view that the exclusion of direct evidence alone would be a sufficient safeguard (see eg *Haywood Securities Inc v Inter-Tech Resource Group Inc* (1985) 24 DLR (4th) 724 (CA) referred to by Tebbutt J at 165F) the judge preferred the view that both direct evidence (evidence that would not have existed independently of the exercise of the power to compel it) as well as derivative evidence (evidence discovered in consequence of the direct answers given) should be excluded. In this regard he referred to *Morena v Mnr* (1991) 1 CTC 78, *Thompson Newspapers Ltd v Director of Investigation and Research* (1990) 54 CCC 4 (3d) 47 and the dissenting opinion of Lambert JA in *Haywood Securities Inc v Inter-Tech Resource Group Inc supra* where it was pointed out that all the major legal systems in the common law world contained protections against the introduction of derivative evidence. Tebbutt J thus found section 5 of the Investigation of Serious Economic Offences Act to be constitutional, since it contained the necessary safeguard of excluding the use of evidence obtained at a section 5 enquiry in any subsequent criminal proceedings.

The plain narrow meaning given by Tebbutt J to section 25 conflicts with the common law approach adopted by our courts. In *S v Shangase* 1994 2 BCLR 42 (D) Levinsohn J referred to the judgments in *R v Camane* 1925 AD 510 575 and *S v Khumalo* 1992 2 SACR 411 (N). In *Camane*, Innes CJ remarked:

> "Now it is an established principle of our law that no-one can be compelled to give evidence incriminating himself. He cannot be forced to do that either before the trial or during the trial. The principle comes to us through the English law and its roots go back far in history."

In *Khumalo* it was stated:

> "There is indeed even a greater need for protection against forced self-incrimination before the trial than there is at the trial."

Furthermore, common law rights are expressly reserved by section 33(3) of the Constitution. This section provides:

> "The entrenchment of the rights in terms of this chapter shall not be construed as denying the existence of any other rights or freedoms recognised or conferred by common law, customary law or legislation to the extent that they are not inconsistent with this chapter."

It would be a strange bill of rights that would reduce the scope of one of the oldest common law procedural rights by restricting its scope to exclude the investigation process.

A technical and narrow interpretation of the word "trial" would make little of the right to a fair trial. (See *S v Kramer* 1991 1 SACR 25 (Nm) and *S v Koekemoer* 1991 1 SACR 427 (Nm), where the Namibian courts stated *obiter* that a right to a fair trial is meaningless unless it includes the right to a fair pre-trial investigation. This remark was made in the context of the constitutional validity of entrapment.)

Although Tebbutt J referred to interrogation procedures authorised by, *inter alia*, the Companies Act, he seemed to have overlooked the finding of his own

court in *Wehmeyer v Lane* 1994 4 SA 414 (C), where this procedure was pertinently discussed. In this case the compulsory furnishing of information under a section 415 enquiry of the Companies Act was challenged as violating the self-incrimination privilege entrenched in section 25. The court rejected the argument that section 25 only applied at the criminal trial and remarked that this was "not an answer in as much as the possibility of prejudice in respect of a future trial exists" (449G–H).

The finding of the Constitutional Court in *Ferreira v Levin; Vryenhoek v Powell* 1996 1 SA 984 (CC) seems to support my argument that section 25 is not confined to persons who are accused or against whom evidence has been tendered at a subsequent criminal trial. In that case the court had to consider, *inter alia*, whether section 417(2)(b) of the Companies Act violates the fair trial rights contained in section 25(3) of the Constitution. (The question of the constitutionality of s 417(2)(b) and a number of related issues came before the court by way of a s 102(1) referral from the Witwatersrand Local Division.)

Section 417 allows for the examination of officers of the company, its debtors and persons with information about the affairs of a company when a company is being wound up by order of court because it is unable to pay its debts. Subsection (2)(b) provides:

> "Any such person may be required to answer any question put to him at the examination, notwithstanding that the answer might tend to incriminate him, and any answer given to such question may thereafter be used in evidence against him."

The majority of the court held that section 417(2)(b) violates the fair trial rights of an individual, which include a right not to be compelled to give potentially incriminating evidence in investigatory proceedings conducted with a view to possible subsequent prosecution. The court then considered whether the limitation was justified under section 33(1) of the Constitution.

In terms of the Companies Act, liquidators are required to determine the cause of the company's failure, and to establish what assets it has. Ackermann J (for the majority of the court) found that it was reasonable (in the sense that there was a rational connection between mischief and remedy) to compel persons to be interrogated in relation to the affairs of the company which are relevant to the discharge by liquidators of their duties, even where the testimony given tends to incriminate the person giving it. It was also necessary, in the sense that there is a pressing or compelling state interest to ensure that assets of the company are recovered for the benefit of creditors, especially from directors and officers of the company who may have been responsible for the failure of the company. The court also found it necessary to compel persons to answer all relevant questions put to them even when the answers may incriminate them, for without compulsion there would be a great reluctance on the part of persons to make a full and frank disclosure of their knowledge of the affairs of the company and their dealings with it (1061H par 126).

There was, however, no acceptable measure of proportionality between the objective sought to be achieved and the means chosen to achieve it. Other jurisdictions, particularly the United States and Canada, had achieved the same objective by means less invasive of the examinee's rights, namely by conferring on the examinee either a direct or both a direct and a derivative use immunity in respect of self-incriminating evidence given at the enquiry. There was nothing to suggest that the objective could not fully be achieved in South Africa by appending some form of use immunity to section 417(2)(b) (1061I–1062B par 127).

Section 98(5) of the Constitution empowers the Constitutional Court to invalidate legislation "to the extent of its inconsistency with the Constitution". To give effect to section 98(5) in the circumstances, the court's order was to the effect that evidence directly obtained by way of compelled testimony could not be used in criminal proceedings against an examinee. Derivative evidence could be admitted subject to the discretion of the court to exclude such evidence on the grounds of fairness to the accused. (The court expressly disagreed with Tebbutt J on the exclusion of derivative evidence (1077F par 152F).)

If one follows the approach of the Constitutional Court, it becomes clear that Tebbutt J should not have held that section 25 is confined to accused or arrested persons. What he should have held was that section 25 had no application in that case, as section 5 of the Investigation of Serious Economic Offences Act precludes the use of evidence obtained at a hearing from further use at any subsequent hearing. In such a case the right to a fair trial is not threatened. The rule against self-incrimination is adequately protected.

Section 6

Tebbutt J then turned to consider section 6 of the Act. For the purpose of any inquiry provided for in section 5, the Director is empowered by section 6 of the Act to "enter any premises on which or in which anything connected with that inquiry is, or is suspected to be" without notice, to seize copies of or extracts from any book or document and to request from any person an explanation of any entry therein.

Tebbutt J had no difficulty in holding that section 6 violates the right to privacy contained in section 13 of the Constitution as contended by the applicants:

> "The applicants . . . have referred to a large number of cases in which the right of every citizen to occupy and enjoy his home or property free from arbitrary or, as it has also been described, 'unreasonable invasion and search' has been stressed. No purpose would be served by an extensive quoting from them, or even listing them, here. Section 13 . . . containing as it does the right to privacy, entrenches that right in terms of our Constitution. It is, I think, undoubted that section 6 of the Act constitutes a violation of the right to privacy embodied in section 13 of the Constitution" (166F–G).

He stated that, since rights are not absolute, the Director should have the opportunity to prove that the limitation of the right by the Act was reasonable and justifiable in an open and democratic society based on freedom and equality. In interpreting section 33(1), the limitation clause, Tebbutt J relied on the criteria laid down in *R v Oakes* (1986) 26 DLR (4th) 200. *Oakes* has been approved as authoritative by our courts in *Qozeleni v The Minister of Law and Order* 1994 1 BCLR 75 (E) and *Phala v The Minister of Safety and Security* 1994 2 BCLR 89 (W). These criteria can be summarised as follows: First of all, the objective of the law must be sufficiently important to limit a constitutional right. Secondly, the law must be connected rationally to the objective. Thirdly, the law must impair the right no more than is necessary to accomplish its objective.

Tebbutt J was of the view that the first of the criteria had been met, namely that the Act pursues an objective that is sufficiently important to justify limiting individual constitutional rights. The objective is the "swift and proper investigation of serious economic offences". He stated (169D–E) that to enable the serious economic offences unit to operate effectively and to provide it with the necessary machinery to conduct its investigations properly, the interrogatory

procedures were necessary and were rationally connected to the objective of the Act.

In considering whether the law impaired the right more than was necessary to advance the objective of the Act, and whether there was proportionality between the effect of the measure and the objective sought to be achieved by the curtailment, Tebbutt J referred to *Hunter v Southam* (1985) 14 CCC (3d) 97 SCC 106 where Dickson J stated:

> "An assessment of the constitutionality of a search or seizure, or of a statute authorising the search and seizure must focus on its 'reasonable' or 'unreasonable' impact on the subject of the search or the seizure, and not simply on the rationality in furthering some blind government objective."

The major requirement laid down for reasonable search and seizure was that of prior authorisation. Dickson J said (109) that a requirement of prior authorisation, usually in the form of a valid warrant, had been a consistent prerequisite for a valid search and seizure both at common law and under most statutes.

The purpose of requiring prior authorisation was, in Dickson J's view, to provide an opportunity, before the event, for the conflicting interests of the state and the individual to be assessed, so that the individual's right to privacy would be breached only where the appropriate standard had been met, and the interests of the state were demonstrably superior:

> "For such an authorisation procedure to be meaningful, it is necessary for the person authorising the search to be able to assess the evidence as to whether that standard has been met, in an entirely neutral and impartial manner" (110).

In terms of section 6 of the Investigation of Serious Economic Offences Act it is the Director who determines whether search and seizure should take place. That power, Tebbutt J concluded,

> "ill accords with the neutrality and detachment necessary to assess whether the evidence reveals that the point has been reached where the interests of the individual must constitutionally give way to those of the state" (per Dickson J 112 in *Hunter supra*).

In his view, the Director could not "be the impartial arbiter necessary to grant effective authorisation".

Tebbutt J held that the spirit and purport of the Constitution would be best served by providing that before any search or seizure takes place pursuant to section 6 of the Act, prior authorisation for such procedure must be obtained from a magistrate or judge. Any application for such authorisation should set out, at the very least, under oath or affirmed declaration, information about the nature of the inquiry, and the need, in regard to that inquiry, for a search and seizure in terms of section 6 (172H). The obligation to obtain such authorisation would not, in Tebbutt J's view, prejudice the objective of the Act. Nor would there be any prejudice to the Director as far as the timely investigation of that objective is concerned, if he were to apply to a magistrate or judge for authorisation to conduct the search and seizure and to motivate such an application. He said (173A–B):

> "It would be akin to an application in a civil matter for an Anton Piller order. Nor would there be any prejudice to the Director on the basis that the person whose premises are to be searched and property seized may get word of the application. The same considerations as exist in respect of Anton Piller orders would apply."

Tebbutt J held that section 6 violates the Constitution in a further respect. Unlike section 5, section 6 contains no provision for excluding evidence obtained as a

result of a search and seizure conducted under that section in any subsequent criminal proceedings. He held that without such a safeguard the right to a fair trial embodied in section 25 of the Constitution would be violated (173B–E). In the result, Tebbutt J held that section 6 conflicts with section 13 of the Constitution, and that the court should exercise the powers it has in terms of section 98(5) of the Constitution and require Parliament to correct the defects in section 6.

The applicants attacked section 6 on another ground. They argued that it violates the property rights contained in section 28 of the Constitution. The latter deals with deprivation of rights in property, while section 28(3) deals with expropriation of rights in property. In relation to deprivations Tebbutt J had this to say:

> "[W]hile [s 28(2)] does provide that 'no deprivation of any rights in property shall be permitted', [it] goes on to specifically say [sic] that such deprivation may occur 'in accordance with a law'" (26).

He held that there may be a seizure of property pursuant to a search provided that it (the seizure) is permissible in accordance with "a law". Section 6 of the Investigation of Serious Economic Offences Act is, in his view, such a law. In the result, he decided that section 28 could not avail the applicants in their assault on section 6.

The first question which arises, is: what is meant by "a law"? If "a law" means any validly passed Act, ordinance, by-law, or delegated legislative provision, then only *ultra vires* executive action would be outlawed by section 28(2). This meaning, which it seems is the one Tebbutt J would have us attribute to it, does no more than set out the position as it was prior to the Bill of Rights and cannot, with respect, be correct. Moreover, it implies the unacceptable conclusion that the internal limitation in section 28(2) overrides the general limitation clause of section 33(1). Any exclusion of the general limitation clause would surely need to have been expressly provided for, given the function of section 33(1) and the Bill of Rights as a whole.

A better interpretation would be that, since a deprivation is a limitation of the right to acquire, hold and dispose of property provided for under section 28(1), and since all limitations on rights must be by law of general application which is reasonable and justifiable in an open and democratic society based on freedom and equality under section 33(1), the law referred to in section 28(2) must be subject to the requirements of section 33(1).

Section 7

The applicants contended further that the right to privacy entrenched in section 13 of the Constitution was violated by section 7 of the Act. Section 7 prevents the disclosure of any information obtained as a result of any inquiry, search and seizure without the permission of the Director. Although it was not clear on what ground the applicants contended that the section was unconstitutional, counsel faintly argued that his objection to its constitutionality was that the Director may give permission for the disclosure of the information referred to in the section. Tebbutt J held that this section clearly *preserves* the right to privacy which in his view was the only right capable of being violated by the section and allows a departure from such preservation only with the Director's permission (173F–G). He stated (173H–I) that the Director does not have an "unfettered discretion" in deciding whether to permit such disclosure, and that his powers had to be exercised *intra vires*. Thus read, and having regard to section 232 of the Constitution, Tebbutt J held that section 7 does not conflict with the Constitution.

The Investigation of Serious Economic Offices Amendment Act 46 of 1995

In consequence of the finding of the court, section 6 of the Investigation of Serious Economic Offences Act was amended by the Investigation of Serious Economic Offences Amendment Act 46 of 1995. Section 6 now provides that premises may be entered and that a search and seizure may take place only pursuant to a warrant issued by a magistrate, regional magistrate or judge (subs 4). A warrant may be issued only if it appears that there are reasonable grounds for believing that anything relating to a section 5 inquiry is, or is suspected to be, on or in such premises. (The term "reasonable grounds" has been held to refer to an objective set of facts – *Craman Investments (Pty) Ltd v The South African Reserve Bank* case no 61/1989 (D).) The person requiring the warrant must state the nature of the inquiry in terms of section 5, the suspicion which gave rise to it, and the need, in regard to the inquiry, for a search and seizure (subs 5). This amendment is to be welcomed. It will go a long way towards preventing the issue of warrants on loose, vague or doubtful bases of fact, and will therefore offer protection against general searches.

Any entry or search of premises must be conducted with strict regard to decency and order, including a person's right to, respect for and the protection of his or her dignity, the right to freedom and security and the right to privacy (subs 2).

The Act also provides for the entry of premises and search and seizure without a warrant in certain circumstances. Search and seizure without a warrant may take place where the person concerned gives his consent or if the Director or any person referred to in section 3(4)(a), upon reasonable grounds, believes that the warrant would be issued if application were made *and* that the delay caused by obtaining a warrant would defeat the object of the entry, search and seizure and removal. This provision makes it clear that search and seizure without a warrant cannot be justified by the seriousness of the offence alone or by the plea that if such searches cannot be made, law enforcement will be more difficult. The amendments to section 6 therefore go a long way towards protecting the right to privacy contained in section 13 of the Constitution.

A further amendment specifically excludes the use of evidence obtained at an investigation or inquiry, in any subsequent criminal proceedings against the person from whom the evidence was obtained (subs 3). The words "no evidence ... shall be admissible" can be interpreted in two ways. Either only direct evidence is excluded, or both direct and derivative evidence is excluded.

Tebbutt J in *Park Ross* stated that the preferred interpretation would be one excluding both direct and derivative evidence. Referring to section 232(3) of the Constitution he held:

> "[S] 5(8)(b) and particularly the word 'evidence' must be 'read down' to give it the restrictive meaning of referring to both direct testimony and derivative evidence" (166C).

However, in *Ferreira supra* the Constitutional Court held that while direct evidence is not admissible, derivative evidence could be admitted subject to the discretion of the court to exclude such evidence on the grounds of fairness to the accused. This means that section 6(3) will be read to mean that only direct evidence need be excluded (see Ackermann J 1077F par 152F).

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DIE WENSLIKHEID VAN DIE GEBRUIKMAKING VAN MOSIEVERRIGTINGE BY ONBESTREDE EGSKEIDINGS

Ex parte Inkley and Inkley 1995 3 SA 528 (K)

Sedert die jare vyftig is daar 'n neiging onder regspraktisyns om al hoe meer van mosieverrigtinge in die hooggeregshof gebruik te maak. Die praktyk het ontstaan om sekere gedinge wat tradisioneel gewoonlik met 'n aksie begin was eerder met 'n aansoek te begin (sien *Minister of Native Affairs v Sekukuni* 1958 4 SA 99 (T) 101F). Hierdie neiging het onder andere ontstaan omdat mosieverrigtinge baie goedkoper en vinniger as aksieverrigtinge is. Maar ten spyte van hierdie neiging is die praktyk nog altyd om egskeidingsgedinge slegs met 'n aksie deur middel van 'n dagvaarding in te stel – selfs in omstandighede waar mosieverrigtinge by uitstek die gepaste prosedure is.

Voordat *Ex parte Inkley and Inkley* bespreek word, is dit wenslik om net eers weer die basiese beginsels van die prosesreg oor die verskillende litigasieprosedures uiteen te sit.

'n Persoon wat 'n geding in die hooggeregshof aanhangig wil maak, kan van een van twee prosedures gebruik maak, naamlik óf aksie- óf mosieverrigtinge. 'n Persoon kan egter nie na willekeur 'n keuse tussen hierdie twee prosedures uitoefen nie. Die omstandighede van elke saak sal telkens bepaal watter een van die twee prosedures gebruik moet word (sien *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 3 SA 1155 (T)).

Aksieverrigtinge moet gebruik word in gevalle waar 'n wesenlike feitedispuut voorsien word, dit wil sê waar die moontlikheid bestaan dat die partye met mekaar gaan verskil oor die feite wat die saak ten grondslag lê. 'n Aksie word begin deur 'n dagvaarding; en wanneer 'n saak wat deur 'n dagvaarding aanhangig gemaak is op verhoor gaan, moet die partye en hulle getuies voor die hof verskyn en *viva voce* getuienis lewer.

Aan die ander kant moet mosie- oftewel aansoekverrigtinge gebruik word in gevalle waar 'n wesenlike feitedispuut nie voorsien word nie, dit wil sê waar daar geen werklike geskilpunte tussen die partye oor die feite van die saak bestaan nie. 'n Aansoek word begin deur 'n kennisgewing van mosie ondersteun deur die applikant se funderende beëdigde verklaring. By die verhoor van 'n aansoek maak die hof sy beslissing op grond van die beëdigde verklarings voor hom (gewoonlik die applikant se funderende beëdigde verklaring en die respondent se antwoordende beëdigde verklaring). Die hof kan egter beveel dat mondelinge getuienis oor 'n bepaalde kwessie aangehoor moet word en dat die partye of enige getuies voor die hof moet verskyn.

In *Ex parte Inkley and Inkley* is die applikante in 1966 getroud. Twee dogters wat nou altwee meerderjarig en onafhanklik van die applikante is, is uit die huwelik gebore. Die huweliksverhouding tussen die applikante het egter onherstelbaar verbrokkel deurdat die applikante by die verhoor van hierdie saak reeds vir ongeveer drie jaar geheel en al afsonderlike lewens gelei het en nie meer as man en vrou saamgeleef het nie. Die applikante het 'n skikkingsakte onderteken waarin hulle ooreengekom het oor die vermoënsregtelike gevolge van die ontbinding van hulle huwelik.

Aangesien daar dus geen geskilpunte oor enige aspek van die egskeiding bestaan het nie, het die applikante die hof genader met 'n *ex parte* aansoek om egskeiding deur middel van 'n kennisgewing van mosie. Die kennisgewing van mosie is ondersteun deur 'n gesamentlike eedsverklaring deur die applikante waarin al die noodsaaklike bewerings en die redes vir die verbrokkeling van die huwelik uiteengesit is. Die applikante se advokate het die volgende redes aangevoer waarom die applikante daarop geregtig was om *in casu* van mosieverrigtinge gebruik te maak:

Hulle het aangevoer (529F) dat daar geen gebiedende bepaling in die Wet op Egskeiding 70 van 1979 of in die hooggeregshofreëls is wat 'n persoon verplig om 'n egskeidingsgeding deur middel van 'n aksie in te stel of wat 'n persoon verbied om mosieverrigtinge vir sodanige doel te gebruik nie.

Artikel 1(1) van die wet omskryf 'n egskeidingsgeding bloot as

> "'n geding waarby 'n egskeidingsbevel of ander regshulp wat daarmee in verband staan, aangevra word, en ook–
>
> (a) 'n aansoek *pendente lite* om 'n interdik of om die tussentydse bewaring van of toegang tot 'n minderjarige kind uit die betrokke huwelik of om die betaling van onderhoud; of
>
> (b) 'n aansoek om 'n bydrae tot die koste van so 'n geding of om so 'n geding of so 'n aansoek *in forma pauperis* in te stel of te doen of om die plaasvervangende betekening van prosesstukke, of die ediktale sitasie van 'n party, in so 'n geding of aansoek."

Daarbenewens bepaal artikel 11 van die wet dat "[d]ie prosedure wat met betrekking tot 'n egskeidingsgeding van toepassing is, is die prosedure wat van tyd tot tyd by hofreëls voorgeskryf word".

En wanneer daar dan na die hooggeregshofreëls gekyk word, blyk dit dat daar geen reël is wat spesifiek oor die prosedure handel wat by 'n egskeidingsgeding gebruik moet word nie. Die hooggeregshofreëls maak slegs in die breë voorsiening vir aansoekprosedure aan die een kant en aksieprosedure aan die ander kant.

Die applikante se advokate het verder geargumenteer (529G) dat die effek van hul aansoek niks meer as 'n verklaring van 'n gewysigde huwelikstatus van die partye is nie en dat hulle aansoek in hierdie opsig dus as analoog aan sekwestrasieverrigtinge beskou moet word. Sekwestrasieverrigtinge, wat ook op die wysiging van 'n persoon se status gerig is, word gewoonlik wel by wyse van 'n kennisgewing van mosie aanhangig gemaak.

Ten slotte het die applikante se advokate verwys na die sake waarin daar aanvaar is dat huweliksake en eise vir skadevergoeding nie deur middel van mosieverrigtinge aanhangig gemaak mag word nie. (Daar word nie in die saak aangedui na watter sake die advokate in hierdie verband verwys het nie, maar ek aanvaar dit is oa *Williams v Tunstall* 1949 3 SA 835 (T), *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 3 SA 1155 (T) en *Ex parte Van Loggerenberg* 1951 1 SA 771 (T).) Hulle betoog dat hierdie sake nie nagevolg behoort te word nie omdat daar vandag geen goeie rede vir die handhawing van so 'n vereiste bestaan nie.

Regter Van Zyl verwerp al hierdie argumente en weier om die egskeiding toe te staan omdat die partye die egskeidingsgeding in 'n aansoek deur middel van 'n kennisgewing van mosie aanhangig gemaak het en nie in 'n aksie deur middel van 'n dagvaarding nie.

Ten spyte van die feit dat daar geen bepaling in die Wet op Egskeiding is wat bepaal dat 'n egskeidingsgeding met 'n aksie deur middel van 'n dagvaarding

ingestel moet word nie, sê regter Van Zyl (531A–B) dat dit duidelik die bedoeling van die wetgewer is dat 'n egskeiding slegs met 'n aksie geëis kan word. Ter ondersteuning van hierdie interpretasie het die regter na verskeie artikels van die Wet op Egskeiding verwys wat dit volgens hom duidelik maak dat 'n egskeiding slegs met 'n aksie ingestel kan word. Die verwysing na hierdie artikels as staving vir sy interpretasie is egter nie oortuigend nie.

Regter Van Zyl verwys ten aanvang (531C–D) na die omskrywing van 'n "divorce *action*" (my kursivering) in artikel 1(1) van die wet. Volgens hom is dit dus duidelik dat 'n egskeiding met 'n aksie begin moet word en dat net die twee voorbeelde wat in (a) en (b) vermeld word met 'n aansoek deur middel van 'n kennisgewing van mosie ingestel mag word. Die punt is egter dat die Afrikaanse teks van die wet (wat weliswaar ook die ondertekende teks is) nie praat van 'n egskeidings*aksie* nie, maar van 'n egskeidings*geding*. En dit is tog duidelik dat 'n geding sowel 'n aksie as 'n aansoek insluit. Die Afrikaanse teks van die wet onderskraag dus die gedagte dat 'n persoon wat 'n egskeiding verlang 'n keuse het om óf van aksie- óf van mosieverrigtinge gebruik te maak.

Regter Van Zyl sê verder (531I–532A) dat die hof nie ingevolge artikel 4(1) van die wet in staat sal wees om sy diskresie uit te oefen by die beantwoording van die vraag of 'n huwelik onherstelbaar verbrokkel het as die hof nie die geleentheid het om die partye en moontlike getuies te sien en hulle getuienis aan te hoor nie. Die probleem met hierdie stelling is egter dat ons howe in die praktyk nie regtig getuienis van die partye of enige getuies in onbestrede egskeidingsake aanhoor nie. 'n Onbestrede egskeidingsaak word gewoonlik in minder as vyf minute afgehandel. Slegs die eiser hoef in die hof te verskyn en 'n paar formele vrae te beantwoord. Dit is hoogs uitsonderlik dat die verweerder of enige getuies by 'n onbestrede egskeidingsaak ook in die hof verskyn. Die feit is dat honderde huwelike elke Vrydag deur egskeiding in die verskillende afdelings van die hooggeregshof ontbind word sonder dat daar sprake van die aanhoor van getuienis in die ware sin van die woord is.

Regter Van Zyl verklaar vervolgens self ook (532D):

> "It is true that the facts and circumstances envisaged in this section [artikel 4(1)] may be placed fully before a Court by way of affidavit which may be accepted by the Court as evidence."

Maar ongelukkig vervolg hy dan:

> "On the other hand, it is common knowledge that, during the course of the leading of evidence, many other relevant facts and circumstances may come to the fore as a result of questions from the Bench, asked for purposes of clarity and elucidation."

Hierdie laaste stelling kan wel waar wees waar dit oor bestrede egskeidingsake gaan, maar dit is beslis nie die geval by onbestrede egskeidingsake nie. In onbestrede egskeidingsake is die verrigtinge na die uitreiking van die dagvaarding bloot 'n rubberstempelprosedure wat myns insiens net sowel op aansoek van die partye afgehandel kan word.

Regter Van Zyl verwys ook na artikel 6 van die wet wat oor die beskerming van die belange van afhanklike en minderjarige kinders handel. Volgens hom (533B) maak hierdie artikel baie duidelik dat die wetgewer bedoel het dat daar 'n verhoor moet wees van 'n egskeidingsaksie wat deur 'n dagvaarding ingestel is. As 'n mens artikel 6 aandagtig deurlees, is dit egter moeilik om te sien waarom die regter van mening is dat die bepalings van artikel 6 slegs by aksieverrigtinge van toepassing kan wees. Die bepalings van artikel 6 kan maklik ook by

mosieverrigtinge toegepas word. Dit gebeur trouens dikwels in die praktyk dat die bepalings van hierdie artikel aanwending vind by reël 43-aansoeke om die tussentydse bewaring van of toegang tot 'n kind. So het die hof in *Terblanche v Terblanche* 1992 1 SA 501 (W) 'n reël 43-aansoek om die tussentydse bewaring van kinders na die gesinsadvokaat verwys vir haar verslag en aanbevelings. Verder gebeur dit dikwels by reël 43-aansoeke dat die hof die partye of ander getuies gelas om voor hom te verskyn en *viva voce* getuienis te lewer.

Regter Van Zyl verklaar dan weer self (533G) dat "[i]t may be argued that these matters can be dealt with on affidavit . . .", maar gaan ongelukkig voort om te sê:

> "[B]ut it is clear that the Legislature envisaged proceedings in the form of a *hearing* where all relevant evidence and related matters are placed before the Court for its consideration."

Die regter maak 'n groot ophef van die feit dat daar 'n verhoor ("a *hearing*") moet wees. Die punt is egter dat wanneer 'n aansoek voor die hof dien, dit in reël 6(5)(f) van die hooggeregshofreëls ook 'n verhoor genoem word. As 'n egskeidingsaak deur middel van 'n aansoek gevoer word, sal daar dus steeds 'n verhoor wees – en as die aansoek nie behoorlik op beëdigde verklaring beslis kan word nie kan die hof ingevolge reël 6(5)(g) beveel dat mondelinge getuienis aangehoor word ten einde 'n bepaalde feitegeskil te beslis.

In sy uitspraak het regter Van Zyl ook die sake behandel waarin daar aanvaar is dat huweliksake nie deur mosieverrigtinge aanhangig gemaak mag word nie. Hy steun (534C–F) veral op die volgende *dictum* van regter Roper in *Ex parte Van Loggerenberg supra* 772A–C:

> "The necessity for action proceedings in such causes [matrimonial causes] is based upon public grounds; it is undesirable that the Court should set aside the marriage tie without hearing the oral evidence of the parties, for two reasons: first, because the status, not only of the parties themselves but of the children, born and unborn, is involved, and secondly, because of the interest of the State in the preservation of the binding nature of marriage."

Hierdie *dictum* kan met reg egter gekritiseer word:

- Eerstens gebeur dit bitter selde in die praktyk dat ons howe werklik mondelinge getuienis in onbestrede egskeidingsake aanhoor.
- Tweedens is die moontlikheid van mondelinge getuienis by mosieverrigtinge nie uitgesluit nie (sien r 6(5)(g) van die hooggeregshofreëls).
- Derdens word daar dikwels in die praktyk van mosieverrigtinge gebruik gemaak in sake waar 'n persoon se status betrokke is. (Voorbeelde hiervan is oa sekwestrasie- en ander aansoeke om 'n persoon onder kuratele te plaas.)
- Vierdens is dit moeilik om in te sien hoe 'n kind wat reeds gebore is se status deur egskeiding verander kan word.
- Vyfdens doen die feit dat 'n egskeidingsgeding deur mosieverrigtinge ingestel word geen afbreuk aan die staat se belang in "the preservation of the binding nature of marriage" nie. As 'n huwelik onherstelbaar verbrokkel het ingevolge artikel 4(1) van die Wet op Egskeiding, moet die hof volgens die appèlhofbeslissing *Levy v Levy* 1991 3 SA 614 (A) 'n egskeidingsbevel verleen. Die feit dat 'n egskeidingsgeding met 'n aksie of met 'n aansoek begin is, gaan dus nie werklik 'n verskil maak nie.

Regter Van Zyl haal vervolgens (535C–I) 'n paar omskrywings van die huwelik deur enkele van ons gemeneregskrywers aan. Met verwysing na openbare belang kom hy dan tot die volgende gevolgtrekking (536E–F):

> "The significance of marriage as one of the foundation stones of any civilised community still pertains to this day. It cannot simply be regarded as a consensual contract which can be breached and cancelled as easily as it was concluded."

Dit is egter moeilik om die logika agter hierdie gevolgtrekking te verstaan. As 'n egskeidingsbevel verleen word na die aanhangigmaking van 'n aansoek, in plaas van 'n aksie, kan daar nog steeds nie gesê word dat die huwelik as 'n konsensuele kontrak beskou word nie. 'n Gewone kommersiële kontrak kan na willekeur (deur ooreenkoms) deur die betrokke partye self gekanselleer word. As 'n huwelik op aansoek van die partye ontbind word, is dit egter steeds die hooggeregshof wat die egskeidingsbevel verleen en kan daar nie gesê word dat die huwelik bloot na willekeur van die partye beëindig is nie.

In die lig van die hoë egskeidingsyfer en die groot toename in saamwoonverbintenisse in ons land is dit verder te betwyfel of die openbare belang vandag nog die huwelik as een van die hoekstene van 'n beskaafde gemeenskap beskou.

Regter Van Zyl sluit sy uitspraak met 'n laaste verwysing na die praktyk om egskeidingsgedinge slegs deur middel van aksieverrigtinge aanhangig te maak. Hy verklaar (537C–D) dat

> "a Court would be loath to depart or deviate from a practice which has been followed since the earliest times. Very good reasons would have to be put forward before such departure or deviation may be regarded as justifiable. In the present case no such reasons have been tendered. On the contrary, there are excellent reasons for retaining the practice".

Daar is inderdaad goeie redes vir die behoud van die bestaande praktyk in geval van bestrede egskeidingsake, maar uit die bogaande bespreking blyk duidelik dat daar beslis geen rede is waarom hierdie praktyk nog op onbestrede egskeidingsake van toepassing moet wees nie. Alhoewel 'n onbestrede egskeidingsaak tans steeds met 'n aksie begin word, word so 'n saak na die uitreiking van die dagvaarding basies op dieselfde wyse as 'n onbestrede aansoek afgehandel. (In die *Praktykshandleiding* van die Transvaalse Provinsiale Afdeling en die Witwatersrandse Plaaslike Afdeling word die praktyksreëlings wat tav mosies en onbestrede egskeidings geld bv saam onder een en dieselfde opskrif behandel.) Daar is dus geen rede waarom onbestrede egskeidingsake nie deur middel van mosieverrigtinge ingestel kan word nie. Mosieverrigtinge is dan juis die gepaste prosedure om te volg in gevalle waar geen feitedispuut voorsien word nie. Verder sal die gebruik van mosieverrigtinge by onbestrede egskeidingsake 'n aansienlike kostebesparing vir die betrokke partye inhou. (Deur die gebruik van mosieverrigtinge in hierdie gevalle word advokaatsgelde vir die ondertekening van die *Besonderhede van Vordering* en 'n aantal opwagtingsgelde byvoorbeeld uitgeskakel.) Waar 'n wesenlike feitedispuut wel by bestrede egskeidingsake voorsien word, moet daar natuurlik van aksieverrigtinge gebruik gemaak word.

Regter Van Zyl se uitspraak is dus regtig teleurstellend. *Ex parte Inkley and Inkley* was eintlik 'n toetssaak wat deur sowel 'n senior as junior advokaat geargumenteer is in die hoop, veronderstel ek, dat ons howe uiteindelik die buigsamer benadering sou aanvaar in teenstelling met die ortodokse streng benadering wat ons regbank so lank gekarakteriseer het.

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HORISONTALITEIT VAN FUNDAMENTELE REGTE AFGEWYS

Potgieter v Kilian 1995 1 BCLR 1498 (N)

1 Inleiding

Die uitspraak van regter McLaren (met wie Squires R saamgestem het) sal 'n teleurstelling wees vir daardie juriste wat van mening is dat die handves van fundamentele regte in hoofstuk 3 van die Grondwet van die Republiek van Suid-Afrika 200 van 1993 noodwendig beteken dat die beproefde bepalings van die gemenereg meteen daarmee heen is. Dit is voorspelbaar dat diegene wat 'n afkeer het van die beginsel dat die (vermoedelike) bedoeling van die wetgewer 'n belangrike rol by grondwetlike uitleg speel, ontevrede gaan wees met 'n *dictum* soos:

> "Dit kon tog sekerlik nie die bedoeling van die wetgewer gewees het om die voormelde drastiese verandering in ons reg aan te bring nie. Ek dink 'n mens kan met veiligheid aanvaar dat as die wetgewer sulke gevolge wou teweegbring (deur die horisontale aanwending van Hoofstuk 3 [van die Grondwet]) hy dit duidelik sou voorgeskryf het" (1518A).

(Sien in hierdie verband ook die opmerkings in *Du Plessis v De Klerk* saak no CCT 8/95 1996-05-15 (CC) par 29, 85 en 111.)

Alhoewel ek nie met alles in die *Potgieter*-uitspraak saamstem nie, is dit verblydend dat daar nog regters is wat nie die vae bepalings van die Grondwet as regverdiging wil gebruik om iewers in die loop van 'n verhoor te transformeer tot 'n regshervormingskommissie of 'n tipe wetgewer nie.

As Suid-Afrika inderdaad nou 'n *regstaat* is (en die "regstaat"-aanspraak stuit natuurlik teen die werklikheid dat die Grondwet bloot met 'n tweederdemeerderheid gewysig kan word – in praktyk is die parlement dus steeds 'n magsblok wat in die naam van 'n sterk meerderheidsparty onreg tot reg kan verklaar), is daar veel te sê vir 'n konserwatiewer benaderinġ tot die uitleg en toepassing van die Grondwet in die privaatreg. Die skepping van grootskaalse onsekerheid deur direkte horisontale werking van die handves van regte toe te laat (vgl bv Van Aswegen "The implications of a bill of rights for the law of contract and delict" 1995 *SAJHR* 53–55) ingevolge elke regter se siening oor hoe die privaatreg ooreenkomstig byvoorbeeld "demokratiese beginsels" hervorm moet word, kan beswaarlik die kenmerk van 'n "regstaat" wees. Die toelating van te veel ruimte vir regterlike willekeur is teenstrydig met die oppergesag van die reg: daar is 'n belangrike verskil tussen 'n "regstaat" en 'n "regterstaat".

In *Du Plessis v De Klerk supra* par 181 wys regter Sachs ook op die onwenslikheid daarvan om, in sy terminologie, 'n "dikastocracy" of 'n "juristocracy" te skep.

In die *Potgieter*-saak word vanselfsprekend nie die laaste woord gespreek oor die horisontale werking van die Grondwet en die besonder moeilike vraag na die korrekte verhouding tussen die fundamentele reg op vryheid van spraak en die beskerming van die *fama* nie.

Alhoewel wesenlike beginsels in die *Potgieter*-uitspraak in effek ook toegepas word in die uitsprake van die meerderheid regters van die konstitusionele hof in *Du Plessis v De Klerk supra*, word in laasgenoemde uitspraak (par 73) ook

verwys na die finale (1996-) Grondwet waarin verskillende formulerings voorkom wat 'n ander uitwerking op die probleem kan hê. Die nuwe voorgestelde Grondwet se erkenning van die belang van "human dignity" (bv in klousule 1) kan inderdaad andersoortige impulse na die privaatreg uitstuur, maar die algemene posisie betreffende horisontaliteit behoort nie dramaties te verander nie.

Daar is internasionaal 'n haas onoorsigtelike literatuur oor laster en vryheid van spraak wat duidelik bewys dat ons reg hom ook moet voorberei op 'n lang ontwikkelingspad (vgl die volgende meer onlangse bydraes: Van der Vyver "Constitutional free speech and the law of defamation" 1995 *SALJ* 572; Neethling en Potgieter "Laster: Die bewyslas, media-privilegie en die invloed van die nuwe Grondwet" 1994 *THRHR* 413; Neethling en Potgieter "Aspekte van die lasterreg in die lig van die nuwe Grondwet" 1995 *THRHR* 709; Barendt "Libel and freedom of speech in English law" 1993 *Public Law* 449; Fleming "Defamation: Political speech" 1993 *LQR* 12; O'Dell "Does defamation devalue free speech?" 1990 *DULJ* 50; Kriele "Ehrenschutz und Meinungsfreiheit" 1994 *NJW* 1897; die belangrike beslissing van die *Bundesverfassungsgericht* in die "Soldaten sind Mörder"-saak 1994 *NJW* 293; Prinz "Der Schutz der Persönlichkeitsrechte vor Verletzung durch die Medien" 1995 *NJW* 817; Grimm "Die Meinungsfreiheit in der Rechtsprechung des Bundesverfassungsgerichts" 1995 *NJW* 1697; Gounalakis "Freiräume und Grenzen politischer Karikatur and Satire" 1995 *NJW* 809; Kommers *The constitutional jurisprudence of the Federal Republic of Germany* (1989) 366–443; Currie *The Constitution of the Federal Republic of Germany* 174–243).

2 Feite en beslissing

Die hof moes 'n appèl bereg teen 'n landdroshof se uitspraak dat die appellante (applikante) nie geregtig is op 'n finale interdik wat die publikasie van 'n lasterlike brief in 'n koerant sou verhinder nie. Die landdros het onder meer op sterkte van *Mandela v Falati* 1994 4 BCLR 1 (W) beslis dat die respondent se vryheid van uitdrukking ingevolge artikel 15 van die Grondwet seëvier oor die applikante se "reg tot waardigheid". By monde van regter McLaren verwerp die hof die *ratio* in die *Mandela*-saak *supra* (en in die besonder ook die beslissing in *Gardener v Whitaker* 1994 5 BCLR 19 (OK) – sien vir 'n kritiese bespreking Visser "A successful invasion of private law" 1995 *THRHR* 745) dat hoofstuk 3 van die Grondwet horisontale werking het.

Vir geval sy beoordeling dalk verkeerd kan wees, ontleed regter McLaren ook die moontlike invloed van die Grondwet op die lasterreg in twee situasies, naamlik as die reg op goeie naam as deel van die reg op (menslike) waardigheid ingevolge artikel 10 beskou word, en waar dit nie deur artikel 10 gedek word nie. Ingevolge beide moontlike konstruksies bevind die hof dat die appellante op 'n finale interdik geregtig is.

3 Basiese evaluasie

Daar kan min twyfel wees dat die hof se beoordeling en toepassing van die algemene beginsels van die lasterreg (1531–1534) basies korrek is. Selfs al aanvaar 'n mens argumentshalwe dat die Grondwet direk toepassing ten aansien van die lasterreg het, kan die beginsels wat die regter *in casu* in ag geneem het, wel redelikerwys die waardes wat 'n oop en demokratiese samelewing gebaseer op vryheid en gelykheid ten grondslag lê, "bevorder" (a 35(1) van die Grondwet; sien hieroor ook Neethling en Potgieter 1994 *THRHR* 518).

Die logika, oortuigingskrag en vernuf van heelwat van regter McLaren se argumente (dieselfde geld Van Dijkhorst R se uitspraak in *De Klerk v Du Plessis* 1994 6 BCLR 124 (T)) word onderskraag, alhoewel nie *in eo nomine* nie, deur die benadering van die meerderheid regters van die konstitusionele hof in *Du Plessis v De Klerk supra* waar die hof ook teen algemene direkte horisontale werking van die handves van fundamentele regte beslis het. Hopelik sal hierdie rigting 'n demper plaas op die eksponente van die meer "vry-swewende" of "ronddrywende" uitlegmetodes wat met die nodige praal van geleerdheid die Grondwet soos 'n buikspreker se pop wil gebruik om hulle eie standpunte die skyn van regskrag te gee (vgl Van Dijkhorst R se gebruik van dié beeldspraak in *De Klerk supra* 128).

4 Enkele van die hof se argumente

In casu oorweeg die hof breedvoerig die moontlike horisontale werking van die Grondwet wat dan 'n invloed op die lasterreg kan hê deurdat die erkenning van die fundamentele reg op vryheid van uitdrukking soms die reg op die *fama* met minder beskerming as voorheen sal laat (1512–1527).

Regter McLaren aanvaar dat daar by die vertolking van die Grondwet nie 'n radikale afwyking van die gewone uitlegreëls mag wees nie (sien ook *Qozeleni v Minister of Law and Order* 1994 1 BCLR 75 (OK) 81). Hy verwys goedkeurend na standpunte dat die vernaamste probleem wat die Grondwet wou aanspreek, die onaanvaarbare grondwetlike bedeling van die ou Suid-Afrika was (1515F–1516F 1520I). Alhoewel min juriste waarskynlik hiermee sal verskil, is dit twyfelagtig of die regter se afleiding korrek is dat die wetgewer *daarom* nie ook kon bedoel het nie dat die Grondwet horisontale werking moet hê. Na my mening is regter McLaren se redenasie nie 'n doeltreffende antwoord aan sekere ywerige regshervormers op (of agter) die regbank nie. Waarom, kan 'n mens byvoorbeeld vra, kon die wetgewer nie bedoel het om tegelykertyd politieke apartheid af te skaf *en* sekere ingrypende wysings aan die privaatreg te magtig nie? Die handves van fundamentele regte wat onder meer as regverdiging dien vir die publikasie en besit van pornografie, die wettiging van dobbelary, die beskerming van afgodsdiens en eise om die wettiging van aborsie, prostitusie en homoseksuele "huwelike", bewys immers duidelik dat dit om veel meer as die afskaffing van die stelsel van politieke apartheid gaan (vgl ook Visser en Potgieter "Some critical comments on South Africa's bill of fundamental rights" 1994 *THRHR* 494).

Terloops kan daarop gewys word dat alhoewel regter McLaren die *Gardener*-uitspraak *supra* verwerp (bv 1520B 1529B 1532G), hy tog met verwysing na *Gardener* aanvaar dat die wetgewer wat die horisontale vlak betref, geen hiërargie van fundamentele regte wou skep nie. Ek het reeds daarop gewys dat so 'n siening teenstrydig met die uitspraak van die konstitusionele hof in *S v Makwanyane* 1995 3 SA 391 (CC) 451 is (sien vir 'n soortgelyke standpunt die insiggewende bespreking deur Van der Vyver 1995 *SALJ* 593–599).

Voorgestelde benaderings tot die uitleg van die Grondwet word dikwels deur eienaardighede gekenmerk. In die loop van sy uitspraak reken regter McLaren af met een so 'n vergesogte teorie van regter Hurt (in *Motala v University of Natal* 1959 3 BCLR 374 (D) 382D) dat die gebrek aan uitdruklike verwysings na die Grondwet se horisontale werking toegeskryf kan word aan die "high-powered, perhaps frantic, milieu in which the Constitution was forged". (Die implikasie is seker dat die hof die grondwetskrywers se taak moet voltooi – daar kan dan

soveel grondwette ontwikkel as wat daar regters is!) Die relevante geskiedenis in hierdie verband word vertel in Du Plessis en Corder *Understanding South Africa's transitional bill of rights* (1994) 112 en vir sover die skrywers se weergawe akkuraat is, steun dit interessant genoeg ten dele regter MacLaren se verwerping van die horisontale werking van die Grondwet.

Ongelukkig is regter McLaren se siening oor die verband tussen *fama* (wat nie *eo nomine* deur die Grondwet erken word nie) en die reg op waardigheid in artikel 10 (1528–1530) nie volkome oortuigend nie. Waarskynlik sal ons reg nog aanvaar dat artikel 10 (en sy nakomelinge) 'n tipe aanknopingspunt vir heelwat privaatregtelike persoonlikheidsontwikkeling kan wees en dat die "waardigheid" waarvan daar melding gemaak word, ook die uiterlike waardigheid of reputasie insluit (sien in die algemeen Burchell "Beyond the glass bead game: Human dignity in the law of delict" 1988 *SAJHR* 1).

Dit is nie nodig om vir doeleindes van hierdie bespreking op al die redes in te gaan wat regter McLaren aanvoer *teen* die horisontale werking van die Grondwet nie. Watter logiese oortuigingskrag sy argumente ook al mag hê (en hy noem heelwat interessante oorwegings – bv 1523F 1527A–B 1431A–B), gaan dit eintlik nie meer oor die vraag of die Grondwet wel horisontale werking het nie, maar oor watter *model van horisontale werking* gebruik behoort te word (vgl ook Neethling, Potgieter en Visser *Neethling's Law of personality* (1996) 82–83; sien verder par 6 hieronder oor wat regters in hierdie verband te doen staan).

Artikel 35(3) van die Grondwet (regter McLaren oorweeg skynbaar nie hierdie bepaling nie) wat onder meer voorskryf dat by die toepassing en ontwikkeling van die gemenereg 'n hof die gees, strekking en oogmerke van die handves van fundamentele regte in ag moet neem, maak ongetwyfeld vir 'n tipe (indirekte) horisontale werking voorsiening net soos in die Duitse reg waaraan dit ontleen is (sien bv Van Aswegen 1995 *SAJHR* 56–57). Dit staan nou ook vas dat in die algemeen daar indirekte horisontale werking van fundamentele regte is (*Du Plessis v De Klerk supra*). Ondanks die feit dat regter Van Dijkhorst in *De Klerk v Du Plessis supra* 501 horisontale werking uitdruklik verwerp, bied die volgende *dictum* deur hom tog steun vir 'n gematigde tipe horisontale werking:

> "Section 35(3) is intended to permeate our judicial approach to interpretation of statutes and the development of common law with the fragrance of the values in which the Constitution is anchored. This means that whenever there is room for interpretation or development of our virile system of law that is to be the point of departure. When in future the unruly horse of public policy is saddled, its rein and crop will be that value system."

Alhoewel dit nie nodig behoort te wees dat die hof by elke geding tussen private burgers besondere aandag skenk aan hoe hy die gemenereg verder moet "ontwikkel" nie, kan hierdie *dictum* toegepas op die feite voor regter McLaren beteken dat die reg op vryheid van spraak noodwendig 'n invloed op die lasterreg kan uitoefen buite die tradisionele gemeenregtelike bepalings in verband met spraakvryheid. Regsvergelyking leer dat grondwetlike vryheid van spraak druk op die lasterreg uitoefen (sien die lysie verwysings in par 1 hierbo). Alhoewel ek meen dat daar *in casu* nie ruimte vir 'n verandering aan die lasterreg was nie, moet aanvaar word dat byvoorbeeld die skuldlose aanspreeklikheid van die massamedia waarskynlik sterker onder druk gaan kom (vgl ook Van Aswegen 1995 *SAJHR* 61–62 en bv *New York Times Co v Sullivan* 376 US 254 (1964)). Dit is dus ietwat onrealisties om 'n skeidsmuur tussen privaatregtelike laster en die fundamenteelregtelike vryheid van uitdrukking te probeer opbou.

5 Slotgedagtes

Danksy regters McLaren en Squires is die nuutste onnodige aanslag op die privaatreg tydelik afgeweer. 'n Mens kan dankbaar wees dat die hof die inherente waarde van ons gemeenregtelike privaatreg bevestig (1515G–1516F), besondere klem op die gebruik van die bekender uitlegreëls plaas en hom nie laat mislei deur 'n onnodige vae "vergunnende en doeldienende" benadering tot grondwetuitleg wat noodsaaklike regsekerheid onredelik versteur nie. Die reg (en die Grondwet) is natuurlik noodwendig in sekere opsigte vaag maar ongelukkig pas sekere juriste se voorstelle oor hoe die Grondwet hanteer moet word, in by regter Van Dijkhorst se waarskuwing oor die buikspreker en sy pop (sien par 3 hierbo).

Wat die horisontale werking van die grondwetlike bepalings oor fundamentele regte betref, is die algemene internasionale neiging blykbaar een van toenemende *Drittwirkung*. Die idee is onder meer dat daar ook gewaak moet word teen magsmisbruik in die geval van private magsblokke (bv Du Plessis en Corder 113). Dit is twyfelagtig of Suid-Afrika aan hierdie tendense gaan ontsnap – en die magtige posisie van die massamedia kan miskien juis noodsaak dat ondanks hulle reg op redelike vryheid van uitdrukking, hulle skuldlose aanspreeklikheid op grond van laster gehandhaaf moet word.

Na my mening kan regters wat 'n waardering vir ons gemeenregtelike erfenis het, deur die ontwikkeling van 'n behoorlike model van horisontale werking (*Drittwirkung*) waarskynlik 'n sterker positiewe invloed op die privaatreg uitoefen as om enige horisontale werking summier af te wys. So kan hulle beter verseker dat beproefde gemeenregtelike bepalings nie onnodig onder verdenking kom nie en gesonde beheer uitoefen oor die verdere ontwikkeling daarvan.

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DIE TOEGANGSBEVOEGDHEDE VAN DIE ONGETROUDE VADER – IS DIE FINALE WOORD GESPREEK?

B v S 1995 3 SA 571 (A)

1 Inleiding

Die dilemma van die ongetroude vader is oorbekend – trouens, sy stryd het openbare besit geword. Die media is vol verhale van ongetroude vaders wat nie hulle kinders te sien kry nie, nie 'n lang hofstryd kan bekostig nie of wie se lang hofstryd onsuksesvol was.

Die appèlhof het in *B v S* bevestig dat die ongetroude vader ingevolge die huidige Suid-Afrikaanse reg geen inherente toegangsreg het nie. Die Suid-Afrikaanse Regskommissie het onlangs die aangeleentheid ondersoek (*'n Vader se regte ten opsigte van sy buite-egtelike kind* Werkstuk 44 Projek 79 (1993)). In 'n verslag wat in 1994 gepubliseer is, beveel die kommissie aan dat wetgewing aanvaar word wat die gemeenregtelike posisie bevestig en waarin riglyne neergelê word wat die howe in ag moet neem by aansoeke van hierdie aard (*Verslag*

oor die regte van 'n vader ten opsigte van sy buite-egtelike kind Projek 79 (1994) 83–89).

'n Ondersoek na die moontlike implikasies van die menseregtehandves (vervat in hfst 3 van die Grondwet van die Republiek van Suid-Afrika 200 van 1993) vir die regsposisie van die ongetroude vader is noodsaaklik.

Ten spyte van die algemene gebruik van die term "toegangsreg" in regsgeskrifte word die term "toegangsbevoegdhede" verkies.

2 Beslissing in *B v S*

2 1 Feite

Die appellant het in 1992 by die Witwatersrandse Plaaslike Afdeling aansoek gedoen om toegang tot sy buite-egtelike seun, welke aansoek deur die hof van die hand gewys is. Hy appelleer nou met verlof van die hof *a quo* teen daardie beslissing.

Die feite soos blyk uit die onbestrede getuienis is soos volg: Die appellant, 'n tegniese bestuurder, het gedurende die grootste gedeelte van 1988 en 1989 met die kind se moeder (respondent) saamgewoon. Hulle het (skynbaar vriendskaplik) uitmekaar gegaan toe die respondent swanger was. 'n Paar maande voor hulle seun se geboorte in 1990 het die appellant weer by die respondent ingetrek. Hoewel die partye tydens die swangerskap 'n aborsie oorweeg het, was die appellant teenwoordig toe die kind later deur middel van 'n keisersnee gebore is. 'n Paar maande na die geboorte het die appellant en respondent se weë finaal geskei maar die respondent het toegestem dat die appellant toegang tot die kind mag verkry. Die appellant het, benewens sy bydrae tot die respondent se hospitaalonkostes ook enkele onderhoudsbetalings gemaak. In Februarie 1991 is alle kontak tussen die respondent en sy seun verbreek. Sedertdien was die enigste vaderfiguur wat die seun geken het sy oupa aan moederskant. Na Februarie 1991 het die appellant geen onderhoud betaal nie maar hy het 'n uitkeerpolis ten gunste van sy seun uitgeneem en die maandelikse premie betaal (585G–586B).

Die bestrede getuienis is kortliks soos volg: Die appellant beweer dat hy graag vir die kind 'n vader wil wees en hom wil onderhou maar dat die respondent sonder rede weier om enige verdere onderhoudsbetalings te aanvaar en dat sy hom enige toegang tot die kind weier. Aan die ander kant beweer die respondent dat die appellant die toegangsbevoegdhede wat sy hom toegelaat het, misbruik het om haar te dreig en selfs fisies te molesteer. Sy beweer egter nie dat die appellant 'n swak karakter het of 'n swak vader sal wees nie (586C–E).

2 2 Die gemenereg soos toegepas deur die howe

Die appellant se eerste betoog was dat die vader van die buite-egtelike kind 'n inherente toegangsreg het wat op vaderskap alleen gebaseer is. Daar word geargumenteer dat die feit dat die Romeins-Hollandse skrywers swyg oor die toegangsbevoegdhede van die ongetroude vader nie beteken dat toegang in daardie tyd nie erken is nie. Daar word onder andere namens die appellant aangetoon dat die vader se bestaan en identiteit as vader wel in die Romeins-Hollandse reg erken is – hy was byvoorbeeld verplig om die kind te onderhou. Daar word alternatief namens die appellant aangevoer dat, sou die hof beslis dat so 'n reg nie gemeenregtelik erken is nie, beginsels van billikheid en geregtigheid die hof noodsaak om te verklaar dat so 'n reg wel bestaan, sodat die posisie van die ongetroude vader nie (wat toegang betref) ondergeskik is aan dié van die getroude vader nie (574I–575D).

Die hof wys daarop dat toegang, soos bewaring, 'n komponent van ouerlike gesag is. 'n Inherente toegangsreg kan slegs uit ouerlike gesag ontstaan. In die gemenereg het die ouerlike gesag (en dus bewaring en toegang) oor die buite-egtelike kind by haar moeder berus. Die vader het geen ouerlike gesag gehad nie. Hy kon slegs ouerlike gesag verkry deur met die moeder te trou of die kind aan te neem (575D–J).

Vervolgens ondersoek die hof die Suid-Afrikaanse regspraak oor die onderwerp en begin met *Wilson v Ely* 1914 WR 34 en *Matthews v Haswari* 1937 WLD 110. Nie een van hierdie beslissings is die hof van hulp nie. In *Wilson* is toegang toegestaan op die verkeerde veronderstelling dat dit 'n *quid pro quo* vir die betaling van onderhoud is. In *Matthews* is toegang toegestaan, skynbaar omdat dit in belang van die kind was, maar die hof het nie in sy uitspraak die regsbeginsels bespreek nie. Daarna ondersoek die hof die beslissings in *Docrat v Bhayat* 1932 TPD 125, *Douglas v Mayers* 1987 1 SA 910 (Z), *F v L* 1987 4 SA 525 (W), *F v B* 1988 3 SA 948 (D) en *B v P* 1991 4 SA 113 (T). Samevattend kan gesê word dat die howe nie 'n inherente toegangsreg erken nie maar aanvaar dat die vader deur middel van 'n hooggeregshofaansoek toegang kan verkry as hy kan bewys dat dit in die kind se belang sal wees (576B–577C).

2 3 Van Erk v Holmer *1992 2 SA 636 (W) in perspektief*

Van Erk v Holmer vorm die hoeksteen van die appellant se saak. In hierdie beslissing is 'n bestrede aansoek om toegang na die gesinsadvokaat vir ondersoek en aanbevelings verwys. Sy het aanbeveel dat sekere omskrewe toegangsbevoegdhede aan die vader verleen word. Hierdie aanbevelings is deur regter Van Zyl aanvaar. Die partye het 'n skikking bereik wat 'n bevel van die hof gemaak is. Daarna het hulle die hof versoek om redes vir sy aanvaarding van die gesinsadvokaat se aanbevelings te verstrek. Na 'n ontleding van verskeie gemeenregtelike bronne, die Suid-Afrikaanse regspraak en die posisie in Anglo-Europese stelsels, dui regter Van Zyl aan dat hierdie 'n geval is waar geen wetgewing, regspraak of gewoonte bestaan wat die hof van hulp kan wees nie, en waar die hof die saak moet beslis in ooreenstemming met oorwegings van redelikheid, geregtigheid, billikheid en openbare beleid (648B–C). Daarna bereik regter Van Zyl sy nou reeds bekende gevolgtrekking (649I–650A):

> "I believe the time has indeed arrived for the recognition by our Courts of an inherent right of access by a natural father to his illegitimate child. That such right should be recognised is amply justified by the precepts of justice, equity and reasonableness and by the demands of public policy. It should be removed only if the access should be shown to be contrary to the best interests of the child."

In *B v S* plaas appèlregter Howie die omstandighede waarin die *Van Erk*-beslissing gelewer is in perspektief. Hy noem dat niks in die hofverslag daarop dui dat die huidige regsvraag, met ander woorde of 'n vader inherente toegangsbevoegdhede tot sy buite-egtelike kind het, ooit 'n geskilpunt tussen die partye was waaroor die hof moes beslis nie. Die gesinsadvokaat moes besluit of toegang deur die vader gepas sou wees al dan nie, en nie of die vader inherente toegangsbevoegdhede het nie. Indien aanbeveel sou word, soos wat wel gedoen is, dat toegang wenslik is, kon hierdie aanbevelings alleen berus op die beste belang van die kind. Die vader is per slot van sake geregtig om toegang aan te vra as dit in belang van die kind sal wees. Daarom was die hof nie verplig om redes te gee vir sy aanvaarding van die gesinsadvokaat se aanbevelings nie. Die hof is dus van oordeel dat daar in *Van Erk v Holmer* nie sprake van 'n beslissing op 'n regspunt was nie. Selfs al sou dit vir die hof nodig gewees het

om argumente aan te hoor en 'n beredeneerde beslissing oor sy aanvaarding van die gesinsadvokaat se verslag te gee, sou die beslissing oor die vraag of 'n inherente toegangsreg bestaan *obiter* wees (578B–I).

Appèlregter Howie ondersoek nietemin die *Van Erk v Holmer*-beslissing en kom tot die gevolgtrekking dat aangesien die gemeenregtelike posisie ten aansien van die toegangsbevoegdhede van die vader van die buite-egtelike kind duidelik is, "the judicial function is to expound, not to legislate". Die vader het geen inherente toegangsbevoegdhede nie maar toegang kan aan hom toegeken word as dit in belang van die kind is (579H).

2 4 Toegang – aanspraak van ouer of kind?

Met verwysing na twee Engelse beslissings, naamlik *A v C* 1985 FLR 445 (CA) en *Re KD (a minor)* 1988 1 All ER 577 (HL), ondersoek appèlregter Howie die vraag of toegang as die inherente reg van die ouer of die kind gesien moet word (580B–582B). Die *dicta* wat hy aanhaal, beklemtoon die feit dat enige regte, voorregte of aansprake wat 'n ouer ten aansien van toegang tot sy of haar kind het, onderworpe is aan die beste belang van die kind. Die belang van die kind is die sentrale faktor in elke geval. Appèlregter Howie stel dit soos volg (582A):

> "It is thus the child's right to have access, or to be spared access, that determines whether contact with the non-custodian parent will be granted. Essentially, therefore, if one is to speak of an inherent entitlement at all, it is that of the child, not the parent."

2 5 Diskriminasie teen die vader?

Hierbo is aangetoon dat appèlregter Howie toegang as die inherente aanspraak van die kind, en nie die ouer nie, beskou. Volgens hom illustreer daardie gevolgtrekking die praktiese realiteit dat daar nie onbillik teen die vader van 'n buite-egtelike kind gediskrimineer word nie. Hy toon vervolgens aan hoekom die posisie van vaders van binne- en buite-egtelike kinders volgens hom nie in die praktyk wesenlik van mekaar verskil nie (582C–F) (sien par 3 3 hieronder). Die appellant se eerste betoog slaag dus nie.

2 6 "Some very strong and compelling ground"?

Die appellant se tweede betoog was dat die hof *a quo* (*B v S* 1993 2 SA 211 (W)) fouteer het deur te beslis dat die appellant 'n bewyslas het om die hof te oortuig van "a very strong and compelling ground" voordat bevind kan word dat toegang in die kind se belang sal wees, en dit nadat die hof *a quo* hom gebonde verklaar het aan *B v P*. Die hof *a quo* het verwys na 'n aanhaling uit *B v P* waarin daardie hof op sy beurt na *Douglas v Mayers* verwys het. Appèlregter Howie wys daarop dat die hof *a quo* die beslissing in *B v P* verkeerd geïnterpreteer het as sou dit die aanhaling uit *Douglas v Mayers* aanvaar, terwyl die hof uitdruklik in *B v P* beslis het dat die streng toets van "a very strong and compelling ground" wat in *Douglas v Mayers* gestel is, nie van toepassing is op gevalle waar die vader van 'n buite-egtelike kind om toegang aansoek doen nie (583H–584H).

2 7 Bewyslas

Verder vind die hof dit noodsaaklik om aan te toon dat waar 'n ouerpaar se toegangs- of bewaringsbevoegdhede vir die eerste keer deur 'n hof vasgestel moet word, daar nie werklik van 'n bewyslas sprake is nie. Die verrigtinge hier is nie normale siviele verrigtinge nie. Dit is nie adversatief van aard nie. As die

hof dus nie op die stukke alleen kan besluit oor die belang van die kind nie, sal die hof ten minste mondelinge getuienis van die partye self moet aanhoor "in order to form its own impression ... of their worth and commitment". Die gewone bestrede mosie-benadering moet nie gevolg word as dit feitelike geskilpunte relevant tot die belang van die kind onbeantwoord laat nie (584I–585F).

Die hof is dus van oordeel dat die hof *a quo* fouteer het deur te bevind dat die appellant hom van 'n bewyslas moet kwyt en dat die saak beslis moet word met verwysing na die erkende feite en beweringe deur die respondent gemaak. Die appellant se tweede betoog slaag dus (585F).

2 8 Die feitebevinding

Die appellant se finale betoog was dat hy op die feite moes slaag, met ander woorde dat die feite aantoon dat toegang in die kind se belang is. Appèlregter Howie dui aan dat die feite 'n neutrale indruk op die hof *a quo* gemaak het toe daardie hof bevind het dat niks in die stukke enige "compelling consideration in favour of allowing ... access" bevat het nie. Die hof is van oordeel dat hierdie aangeleentheid nie op die stukke alleen beslis kon word nie en dat die hof *a quo* die getuienis verkeerd geëvalueer het. Die hof *a quo* moes die partye *mero motu* opgeroep het om te getuig. Appèlregter Howie stel dit soos volg (586G–H):

> "Given the general desirability of the father-child bond and given the absence of any substantial allegations against appellant's worth as a person generally, and as a father in particular, there was a materially strong possibility that further investigation and the hearing of oral evidence might reveal access to be in the child's best interests."

2 9 Die bevel

Die appellant se eerste betoog was onsuksesvol maar hy slaag met die ander twee. Die appèl slaag dus en die bevel van die hof *a quo* word vervang deur 'n bevel ingevolge waarvan die aansoek terugverwys word na die Witwatersrandse Plaaslike Afdeling vir die aanhoor van mondelinge getuienis. Aangesien die verrigtinge reeds so lank sloer en die appellant reeds vir langer as vier jaar nie sy kind gesien het nie, probeer die hof die getuienis soveel as moontlik beperk. Die hof beslis spesifiek dat die getuienis wat aangehoor moet word dié is van die partye, enige getuies wat hulle wil roep en enige getuies wat die hof *mero motu* wil roep. Daarbenewens word die gesinsadvokaat opdrag gegee om die aangeleentheid te ondersoek en aan die hof verslag te doen. Die koste van die aansoek tot dusver word voorbehou vir beslissing deur die hof wat die getuienis aanhoor. Wat die koste van die appèl betref, beslis die hof dat, sou die appellant versuim om die griffier binne 30 dae in kennis te stel van sy voorneme om met die aansoek voort te gaan, die bevel van die hof *a quo* sal herleef en dat die appellant vir die koste van die appèl aanspreeklik sal wees (dit sal ook die geval wees as die aansoek van die hand gewys word). Sou die appellant slaag met sy aansoek om toegang, betaal elke party sy of haar eie appèlkoste.

3 Enkele opmerkings oor die beslissing in *B v S* en die huidige Suid-Afrikaanse regsposisie

3 1 Algemeen

Die gemeenregtelike reël wat handel oor die ongetroude vader se toegangsbevoegdhede is duidelik en korrek deur ons howe toegepas soos die appèlhof nou bevestig het.

Die gemeenregtelike reël is egter uitgedien. Daar is beslis sosiologiese en beleidsoorwegings wat die erkenning van inherente toegangsbevoegdhede noodsaak. Hierdie taak rus egter op die skouers van die wetgewer en nie die howe nie.

In 'n vorige bydrae is daarop gewys dat die huidige regsposisie verskeie probleme vir sowel vader as kind inhou (Kruger, Blackbeard en De Jong "Die vader van die buite-egtelike kind se toegangsreg" 1993 *THRHR* 696). Om saam te vat:

- Daar word vandag algemeen deur gedragswetenskaplikes aanvaar dat 'n kind 'n vader en 'n moeder nodig het vir die ontwikkeling van 'n eie persoonlikheid en identiteit (Eckard "Toegangsregte tot buite-egtelike kinders – behoort die wetgewer in te gryp?" 1992 *TSAR* 125; Labuschagne "Persoonlikheidsgoedere van 'n ander as regsobjek: opmerkinge oor die ongehude vader se persoonlikheids- en waardevormende reg ten aansien van sy buite-egtelike kind" 1993 *THRHR* 421).
- Die klaarblyklike grondslag van die gemeenregtelike reël, naamlik om Christelike huwelike aan te moedig en die vader te straf vir sy versuim om met die moeder te trou, is uitgedien. Die moontlikheid dat hulle kinders as buite-egtelik geklassifiseer sal word as hulle nie trou nie, oorreed vandag min mense om te trou (Eckard 1992 *TSAR* 124).
- Die huidige regsposisie van buite-egtelike vaders is onhoudbaar. Hulle slaag selde daarin om toegang tot hulle kinders te verkry en is dikwels in lang, uitgerekte en duur hofverrigtinge betrokke. Die feite van die saak onder bespreking illustreer hierdie punt. Toe die appèlhofbeslissing in *B v S* gelewer is, het die appellant reeds vir langer as vier jaar nie sy kind gesien nie. Daar het twee en 'n halwe jaar verloop tussen die beslissings van die hof *a quo* en die appèlhof. Die redes vir hierdie lang tydsverloop is onseker maar kan beslis nie net voor die appellant se deur gelê word nie. Die ironie is dat hierdie lang tydsverloop dalk 'n onherstelbare wig tussen vader en seun ingedryf het wat die hof kan noop om te beslis dat toegang nie meer in die kind se belang sal wees nie.

  Hieroor merk die hof in *B v S* op: "If the evidence on remittal shows that time and circumstance have driven an unshakable wedge between [father and child], so be it" (587D). So 'n ongeërgde skouerophaling is nie die oplossing nie. Daar behoort liewers ten alle koste gepoog te word om te verhoed dat vaders en hulle kinders só van mekaar wegdryf. Dit kan alleen gedoen word deur die erkenning van inherente toegangsbevoegdhede.
- Teenstanders van inherente toegangsbevoegdhede opper dikwels die beswaar dat die moeder se posisie daardeur verswak sal word. Eckard (1992 *TSAR* 129) toon oortuigend aan dat dit nie noodwendig sal gebeur nie. Toegang moet tog redelikerwys uitgeoefen word en as die vader sy reg onredelik uitoefen, sal die moeder die hof geredelik kan oortuig dat toegang nie in die kind se belang is nie.
- Nog 'n beswaar wat dikwels deur die teenstanders van inherente toegangsbevoegdhede geopper word, is dat dit daartoe sal lei dat die vader wat niks met sy kind te doen wil hê nie, periodiek sy regte kan uitoefen as dit tot sy eie voordeel strek en die gier hom beetpak (sien Sonnekus en Van Westing "Faktore vir die erkenning van 'n sogenaamde reg van toegang vir die vader van 'n buite-egtelike kind" 1992 *TSAR* 240).

Appèlregter Howie wys in *B v S* daarop dat

> "[i]t is difficult to see the fairness to the mother and child in a case where the father, whose contact with the mother has been little more than the act from which he derives his status, returns many years later and troublesomely insists on access to a child to whom he is a complete stranger" (582G–H).

Soos hy tereg aandui, is gevalle soos hierdie 'n rare verskynsel.

Uitsonderingsgevalle, soos die voorbeeld wat appèlregter Howie hierbo noem, behoort nie gebruik te word om die miskenning van inherente toegangsbevoegdhede te regverdig nie. 'n Mens kan tog nie sulke bevoegdhede misken net omdat dit soms in uitsonderingsgevalle misbruik kan word nie. Hierbo is reeds aangetoon dat die moeder haar tot 'n hof kan wend as die vader nie sy toegangsbevoegdhede redelik en in belang van die kind uitoefen nie. Daarbenewens word vandag algemeen aanvaar dat die meeste vaders besorg is oor die welstand van hulle kinders en dat vaders wat graag toegang tot hulle kinders wil hê, hierdie reg selde sal misbruik (Ohannessian en Steyn "To see or not to see? – that is the question" 1991 *THRHR* 258; *B v S* 579I). Om alle ongetroude vaders as onverantwoordelik, ongevoelig of onbelangstellend te brandmerk, is 'n verouderde stereotipe siening wat nie met hedendaagse realiteite rekening hou nie (Eckard 1992 *TSAR* 125; Labuschagne 1993 *THRHR* 426).

- Die belangrikste oorweging vandag is die menseregtehandves vervat in hoofstuk 3 van die Grondwet. Hierin word gelykheid gewaarborg en onbillike diskriminasie verbied (a 8). Hierdie bepaling sal hieronder bespreek word (sien par 3 3).

3 2 Die Suid-Afrikaanse Regskommissie

Die regskommissie het onlangs vir die tweede keer die vader van die buite-egtelike kind se regsposisie ondersoek (Werkstuk 44 Projek 79 (1993)). Hierdie ondersoek het uitgeloop op twee voorgestelde wetsontwerpe. Die eerste sou die huidige posisie behou waarvolgens die moeder van die buite-egtelike kind voogdy en bewaring oor die kind het en die vader deur middel van 'n hooggeregshofaansoek toegang tot die kind kan verkry. Die maatstaf is die beste belang van die kind. Die tweede wetsontwerp sou aan die vader van 'n buite-egtelike kind 'n reg op redelike toegang tot daardie kind verleen. Die hof sou die bevoegdheid behou om die vader se toegangsreg te omskryf, te beperk of weg te neem. Die maatstaf is weer eens die beste belang van die kind.

In 1994 het die regskommissie 'n verslag gepubliseer waarin hulle die eerste opsie aanvaar (Projek 79 (1994) 83–89). Hierdie opsie bevestig grootliks bloot die gemeenregtelike posisie; nietemin bring dit regsekerheid mee en lê riglyne neer wat by aansoeke van hierdie aard in ag geneem moet word. Hierbo is reeds gewys op die feit dat die gemeenregtelike posisie onbevredigend is en dat die ongetroude vader inherente toegangsbevoegdhede behoort te verkry.

3 3 Die menseregtehandves

Reëls van die gemenereg is nie immuun teen die bepalings van die menseregtehandves vervat in hoofstuk 3 van die Grondwet nie. Verskeie argumente word ten gunste van hierdie standpunt geopper. Een daarvan is dié van Van der Vyver ("The meaning of 'law' in the Constitution of the Republic of South Africa" 1994 *SALJ* 569). Hy argumenteer dat hoewel die Engelse teks van die tussentydse Grondwet vir uitlegdoeleindes gebruik word, die Afrikaanse teks gebruik moet word om die woord "law" uit te lê aangesien hierdie woord dubbelsinnig is

(dit kan die positiewe reg in die wye sin of statutêre reg beteken). In teenstelling daarmee gebruik die Afrikaanse teks van die Grondwet nooit die woord "wet" om die reg in wyer sin aan te dui nie. "Wet" verwys gewoonlik na 'n parlementswet (of die statutêre reg in die algemeen), terwyl "die reg" dui op die positiewe reg (statutêre reg, regspraak, die gemenereg en gewoontereg). As artikel 7(2) dus bepaal dat die menseregtehandves van toepassing is op *alle reg wat van krag is* (Engels: *all law in force*), het dit die wye betekenis van positiewe reg (*idem* 571–572; sien ook Sinclair "Family rights" in Van Wyk *et al* (reds) *Rights and constitutionalism: The new South African legal order* (1994) 521–522 538 vn 131).

Die menseregtehandves bepaal dat elke persoon 'n reg het op gelykheid voor die reg en gelyke beskerming deur die reg (a 8(1)), en dat daar teen niemand onbillik gediskrimineer mag word nie, onder andere op grond van geslag (a 8(2)). Laasgenoemde bepaling is 'n algemene bepaling en die spesifieke gronde daarin genoem doen nie afbreuk aan die algemeenheid daarvan nie.

In *B v S* het die appellant op algemene beginsels van billikheid en geregtigheid gesteun om aan te toon dat die gemeenregtelike posisie wat handel oor die ongetroude vader se toegangsbevoegdhede, onbillik teen die ongetroude vader diskrimineer (die tussentydse Grondwet het eers in werking getree nadat die beslissing van die hof *a quo* gelewer is). Die appèlhof maak egter 'n paar verontrustende opmerkings oor diskriminasie. Appèlregter Howie is van oordeel dat sy gevolgtrekking dat toegang die inherente reg van die kind eerder as dié van die ouer is, die praktiese realiteit illustreer dat daar nie onbillik teen die ongetroude vader gediskrimineer word nie. Hy illustreer hierdie gevolgtrekking met die volgende voorbeeld (582C–F):

> "It is true that the father of a legitimate child has a right of access at common law . . . with which right he can confront the mother if she refuses access. But that right will be to no avail if for any reason she persists in her refusal. He will then have to go to Court for an order enforcing access. If access is found to be adverse to the child's welfare, he will fail. By comparison, the father of an illegitimate child who considers access is in the best interests of the child can confront the mother with the contention that he should, on that ground, be granted access. If she refuses to concede that, he will have to go to Court to obtain an order granting him access. As in the other example, he will fail if access is not in the child's best interests."

Enkele opmerkings hieroor is nodig. Om toegang as algemene beginsel as die inherente reg van die kind, eerder as dié van die ouer te sien, illustreer slegs een beginsel naamlik die belangrikheid en plek van die beste belang van die kind-maatstaf by aansoeke van hierdie aard. Die feit dat toegang, as algemene beginsel, as die inherente reg van die kind gesien word, beteken nie dat die miskenning van toegang nie ook die vader se fundamentele regte kan aantas nie.

Om soos appèlregter Howie te sê dat daar in die praktyk nie van diskriminasie tussen getroude en ongetroude vaders sprake is nie, is simplisties. Die regspraak skets 'n ander prentjie. Die vader van die binne-egtelike kind het ingevolge die gemenereg inherente toegangsbevoegdhede. Dit is waar dat as die moeder weier dat hy hierdie bevoegdhede uitoefen, hy die hof moet nader om sy toegangsbevoegdhede af te dwing en dat hy nie sal slaag as die hof bevind dat toegang nie in die kind se belang is nie. Dit is egter ook waar dat die howe die ouerlike gesagsbevoegdhede van die binne-egtelike ouer jaloers beskerm en net in uitsonderlike gevalle met ouerlike gesag sal inmeng (Kruger "Enkele opmerkings oor die bevoegdhede van die hooggeregshof as oppervoog van minderjariges om in te meng met ouerlike gesag" 1994 *THRHR* 309).

Die vader van die buite-egtelike kind het aan die ander kant geen inherente toegangsbevoegdhede nie. Waar die moeder toegang weier, kan hy slegs toegang verkry na 'n hooggeregshofaansoek waarin hy die hof moet oortuig dat toegang in die kind se belang sal wees. Die regspraak illustreer hoe 'n moeilike taak dit is en hoe selde aansoeke van hierdie aard slaag.

Daarbenewens diskrimineer die gemeenregtelike reël nie net onbillik tussen getroude en ongetroude vaders nie maar ook tussen ongetroude vaders en ongetroude moeders (op grond van geslag), en tussen binne- en buite-egtelike kinders (Sinclair in Van Wyk *et al* (reds) 537–538; Labuschagne 1993 *THRHR* 417–419 428).

Daar moet ook in gedagte gehou word dat die diskriminasie teen die buite-egtelike vader en kind nie beperk is tot toegang nie maar dat dit wyer strek. Dit sluit voogdy en bewaring, aanneming en registrasie van geboortes in (Sinclair in van Wyk *et al* (reds) 538). Ingevolge die Wet op Kindersorg 74 van 1983 is slegs die moeder van die buite-egtelike kind se toestemming nodig vir die aanneming van daardie kind (a 18(4)(d)). Ingevolge die Wet op die Registrasie van Geboortes en Sterftes 51 van 1992 kan 'n buite-egtelike kind se van sonder die toestemming en medewete van die natuurlike vader verander word, selfs waar die kind aanvanklik met die vader se toestemming onder sy van geregistreer is (a 25(1)). (Die SA Regskommissie het nou aanbeveel dat vaders so ver moontlik kennis moet kry indien hulle buite-egtelike kinders vir aanneming beskikbaar gestel word, en dat die skriftelike toestemming van die vader van 'n buite-egtelike kind wat onder haar vader se van geregistreer is, verkry moet word voordat daardie kind se van verander mag word (Projek 79 (1994) 83–89).)

4 Gevolgtrekking

Die appèlhof het in *B v S* die gemeenregtelike posisie ten aansien van die toegangsbevoegdhede van die ongetroude vader bevestig. Dit is nou duideliker as ooit tevore dat hierdie posisie deur wetgewing hervorm moet word. Die regskommissie se voorgestelde wetsontwerp wat die gemeenregtelike posisie bloot bevestig, kan nie aanvaar word nie. Die ongetroude vader behoort inherente toegangsbevoegdhede te verkry wat slegs weggeneem mag word indien toegang nie in die kind se belang is nie. So 'n reëling sal nie die moeder se posisie verswak nie – sy bly die bewaargewende ouer. Toegang moet nie gesien word as 'n vermindering of aantasting van die moeder se ouerlike gesagsbevoegdhede nie maar as 'n aanvulling daarvan. Inherente toegangsbevoegdhede vir die vader sal nie in stryd met die belang van die kind wees nie – inteendeel, die belang van die kind vereis 'n verhouding met beide haar ouers. Die beste belang van die kind-maatstaf is wyd en buigsaam genoeg om enige besware teen die verlening van inherente toegangsbevoegdhede aan die ongetroude vader te ondervang.

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THE CORPORATE VEIL – AN UNNECESSARILY CONFINING CORSET?

Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd 1995 4 SA 790 (A)

The principle that a company is a legal person separate from its members has its origin in our common law (*Salomon v Salomon and Co Ltd* [1897] AC 22 31 51; *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 550). In terms of this principle, a company is liable for its own debts, capable of owning property, entitled to sue or liable to be sued in its own name and enjoys the advantages of perpetual succession. (See eg Gower *Gower's Principles of modern company law* (1992) 88ff; Cilliers, Benade, Henning and Du Plessis *Corporate law* (1992) 3 8; Beuthin and Luiz *Beuthin's Basic company law* (1992) 10–12.) As early as in *Salomon v Salomon supra* 33 52–53 the court implicitly recognised that there were circumstances (eg, where fraud or dishonesty was found to exist) which might justify disregarding the separate legal personality of the company; this was referred to as piercing the corporate veil (confirmed in *The Shipping Corporation of India Ltd v Evdomon Corporation* 1994 1 SA 550 (A) 566). The effect of piercing the corporate veil is to redirect the focus "from the company to the natural person behind it . . . as if there were no dichotomy between such person and the company" (*Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd*).

Although attempts have been made by various academic writers to categorise the circumstances in which our courts will pierce the corporate veil (Gower 88ff; Cilliers and Benade 11–12; Beuthin and Luiz 13–17; for a discussion of the potential dangers of the categorising approach, see Domanski "Piercing the corporate veil – a new direction?" 1986 *SALJ* 224), the law is far from settled. It is uncertain what circumstances our courts may regard as appropriate for the lifting of the corporate veil and upon what theoretical basis it is justifiable. (See eg Benade "Verontagsaming van die selfstandigheid van die maatskappyregspersoon" 1967 *THRHR* 213; Larkin "Regarding judicial disregarding of the company's separate identity" 1989 *SA Merc LJ* 277; Domanski 1986 *SALJ* 224; Davids "The lingering question: Some perspectives on the lifting of the corporate veil" 1994 *TSAR* 155; Ottolenghi "From peeping behind the corporate veil, to ignoring it completely" 1990 *MLR* 338.)

The question whether it was appropriate to lift the corporate veil arose in *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd.* In February 1979 Lubner Controlling Investments (Pty) Ltd (LCI) sold its shares and loan account in Findon Investments (Pty) Ltd (Findon) to Cape Pacific Ltd (CP). These shares entitled the owner to the use and occupation of a certain flat in Clifton. After denying the sale of the shares and loan account to CP, LCI transferred them to Gerald Lubner Investments (Pty) Ltd (GLI) during the second half of 1979. CP became aware of this in June 1980. A certain Mr Lubner (Lubner) controlled LCI completely and was at all relevant times the sole shareholder of GLI. In 1987 CP was successful in an action heard before Friedman J in the Cape Provincial Division against LCI for delivery of the shares and the loan account in

Findon (the "original action"). Although LCI's subsequent appeal to the Appellate Division was dismissed in 1989, LCI failed to comply with the order to deliver the shares and loan account to CP. An application by CP for contempt of court for failure to comply with the court order was dismissed. (It appears from Van den Heever JA's judgment 809 that the reason for the failure of the contempt proceedings was certain false evidence given on affidavit, the falseness of which only became evident at a later stage. Unfortunately the judgment in the contempt proceedings was unobtainable.)

Thereafter, another action (the action in the "court *a quo*") was instituted by CP, this time against LCI, GLI and Lubner. In the court *a quo* in *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1993 2 SA 784 (C), CP asserted that GLI and Lubner were the real debtors and that the judgment in the original action should therefore be enforceable against them. Here the question was whether the transfer of the Findon shares to GLI had taken place in order to defeat CP's claim. If this was so, it had to be decided whether it was appropriate for the court to order the lifting of the corporate veil and the retransfer of the shares to LCI (799). It was clear from the evidence that Lubner controlled LCI completely and was the sole shareholder of GLI at all relevant times. Nothing in the evidence suggested that he did not also effectively control GLI's affairs (814). Nel J did not accept the assertion that the transfer of the shares from LCI to GLI formed part of the restructuring of Lubner's South African interests and had been motivated by a desire to avoid tax (815).

Notwithstanding Lubner's control over LCI and GLI, Nel J was of the view that neither company could be described as Lubner's *alter ego*. Apart from the Findon shares, both companies had considerable assets. LCI's original acquisition of the Findon shares was an ordinary transaction, there being nothing sinister about it. Although the subsequent transfer of these shares to GLI was not done surreptitiously in that CP had been aware of this fact before the original action was instituted (821), the judge found that the transfer had been effected on Lubner's instructions in an attempt to defeat CP's claim (815). After quoting from the judgment of Flemming J in *Botha v Van Niekerk* 1983 3 SA 513 (W) 525, Nel J concluded that, despite the fact that the transfer was "clearly improper", it did not result in an "unconscionable injustice". CP had had the opportunity of joining GLI as a party to the original action but had failed to make timeous use of this opportunity to recover the shares from GLI. Nel J concluded that CP was "the author of his own misfortune" (822) and granted absolution from the instance.

For a second time, CP had to approach the Appellate Division for relief. Once again CP alleged that, notwithstanding the fact that Lubner knew of its rights in respect of the shares, he procured the transfer of these shares from LCI to GLI in order to defraud CP. The latter accordingly requested the court to pierce the corporate veils of both LCI and GLI and to enforce the judgment in the original action against them (797). CP had known that the Findon shares had been transferred to GLI before the original action was instituted and it was common cause that any action that CP would have had against GLI had since become prescribed (797). Only if the corporate veils could be pierced, would the original judgment against LCI be enforceable against GLI and Lubner (802).

Smalberger JA, who delivered the majority judgment, commenced by considering the factual findings of the court *a quo* (798ff). The first finding was that Lubner exercised complete control over LCI. According to Smalberger JA, it

was unnecessary to decide whether Lubner controlled the company as a whole. What was important was whether Lubner exercised absolute control over LCI *as far as the Findon shares were concerned.* The judge found that Lubner personally controlled the Findon shares as if they were his own and concluded that as far as the Findon shares were concerned, LCI was not only Lubner's puppet but was in fact Lubner in another guise (799). Smalberger JA agreed with the second finding of the court *a quo*, that is that Lubner effectively controlled the affairs of GLI, but went further to say that in respect of the Findon share transactions, GLI was in reality Lubner (799). The third finding of the court *a quo*, namely that the Findon shares had been transferred by LCI to GLI on Lubner's instruction to evade CP's claim to them, was held by Smalberger JA to be justifiable. However, the judge pointed out that it was more accurate to refer to CP's *rights* to the Findon shares rather than to its *claim*, since judgment in the original action had been granted in CP's favour and Lubner knew about and appreciated the validity of CP's claim (799). The transfer of the Findon shares from LCI to GLI was a "device or stratagem resorted to by him in a deliberate attempt to thwart [CP's] rights to delivery of the shares. His conduct in the circumstances, if not fraudulent, was at the very least gravely improper" (799–800).

Smalberger JA could not fault the factual findings of Nel J in the court *a quo* and considered whether, on these facts, the court should pierce the corporate veils of both LCI and GLI and grant CP the relief it sought. The Appellate Division confirmed that the separate legal personality of a company should not be easily ignored. However, it acknowledged that circumstances do exist, for example where fraud, dishonesty or other improper conduct has been proved, where it would be justifiable to pierce the corporate veil (803). The judgment in the court *a quo* (821) was interpreted by Smalberger JA as implying that, before the corporate veil could be pierced, the company should have been established with a fraudulent intention (804). However, Smalberger JA did not agree with this and it is submitted that he was correct in asserting that the corporate veil could be pierced on a particular occasion in relation to a specific transaction (in this case, the transfer of the Findon shares from LCI to GLI) whilst still recognising the corporate legal personality in all other respects (804) (see also Gower 133). He concluded that the corporate veils of both LCI and GLI should be pierced in respect of the Findon share transactions (804). This would expose Lubner as "the true villain of the piece" (804) and CP would be entitled to enforce the original judgment against GLI and Lubner (801–802).

Van Heerden JA, who delivered the dissenting judgment in the Appellate Division, conceded that fraud was not the only instance in which the corporate veil could be lifted. It could also be lifted where special circumstances existed which would indicate that the company is a mere facade concealing the true state of affairs (811). (See *Adams v Cape Industries plc* [1991] 1 All ER 929 (CA) 1022; *Jones v Lipman* [1962] 1 All ER 442 (Ch) 445; *Gilford Motor Company Limited v Horne* [1933] 1 Ch 935 (CA). For a discussion of "facade" see Rixon "Lifting the veil between holding and subsidiary companies" 1986 *LQR* 423.) However, on the facts Van Heerden JA found that there was no facade. Neither the transfer of the Findon shares nor the fact that Lubner controlled LCI and GLI was a secret. The judge concluded that the mere fact that Lubner was in control and that the transfer of the shares was effected with the intention of thwarting CP's rights, did not justify the lifting of the veil (811).

Smalberger JA stated that policy considerations demanded the lifting of the veil as the transfer of the Findon shares from LCI to GLI was in fraud of CP's

rights or at least effected by Lubner with an improper purpose or motive, namely to evade his legal obligation to transfer the shares to CP (804) (see also *Adams v Cape Industries plc supra* 1022 1024). Generally, the presence of fraud or other improper conduct in relation to the incorporation of, the use of, or the business carried on by the company would seem to be a sufficient reason to lift the corporate veil (*The Shipping Corporation of India Ltd v Evdomon Corporation supra* 566). It is uncertain what constitutes "improper conduct" and when conduct is sufficiently improper to warrant the piercing of the corporate veil (see also Davids 1994 *TSAR* 160). The court *a quo* found that Lubner's conduct in transferring the shares to GLI was clearly improper, yet it failed to lift the veil because the transfer did not cause an "unconscionable injustice" (*Botha v Van Niekerk supra* 525). The consideration that swayed the court *a quo* was the fact that CP had had another remedy which it had failed to use (822). The Appellate Division, however, weighed up the impropriety of Lubner's conduct against CP's inaction (806) and concluded on the same facts that the veil should indeed be lifted despite the fact that another remedy had been available which CP had failed to pursue (805 806). As far as Smalberger JA was concerned, too much emphasis should not be placed on the fact that CP had failed to exhaust the other available remedy (805).

Van Heerden JA, in his dissenting judgment, agreed that where a person has two remedies available he is entitled to elect which one he wishes to pursue. However, he was of the view that CP did not have two concurrent remedies, namely one based on the doctrine of notice and the other on lifting the corporate veil. As CP knew about the transfer of the shares to GLI, it originally had the right to claim the Findon shares from GLI and the remedy of piercing the corporate veil was not available to CP. This remedy falls to be considered only when a person cannot enforce his rights in any other manner (812). Although Van Heerden JA failed to quote any authority for this point of view, he asserted that as considerations of justice underlie the lifting of the corporate veil, an injustice would occur only if there was no other way in which a person could enforce his rights (812). CP could not rely either on its own failure to join GLI in the first action or on the fact that this claim subsequently prescribed, to invoke the remedy of piercing the corporate veil (812).

Smalberger JA, in delivering the main judgment, found on the facts that, as far as the Findon share dealings were concerned, Lubner was in fact LCI and GLI. Consequently, the court order which CP had originally obtained against LCI was in substance a judgment against Lubner in any guise. The judge was not deterred by the fact that neither GLI nor Lubner had been joined as a party to the original action, because Lubner was in fact present in the guise of LCI, and the outcome of the original action would not have been affected in any way had Lubner been present either personally or in the guise of GLI. Smalberger JA concluded that the corporate veils of both LCI and GLI should be pierced, resulting in the judgment debt which CP had against LCI being enforceable against GLI and Lubner as well (806).

Although CP's failure to join GLI and Lubner as parties to the original action may have been tardy, not even Friedman J (who delivered the original judgment) had envisaged a problem in enforcing the order. According to him, the fact that the Findon shares had been transferred from LCI to GLI did not deprive CP of his rights to an order against LCI for the transfer of the shares to CP. Friedman J continued by saying that, if necessary, LCI would be obliged to obtain the shares

from GLI and transfer them to CP. (Unfortunately the judgment of Friedman J was unobtainable and thus reliance was placed on Van den Heever JA's reference (808) to Friedman J's judgment. Van den Heever JA delivered a separate concurring judgment in the Appellate Division.) Perhaps, as Van den Heever JA observed, the judgment in the original action is an example of the court ignoring the separate existence of the company without conceding or specifically acknowledging this (808). (A recent example of this approach can be found in *Von Wuldfling-Eybers v Soundprops 2587 Investments CC* 1994 4 SA 640 (C) 645; see also Luiz "Ignoring the existence of a close corporation?" 1995 *SA Merc LJ* 102; Larkin 1989 *SA Merc LJ* 277–278.)

At the time of the commencement of the original action in the case under discussion, CP could have joined GLI and Lubner as parties on the basis of the doctrine of notice. Because of the availability of this remedy, CP could not have (and indeed need not have) requested the court to pierce the corporate veil. CP had obtained judgment against LCI and no one foresaw any problem in enforcing it. However, CP was unable to enforce this judgment and, moreover, contempt of court proceedings instituted against LCI for failure to comply with the court order proved to be unsuccessful. Even if one accepts that CP's conduct in failing to join GLI and Lubner in the original action was lax, it was insignificant when one compares it with Lubner's behaviour which was described in terms ranging from "clearly improper" (per Nel J 822) to "gravely improper" (per Smalberger JA 800) to morally despicable (per Van Heerden JA 810). The only way in which the court could come to CP's rescue was to pierce the corporate veils of LCI and GLI. In this way the judgment would be enforceable against GLI and Lubner.

The corporate veil should be respected and not be interfered with too readily. A general discretion simply to disregard the separate personality of a company whenever it seems just, does not exist (per Smalberger JA 803; see also *Botha v Van Niekerk supra* 524; *Adams v Cape Industries plc supra* 1020; Gower 133). However, a strict application of the law in a case where exceptional factual circumstances are present, could result in an injustice (see also Davids 1994 *TSAR* 161). It is submitted that exceptional circumstances indeed existed in *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd.* Even Van Heerden JA, who delivered the dissenting judgment, admitted that it was with regret that he had to conclude that the corporate veil should not be pierced in this case (810). It is therefore recommended, in line with the judgment of Smalberger JA (805), that a more flexible approach be followed to the question of when the corporate veil should be pierced and that each case be determined on its own facts.

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DIE REG OP PRIVAATHEID, DIE PERS EN ARTIKEL 12 VAN DIE WET OP EGSKEIDING 70 VAN 1979

National Media Ltd v Jooste 1996 3 SA 262 (A)

1 Inleiding

Hierdie beslissing kan beskou word as 'n mylpaal in die beskerming van privaatheid teen vergrype van die pers in die besonder en die massamedia in die algemeen, en volg op die voetspoor van ander appèlhofuitsprake waarin die belangrikheid van die reg op privaatheid ook op ander terreine beklemtoon is: *Financial Mail (Pty) Ltd v Sage Holdings* 1993 2 SA 451 (A); *Jansen van Vuuren v Kruger* 1993 4 SA 842 (A); *Janit v Motor Industry Fund Administrators (Pty) Ltd* 1995 4 SA 293 (A) (1994 3 SA 56 (W)). Die verskansing van die reg op privaatheid as fundamentele reg in artikel 13 van die Grondwet van die Republiek van Suid-Afrika 200 van 1993 bevestig insgelyks onomwonde die belangrikheid van privaatheid as beskermingswaardige regsgoed (sien hieroor *Bernstein v Bester* 1996 2 SA 751 (CC) 784–795; Neethling en Potgieter "Aspekte van die reg op privaatheid" 1994 *THRHR* 704–706; Neethling, Potgieter en Visser *Neethling's Law of personality* (1996) 239). Terselfdertyd bring die grondwetlike erkenning van die reg op vryheid van spraak en persvryheid in artikel 15 egter onvermydelik 'n potensiële konflik van gelykwaardige fundamentele belange (privaatheid en persvryheid) na vore wat die Salomo-wysheid van die howe in die toekoms waarskynlik nog veel sal beproef (sien *Neethling's Law of personality* 268–273 oor die stand van die afbakeningsproses tussen die reg op privaatheid en die openbare inligtingsbelang voor die moontlike invloed van die Grondwet) – te meer as die enersyds selfregverdigende en andersyds amper minagtende houding van die massamedia oor hul klaarblyklike verontagsaming van die statutêre verbod op die publikasie van persoonlike inligting insake egskeidingsgedinge (a 12 Wet 70 van 1979) tydens die Mandela-egskeiding in ág geneem word (hieroor *infra* par 3 meer).

Die gretigheid van die pers om oor die veral intieme (meesal seksuele) en skandalige aspekte van die private lewens van persone te berig, is nie eie aan die moderne tyd nie. Trouens, die baanbrekersartikel van Warren en Brandeis waarmee appèlregter Harms (267–268) sy uitspraak afskop en wat die bal vir die fenomenale ontwikkeling van die Amerikaanse reg op privaatheid aan die rol gesit het, dateer reeds uit 1890 ("The right to privacy" 1890 *Harv LR* 193; sien Neethling *Die reg op privaatheid* (LLD-proefskrif Unisa 1976) 152–153). Warren en Brandeis sê onder andere die volgende (waarmee regter Harms (267) hom volkome vereenselwig):

> "The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attending upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention

> have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury."

In ongeveer dieselfde tyd maak Melius de Villiers (*The Roman and Roman-Dutch law of injuries* (1899) 138 vn 32) die volgende stelling in Suid-Afrika:

> "The question may be mooted whether when a newspaper writer pries into the private life of an individual, and details for public delectation or amusement private affairs, of no consequence in themselves, in a manner calculated to disturb such an individual in the enjoyment of his privacy or peace of mind, this would amount to an injury."

2 *Jooste*-saak

In ons dag is die feite van die *Jooste*-saak 'n tipiese voorbeeld van privaatheidskending deur die pers wat by die opmerkings van Warren en Brandeis en De Villiers aansluit. Die verweerders (appellante) het 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 voorwaardes 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 (*Jooste v National Media Ltd* 1994 2 SA 634 (K); sien Neethling en Potgieter 1994 *THRHR* 703 ev vir 'n bespreking) – 'n bevinding wat deur regter Harms in appèl bekragtig word.

Die *Joose*-uitspraak is om verskeie redes vir die reg aangaande privaatheidsbeskerming van groot betekenis.

(a) Eerstens word onomwonde erkenning aan privaatheid as eiesoortige persoonlikheidsgoed verleen. Van 'n gelykskakeling van hierdie regsgoed met die eer of waardigheid van 'n persoon om sodoende 'n beledigende handeling of *contumelia* as noodsaaklike voorwaarde vir privaatheidskending te stel, is daar geen sprake nie (sien hieroor *Neethling's Law of personality* 37 240–242). Die hof aanvaar ook dat 'n *privaathoudingswil* 'n essensiële bestanddeel van privaatheid is en verwerp tereg die siening dat die privaathoudingswil die grense van die *reg op privaatheid* bepaal. In hierdie verband is dit van kardinale belang om 'n duidelike onderskeid te maak tussen die aard of hoedanigheid van privaatheid as individuele belang, en die juridiese erkenning en beskerming daarvan. Terwyl die hoedanighede van 'n individuele (persoonlikheids)belang net met verwysing na sy voorkoms in die *feitelike werklikheid* vasgestel kan word, word sowel die regserkenning as die grense of omvang van die regsbeskerming

van 'n belang, oftewel die erkenning van 'n subjektiewe reg daarop, weer net met verwysing na objektiewe regsnorme bepaal (hier die regsgevoel of -oortuiging van die gemeenskap: *boni mores*). Aangesien die privaathoudingswil 'n feitelike hoedanigheid van privaatheid uitmaak, kan dit dus nie die grense van die reg op privaatheid omlyn nie; nietemin dui afwesigheid van 'n privaathoudingswil onteenseglik daarop dat die betrokke individu dan geen belang in (die besondere aspek van) sy privaatheid het nie (vgl *Neethling's Law of personality* 27–28 35–36 243). Die regter stel dit soos volg (271A–D):

> "The starting point of Mr Burger's argument for the appellants related to the so-called 'privaathoudingswil', ie the individual's personal wish to withhold personal facts from others. Neethling, in his doctoral thesis, *Die Reg op Privaatheid* (UNISA) 1976) p 287 defined 'privacy' as follows:
>
> '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 buitestaanders uitgesluit te wees en ten opsigte waarvan hy 'n privaathoudingswil het.'
>
> This definition can be interpreted to mean that the boundary of the individual's right to privacy is determined solely by that individual's wishes or will. I do not, however, accept that this was what Neethling intended. A footnote in Neethling, Potgieter & Visser, *Deliktereg*, (3rd ed) p 344 n 239 puts the 'privaathoudingswil' in its true perspective: Absent a will to keep a fact private, absent an interest (or a right) that can be protected. The boundary of a right or its infringement remains an objective question. As a general proposition, the general sense of justice does not require the protection of a fact that the interested party has no wish to keep private."

Regter Harms (271F) kom tot die slotsom dat aangesien die eiseres ongetwyfeld die wil gehad het om die gewraakte gedeeltes privaat te hou totdat aan haar voorwaardes voldoen is, 'n privaathoudingswil nie by haar afwesig was nie.

(b) Tweedens word naas die privaathoudingswil, die *selfbestemmingsfunksie* van die individu oor sy privaatheid – in die sin dat die individu self die inhoud en gevolglike omvang van sy privaatheidsbelang bestem – ook as essensiële (feitelike) eienskap van privaatheid beklemtoon. Hierdie funksie kan inderdaad as die wese van die individu se belang in privaatheid beskou word (sien hieroor *Neethling's Law of personality* 35). Appèlregter Harms (271G–272A) verduidelik:

> "A right to privacy encompasses the competence to determine the destiny of private facts (see Neethling's comment on the judgment of the court *a quo*: 1994 *THRHR* 703 at 705). The individual concerned is entitled to dictate the ambit of disclosure eg to a circle of friends, a professional adviser or the public (cf *Jansen van Vuuren and Another NNO v Kruger* 1993 (4) SA 842 (A); Neethling *Persoonlikheidsreg* (3rd ed) p 238–9). He may prescribe the purpose and method of the disclosure (cf the facts in *O'Keeffe v Argus Printing and Publishing Co Ltd and Another* 1954 (3) SA 244 (C) – whether that case was truly concerned with privacy does not require consideration). Similarly, I am of the view that a person is entitled to decide when and under what conditions private facts may be made public. A contrary view will place undue constraints upon the individual's so-called 'absolute rights of personality' (*Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) 145I). It will also mean that rights of personality are of a lower order than real or personal rights. These can be limited conditionally or unconditionally and irrespective of motive."

(c) Derdens onderstreep die hof (272B–E) die rol wat die onderhawige tipe ooreenkoms in verband met deliktuele privaatheidsbeskerming kan speel: enersyds dien dit as bewys van die aan- of afwesigheid van die betrokkene se

privaathoudingswil of toestemming tot privaatheidskending, en andersyds kan kontrakbreuk aanduidend van deliktuele onregmatigheid wees:

> "The breach of the agreement is relevant to the claim in the sense that it may be a determinant of the scope of the complainant's 'privaathoudingswil'. Also, the general sense of justice of the community requires in my judgment due compliance with the terms of such an agreement. If, as here, it is breached intentionally, the breach may be a relevant fact to consider in assessing the wrongfulness (in a delictual context) of the publisher's action. On the other hand, had publication taken place according to the terms of the agreement, the publication of the erstwhile private facts could not have been wrongful for several reasons, such as lack of 'privaathoudingswil', consent and *volenti non fit iniuria*. (Where the one defence begins or the other ends is, from a practical point of view, difficult to discern and probably often of no consequence.)
>
> The alternative defence of consent is also devoid of any merit. According to the plea, the consent consisted of the agreement. It is axiomatic that the defence of consent can only succeed if the *prima facie* wrongful act falls within the limits of the consent (Neethling, Potgieter and Visser, *op cit*, p 101). The publication did not comply with the terms of the consent and it smacks of cynicism to argue in these circumstances that the publication took place pursuant to the consent."

(d) Vierdens bepaal regter Harms (270H–J) die "privaatheidswaarde" oftewel die juridiese beskermingswaardigheid van private feite met verwysing na die Amerikaansregtelike toets van "ordinary or reasonable sensibilities and not to hypersensitiveness":

> "The general sense of justice of the community as perceived by the court . . . does not, in a case such as this, require the protection of facts whose disclosure will not 'cause mental distress and injury to anyone possessed of ordinary feelings and intelligence, situated in like circumstances as the complainant'."

In hierdie verband moet nietemin gewaak word teen 'n slaafse navolging van die Amerikaanse reg. Myns insiens is die massapublikasie van private feite in stryd met die betrokkene se bestemming en wil in beginsel altyd onregmatig. Geen persoon hoef tog te duld dat selfs byvoorbeeld sy foto in 'n koerant gepubliseer word nie (sien Neethling "Foto's en privaatheidsbeskerming" 1993 *THRHR* 270 ev; *Neethling's Law of personality* 254–255) tensy daar natuurlik 'n regverdigingsgrond vir die publikasie bestaan. Daarenteen verklaar die Amerikaanse *Restatement of the law* par 867 400 (sien ook Neethling *Privaatheid* 89 ev) dat daar

> "no invasion of the right to privacy in the description of the ordinary goings and comings of a person or of weddings, even though intended to be entirely private, or of other publications to which people do not ordinarily seriously object"

is nie. Daar word aan die hand gedoen dat hierdie gevalle eerder aan die hand van die beginsel *de minimis non curat lex* beoordeel moet word (*Neethling's Law of personality* 255 vn 111).

Nieteenstaande herhaling moet ten slotte weer eens beklemtoon word dat die feit dat 'n skending van 'n persoon se privaatheid strydig met sy bestemming en wil geskied, natuurlik nie noodwendig beteken 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's Law of personality* 243). Uiteraard skakel die teenwoordigheid van 'n regverdigingsgrond normskending en bygevolg onregmatigheid uit (*idem* 62 262 ev).

3 Artikel 12 van die Wet op Egskeiding

Die klaarblyklike erns waarmee die appèlhof die beskerming van privaatheid bejeën, staan in skrille kontras met die feitlik totale verontagsaming van die Mandelas se privaatheid tydens hulle onlangse egskeidingsgeding – en dit in stryd met artikel 12 van die Wet op Egskeiding wat 'n beperking op die bekendmaking van besonderhede van egskeidingsgedinge plaas (sien hieroor Barnard *Die nuwe egskeidingsreg* (1979) 98–99).

Artikel 12(1) magtig net die publikasie van die volgende inligting aangaande 'n egskeidingsgeding: die name van die partye in die geding; die feit dat 'n egskeidingsgeding tussen die partye in 'n geregshof hangende is; en/of die uitspraak of bevel van die hof. Geen ander besonderhede van 'n egskeidingsgeding of enige inligting wat in die loop van so 'n geding aan die lig kom, mag in die openbaar bekendgemaak word of vir kennisname deur die publiek of enige deel van die publiek gepubliseer word nie. Die volgende uitsonderings word nietemin ingevolge artikel 12(2) veroorloof, te wete waar die bekendmaking van egskeidingsinligting gedoen word vir doeleindes van die regspleging; of in 'n *bona fide*-hofverslag wat nie deel uitmaak nie van 'n ander publikasie as 'n versameling van verslae van die verrigtinge in geregshowe; of vir die bevordering van of gebruik in 'n besondere beroep of wetenskap. Barnard 99 merk tereg op (vgl ook *Neethling's Law of personality* 275 vn 241):

> "Dit is duidelik dat die gades en hul kinders beskerm word teen die openbaarmaking van besonderhede van die huweliksgeskiedenis wat tot die egskeiding aanleiding gegee het, terwyl die belang van derdes om te weet of twee bepaalde persone steeds met mekaar getroud is, behoue bly. Benewens die feit dat die openbaarmaking van die besonderhede van egskeidingsverrigtinge 'n misdryf en met 'n boete of gevangenisstraf strafbaar is [a 12(4) maak voorsiening vir 'n boete van hoogstens R1 000 of gevangenisstraf van hoogstens een jaar of beide so 'n boete en die gevangenisstraf], sal sodanige openbaarmaking waarskynlik ook op die skending van die privaatheid van die betrokke partye neerkom, en behoort dit 'n aksie om genoegdoening op die grond te fundeer."

In hierdie verband is dit interessant en insiggewend om die redakteurskommentaar in *Beeld* van 20 Maart 1996 volledig aan te haal:

> "***Mandela-saak***
>
> *Die Wet op Egskeiding bepaal dat geen inligting wat in die loop van 'n egskeidingsgeding aan die lig kom, gepubliseer mag word nie.* Ons het ons verslaggewing oor die Mandela-skeigeding in daardie lig benader, en met die nodige regsadvies wel noodsaaklike inligting aan lesers probeer gee.
>
> *Die grootste deel van die Suid-Afrikaanse media het egter besluit om volledig, selfs woordeliks, verslag te doen. Die SABC – die openbare uitsaaier van die land – het in sy nuusprogramme miljoene mense ingelig oor die intieme besonderhede van die geding.*
>
> Moderne tegnologie bring mee dat Suid-Afrika lankal nie meer 'n eiland is nie. Internasionale radio- en televisienetwerke wat ook na Suid-Afrika uitsaai, het in nuusbulletins die getuienis in die hof bekendgemaak.
>
> Al sou die hele Suid-Afrikaanse media dus die saak volgens die bepaling van die wet gehanteer het, sou buitelandse dienste soos BBC en CNN 'n onregverdige nuusvoorsprong gehad het.
>
> Dit kan dus gebeur dat miljarde mense in ander lande weet wat in die hof gebeur, maar dat Suid-Afrikaners deur hul media in die duister gelaat word (soos met die Angolese oorlog in die jare sewentig). Klaarblyklik is dit 'n absurde situasie, en is wetsbepaling en ontwikkelende tegnologie moeilik versoenbaar. Die

Regering sal dringend daarna moet kyk. Die Suid-Afrikaanse media moet 'n gelyke kans kry, of mense sal hul inligting elders gaan soek.

Ons glo in elk geval dat die Mandela-egskeidingsaak een van openbare belang is. Twee hoë politici pak mekaar, en die inligting wat na vore kom, kan vir mense belangrik wees in hul besluite oor die aanwysing van leiers.

In die lig van bostaande het ons geen ander keuse nie as om vandag volledig verslag te doen oor die Mandela-saak" (my kursivering).

Wat nou ook al die meriete van sommige van hierdie argumente oor wenslike wetswysiging mag wees, dit staan onomstootlik vas dat die massamedia, inbegrepe *Beeld*, willens en wetens nie net aan onregmatige privaatheidskending nie, maar veral, en dit moet onderstreep word, aan blatante *misdaadpleging* meegedoen het en sodoende hulle deel tot die kultuur van minagting van die reg wat tans botoon in die land voer, bygedra het (die vertroue word nietemin uitgespreek dat die polisiediens nie sal skroom om die oortreders aan die man te bring nie). As dit die tipe verslagdoening is wat met 'n beroep op vryheid van spraak en persvryheid in ons nuwe grondwetlike bedeling toegelaat gaan word, word voorsien dat Suid-Afrikaners, wat soos die deursneemens van die moderne tyd deur algemene beskawingsontwikkeling al hoe meer bewus geword het van sy wese, betekenis en waarde en sodoende al hoe meer sensitief geword het vir aantastings van sy persoonlikheid – veral sy waardigheid, privaatheid, goeie naam, gevoelslewe en identiteit – hulle teen die aanslae van die massamedia sal moet staal. Hoe ook al, 'n ligpunt is nietemin die duidelike standpunt in *Jooste* ten gunste van die beskerming van privaatheid teen vergrype van die pers – 'n standpunt wat hopelik in die toekoms deur die massamedia ter harte geneem sal word.

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There must be an acceptance and respect for the principles of privacy and freedom of choice. An individual has the right to choose his/her own associates, and to construct, mould, and fashion his/her private life as a matter of free choice. The right to freedom of movement does not involve the corollary that trespass is justified. The individual has and retains the right to choose where to live, with whom to associate, contract, marry. In other words the ordinary incidents of private law, and their relationships, are not subject to the horizontal dimension and application of the fundamental rights. An important consideration in this respect is that now we have a free society, and private rights such as marital and family privacy, to raise a family and marry, are of momentous and primary importance (per Friedman JP in *Baloro v University of Bophuthatswana* 1995 4 SA 197 (B) 240).

BOEKE

ADVERTISING AND THE LAW

deur CLARISSA DE JAGER in medewerking met ERICK SMITH

Butterworths Durban 1995; ix en 162 bl

Prys R109,44 plus AVB (sagteband)

Hierdie boek is beslis 'n aanwins tot die regsliteratuur aangesien dit die regsbeginsels wat op advertensies van toepassing is op 'n kort en bondige wyse uiteensit. Die outeurs verduidelik die rede vir die samestelling van hierdie publikasie soos volg:

> "There is simply no compact reference on the law and advertising in South Africa. Added to this is the complication that the South African advertising industry is by and large self-regulatory and no definitive legal commentary exists on the relationship between the self-regulatory and legal systems."

Die boek is geskryf as handige verwysing nie alleen vir die regs- en advertensiepraktisyn nie, maar ook vir verbruikers en hul organisasies. Soos die outeurs dit self stel:

> "The essential purpose of this work is therefore to be a general ready-reference to the matrix of the rather uncomfortable relationship shared by advertising, its self-regulatory rules and the law."

Hoofstuk 1 is 'n inleidende hoofstuk en verduidelik die indeling van die boek. Die beweegrede vir die samestelling van die boek en die teikengroep waarop dit gerig is, wat reeds in die voorwoord uiteengesit is, word ietwat onnodig weer hier herhaal.

Hoofstuk 2 handel oor die gesagsvereniging vir reklamestandaarde van Suid-Afrika (RGV). Die kode van advertensiepraktyk wat deur die RGV toegepas word asook die jurisdiksie, struktuur en funksionering van die RGV word bespreek. Dit is myns insiens jammer dat besluit is om die RGV-prosedures vir die indien en aanhoor van klagtes asook vir die vooraf goedkeuring van advertensies onderskeidelik in aanhangsel B en C agter in die boek te plaas. Dit sou meer logies gewees het om hierdie prosedures uiteen te sit in die hoofstuk waar die RGV bespreek word. Hierdie prosedures sal net so vinnig en maklik in die teks opgespoor kan word deur gebruik te maak van duidelike opskrifte en tipografiese afbakening in sowel die teks as die inhoudsopgawe. Indien die uitsluitlike oogmerk met die plasing van hierdie prosedures in die aanhangsels was om opsporing te vergemaklik, moes daar myns insiens ten minste in die inhoudsopgawe ook daarna verwys gewees het.

In hoofstuk 3 word die rol van statutêre liggame in die advertensie-industrie bespreek. Statutêre liggame wat hier onder die soeklig kom, is die Onafhanklike

Uitsaai-owerheid, die Raad op Mededinging ("Competition Board") en die Sakepraktykekomitee ingestel ingevolge die Wet op Skadelike Sakepraktyke 71 van 1988. Daar word oor die algemeen aandag gegee aan die doel en samestelling van hierdie liggame, hulle verpligtinge en die prosedures wat gevolg moet word. Dieselfde beswaar wat hierbo genoem is ten opsigte van aanhangsel B en C, geld ook ten aansien van aanhangsel D. Die riglyne wat deur die Sakepraktykekomitee gegee is oor wat onregverdige of misleidende handelinge of praktyke sou wees, sou myns insiens beter inpas by die bespreking in die teks van die ondersoeke wat deur die Sakepraktykekomitee gedoen word (par 3 4 2). Alternatief sou 'n verwysing na hierdie riglyne in die inhoudsopgawe opsporing daarvan aansienlik vergemaklik het.

In hoofstuk 4 word die vereistes vir die instel van deliktuele eise op grond van onregmatige mededinging, laster en privaatheidskending bespreek. Die besondere verwere en remedies van toepassing in elke geval word uitgelig. In die bespreking word deurgaans verwys na praktiese gevalle uit hofbeslissings en ter illustrasie is 'n aantal kleurvolle advertensies in die boek opgeneem. Die netelige kwessie van vergelykende advertensie word bespreek aan die hand van die RGV se riglyne vervat in die advertensiekode en is beide interessant en insiggewend.

Hoofstuk 5 handel oor advertensies en die reg insake handelsmerke. Daar word onderskei tussen die statutêre, gemeenregtelike en selfregulerende beskerming van handelsmerke. Die skendingshandelinge word bespreek, asook die praktiese gevolge wat dit vir die adverteerder inhou. Weer eens word die bespreking gedoen aan die hand van hofbeslissings en kleurvolle praktiese voorbeelde.

Hoofstuk 6 bespreek advertensies en outeursreg. Die beginsels vir die vestiging van outeursreg in 'n werk, die duur van outeursregbeskerming, die handelinge wat neerkom op skending van outeursreg en vrystelling van outeursregskendings word in breë trekke behandel.

Hoofstuk 7 handel oor verskeie statute wat op advertensies van toepassing is. In aanhangsel A onder die opskrif "International Advertising Authorities" word 'n adreslys van kontakpersone gegee wat baie handig kan wees vir die advertensiepraktisyn. Die boek is voorsien van 'n indeks maar dit bevat nie 'n sakelys nie alhoewel daar in die teks na verskeie hofsake verwys word.

Die skryfstyl is vloeiend en die tegniese versorging goed. Alles inaggenome, is hierdie 'n baie nuttige boek vir enige regs- of advertensiepraktisyn en elkeen wat belangstel in advertensies en die toepaslike regsbeginsels. Die outeurs slaag goed daarin om die inhoud prakties verstaanbaar uiteen te sit deur die teks deurgaans toe te lig met skematiese voorstellings en gevallestudies.

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BUSINESS TRANSACTIONS LAW

by ROBERT SHARROCK

Fourth edition; Juta Cape Town Wetton Johannesburg 1996; xx and 524 pp

Price R118,00 (soft cover)

The fourth edition of this book follows only four years after the third and three years after a revised reprint, but more than enough major changes and developments have taken place in this period in the areas of law covered by the book to merit a new edition.

The first of these changes is found in chapter 1, where the jurisdiction and functions of the Constitutional Court are now explained, as well as the Constitution as a source of our law. The list of judicial officers and of officers of the courts has also been extended to include adjudicators and commissioners, as well as members of the Judicial Services Commission and the Law Commission, and the Public Defender.

The chapter that has certainly undergone the biggest changes, is chapter 21, "Employment". It deals mainly with the Labour Relations Act 55 of 1995 which is due to come into operation during 1996. The author was faced with the dilemma of having to choose between the old Labour Relations Act 28 of 1956 which is (or was, at the time of writing this review) still in force and is therefore current law, and the new one which is not law as yet, but is expected to be so in the near future and would render any textbook dealing with the previous Act out of date. Totally ignoring the current (1956) Act is not without risk, however, as there is no guaranteed date of commencement for the new Act. The whole debate around the issue of lock-outs in the new Constitution has furthermore made it abundantly clear that nothing will be settled and certain until a new Act actually comes into operation. Perhaps a short reference to the most important aspects of the current Act, drawing attention to those provisions that will be radically changed or abolished by the new legislation, would have been a better solution to the problem.

Chapter 31, dealing with sequestration and its immediate consequences, discusses the changes brought about in 1993 by the insertion of sections 25(3) and 25(4) into the Insolvency Act 24 of 1936. Strangely enough, however, no mention is made of sections 35A and 35B of the Act which were promulgated in July 1995. These sections are of great importance to stockbrokers, amongst others, and one can safely assume that among the commercial law students for whom *Business transactions law* may be prescribed, there would be a number of (potential) stockbrokers and others who would have appreciated some explanation of the sections and their effect.

Another omission is the total absence of any preface to the fourth edition or some other indication of the date up to which the law was as it is stated and discussed in the book. Students operating on a limited budget would certainly also have welcomed a short preface by the author explaining in which areas and to what extent important and substantial changes have been made in the fourth edition of *Business transactions law*. This would immediately have answered the question whether it is necessary to buy the fourth edition if you already have the third edition.

The book has been brought up to date with the inclusion of many relevant new cases, for example *Volkskas Bank Bpk v Bonitas Medical Aid Fund* 1993 3 SA 779 (A) and *Navidas (Pty) Ltd v Essop; Metha v Essop* 1994 4 SA 126 (A) in chapter 26 (cheques), and *Van Zyl and Maritz v South African Special Risks Insurance Association* 1995 2 SA 331 (SEC) and *Quilingele v South African Mutual Life Assurance Society* 1993 1 SA 69 (A) in chapter 24 (insurance), to name just a few. The number of cases mentioned in the book have thus increased by more than fifty, bringing it to a total of just over 450. The previous edition was criticised for the large number of cases discussed in a book which was not primarily intended for use by law students or practitioners, but as these cases are mostly discussed very briefly, with just enough detail to illustrate the relevant principle, they might just succeed in making this area of our law a little more interesting to students.

Even where no change in the law as such has taken place, but a certain subject has become more relevant or prominent in the last few years, it has now been included or discussed in greater detail in the latest edition. Examples are found in the discussion on cession *in securitatem debiti* in chapter 30, and friendly sequestrations in chapter 31.

Business transactions law has always been easy to read, which is due in no small measure to the absence of footnotes and its forthright style of writing which focuses on principles rather than theory. The fourth edition has now also undergone a major face-lift in its layout, and this has greatly improved its general appearance and accessibility. The main headings in each chapter, which were previously extremely small and quite easily overlooked, are now numbered and printed in bold capital letters, while subheadings are slightly smaller but also in bold lettering. Where requirements, conditions or exceptions are listed, they are no longer crammed together into one single paragraph, but arranged in list-form in such a way that each one stands out clearly. These changes will certainly make it much easier for students to understand the overall structure of each subject under discussion.

The existing overall structure of the book, which was criticised in reviews of both the second and the third editions, has been retained by the author. I would suggest that for a future edition, serious consideration should be given to doing away with the division of the book into seven parts. This division often seems artificial and illogical, and serves no real purpose.

In general the book still succeeds in what it set out to be from the first edition: a textbook for commercial law students introducing them to the law of business transactions. Judged on these terms, I have no hesitation in recommending it for such students. It is comprehensive and clear, and will guide the student through the maze of this very wide subject in a relatively painless manner. Although not really suitable (or intended) for use by law students or legal practitioners, it may even prove useful at times to a harassed practitioner who needs no more than a short, direct and quick answer as to what the current law on a specific point is.

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Teaching Roman law on the eve of the millennium: A new beginning*

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OPSOMMING

Die doseer van die Romeinse reg op die vooraand van die millennium: 'n Nuwe begin

Tot op hede is die Romeinse reg aan ons universiteite doseer om redes en deur metodes wat in die algemeen nie vir die nuwe Suid-Afrika geskik is nie. Indien die doseer van die Romeinse reg gaan oorleef, moet dit in 'n Afrosentriese konteks regverdigbaar wees. Dit vereis dat die mislukte sekulêre positivistiese etos wat die studie van die Romeinse reg vir te lank vertroebel het, onverwyld oorboord gegooi moet word. Die studie van die vak moet eerder direk verbind word met die tydlose, onveranderlike beginsels van die natuurreg wat die Romeinse reg van Justinianus ten grondslag gelê en aangewakker het. Hierdie beginsels wat universeel is (en nie bloot Eurosentries nie), sluit geregtigheid, redelikheid, eenheid en gelykheid in. Daar moet met ander woorde 'n radikale klemverskuiwing van die letter na die gees, van die tegniese na die etiese inhoud van die Romeinse reg plaasvind. Indien dit uit hierdie natuurregperspektief doseer word, kan die Romeinse reg mettertyd help om etiese standaarde in die regsprofessie te verhoog. Die metode waarvolgens die beginsels en waardes van die natuurreg by studente aangekweek kan word, is om Romeinse reg direk uit die vertaalde tekste van die *Institute* van Justinianus aan te bied, onversier deur glos of kommentaar.

> "The unerring law is right reason; not an ordinance made by this or that mortal, a corruptible and perishable law, a lifeless law written on lifeless parchment, or engraved on lifeless columns; but one imperishable, and impressed by immortal Nature on the immortal mind" (Philo Judaeus *Works* 3.516 (Bohn's Ecclesiastical Library)).

1 INTRODUCTION

Once upon a time, an attorney employed in commerce responded to the lure of academe. On taking up a post as a university lecturer, he was asked to teach Roman law. The years went by and he grew to love the subject. It was evident from the outset, however, that most of his students (and not a few of his colleagues), far from sharing his enthusiasm, displayed attitudes of antagonism, boredom or, at best, indifference towards Roman law. The reasons, it seemed,

* My thanks are due to Proff B Stoop, E Kahn and C Lewis for their perusal of the manuscript. They, of course, are not responsible for any of the views expressed below. I am no Romanist: I cannot lay claim to any specialist knowledge of Roman law, which is but one of the subjects on which I lecture. This article is an enthusiastic initiate's first publication on the subject.

included a perceived lack of relevance, a high failure rate, the fear of Latin terminology, the use of prescribed course notes which were dished out to students year after year (and, if the truth be told, a diffident lecturer who spoke in an endless monotone). The students were right, of course: much was amiss in the teaching of Roman law.

But where lay the remedy? On reflection, it appeared that two things were required: the first was to give students an unassailable reason to study the subject; the second was to present it in such a manner as to convey to students the same enthusiasm that it had aroused in their lecturer. After all, as Lawson[1] puts it,

> "I have yet to be convinced that a teacher who is himself genuinely interested in Roman law has greater difficulty in interesting his pupils in it than in any other subject . . ."

Two questions, in other words, had to be addressed: Why do South African law students need to study Roman law? By what method should Roman law be taught? It is contended in this article that Roman law in South Africa has, more often than not, been taught for the wrong reasons. Furthermore, the methods by which the subject is taught are generally not suited to the needs of students in the new South Africa.

In order to substantiate these views, I shall critically examine the arguments that are conventionally advanced to justify the teaching of Roman law to university students. Here I shall attempt to show that these arguments are mostly insufficient and that there is only one rationale which meets the case. After that, in a second instalment of the article, I shall turn to consider the method by which the subject ought to be taught.

The need to justify the continued study of Roman law by our students is a most pressing one: to a greater extent than at any time in the past, the teaching of Roman law in South African universities is under threat. Now that the requirement of a credit in Latin for admission to legal practice has been abolished,[2] how long will it take before the abolitionist lobby turns its guns on Roman law?[3] There is even a willingness in academic quarters to anticipate that sad day.[4]

2 WHY SHOULD ROMAN LAW BE TAUGHT TO LAW STUDENTS?

An argument often heard in this country is that many parts of our law are deeply imbued with Roman law, which is still regularly applied in South African legal practice. From this it would follow that for an adequate understanding of the law of contract, property and delict, the study of Roman law is essential.

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1 1956 *Butterworths SALRev* 16 (hereinafter Lawson I).

2 The Admission of Advocates Amendment Act 55 of 1994, which came into operation on 1994-12-02, has extended the abolition to advocates.

3 Stoop "Hereditas damnosa? Some remarks on the relevance of Roman law" 1991 *THRHR* 175 (hereinafter Stoop) 178 180–181; see also Erasmus "Roman law in South Africa today" 1989 *SALJ* 666 (hereinafter Erasmus) 673; Van Zyl "Die regshistoriese metode" 1972 *THRHR* 19; Bray "A plea for Roman law" 1983–1985 *Adelaide LR* 50 (hereinafter Bray) 51.

4 One tentative proposal would be to eliminate Roman law as an independent course, and to relegate the subject to the status of a single component in a new composite course embracing the various sources of South African law. The aim of this new course would be to introduce students, in only one year of study, to the essential features of Roman law, Roman-Dutch law and English law.

In recent years, the facile and specious nature of this argument has been convincingly exposed. It is a truism that Roman law underlies much of our private law and that it has continued to feature prominently in recent judgments of our courts.[5] But this must be seen in context. Stoop[6] quotes figures which indicate that

> "Roman law will constitute only 0,1805% of authority that will be consulted by the Appellate Division towards the year 2000 . . . It can thus be stated with confidence that as far as our courts are concerned, Roman law is dead and no longer has any direct practical legal value in South Africa and . . . will finally be buried at the turn of the century."

Assuming the correctness of this verdict, one may ask why the subject has undergone such an alarming decline. The answer, according to Zimmermann,[7] is that the direct relevance of Roman law is continuously being eroded by the system of precedent in South African courts. Each time Roman law is used as authority by a court, that part of Roman law dies and is reborn in the guise of South African law. From that moment onwards, practitioners will rely, not on the original Roman text that served as authority for the decision, but on the decision itself. Recourse to Roman law becomes more and more infrequent as there is gradually established sufficient authority in the law reports to make a study of the original Roman texts redundant.[8]

Another flaw in the argument under scrutiny is that it is entirely possible to practise law competently and successfully without prior exposure to Roman law.[9] Thus a practitioner may acquire a specialist knowledge of the law of succession without ever knowing how the earliest wills originated, or the way in which the modern conception of testation has gradually evolved from Roman doctrine over the centuries. Again, he may build up a lucrative practice in property law without ever knowing the history of the idea of individual ownership of land, one of the fundamental conceptions bequeathed to us by Roman jurisprudence.[10]

Moreover, my own experience in the lecture room suggests that South African private law can adequately be taught to students without direct reference to Roman law. Consider, for example, the law of security, a broad term which traditionally embraces suretyship, mortgage, pledge, lien and cognate topics. The first chapter of the standard South African textbook on suretyship[11] is a scholarly and succinct resumé of the Roman law of sureties. Most students ignore this chapter, yet still acquire a satisfactory grasp of the principles of suretyship by studying the modern law. This, of course, is not to say that Roman law has no

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5 Here is no more than a small sample of recent judgments: *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A); *Clifford v Farinha* 1988 4 SA 315 (W); *Mountbatten Investments (Pty) Ltd v Mahomed* 1989 1 SA 172 (D); *Van Erk v Holmer* 1992 2 SA 636 (W); *Cooper v Die Meester* 1992 3 SA 60 (A); *Cooper AEM v Boyes* 1994 2 PH G1.

6 180.

7 Zimmermann "Synthesis in South African private law: civil law, common law and usus hodiernus pandectarum" 1986 *SALJ* 260.

8 See also Lawson I 17.

9 See, eg, Coleman-Norton 1950 *Journal of Legal Education* 473 (hereinafter Coleman-Norton); Bryce *Studies in history and jurisprudence* (1901) Vol II (hereinafter Bryce) 884.

10 Coleman-Norton 474.

11 Forsyth and Pretorius *Caney's The law of suretyship* (1992) 1–23.

bearing on our law of suretyship – quite the contrary. But so thoroughly have the Roman principles become absorbed into the fabric of the South African law that there is simply no need for direct recourse to them.

Much the same could be said about teaching the modern law of property. There is no denying that students who bring to that course an understanding, gleaned from the study of Roman law, of such topics as the all-important distinction between real rights and personal rights, the abstract and causal approaches to the passing of ownership by *traditio*, the various modes of fictitious delivery, and the juridical nature of possession, will enjoy a distinct advantage over students not so equipped. Yet the latter often succeed in gaining a sufficient grasp of those concepts from their study of the modern law. This first argument, based on direct relevance, accordingly fails to convince.[12]

Secondly, there is the cultural argument.[13] It is trite but true that the West owes the three chief elements of its modern civilisation to three great peoples of antiquity: its religion comes from the Hebrews, its culture (philosophy, science, art, and literature) from the Greeks, its jurisprudence from the Romans.[14] According to the so-called elegant approach,[15] Roman private law, as our precious cultural gift from the ancient world, is eminently worthy of study. This argument has had a considerable influence in England; it could well serve to justify the continued study of Roman law in Europe and the Americas. But does it convince in our increasingly Afrocentric environment? Lee[16] argues that it is part of a liberal education to know something about Roman law. The concept of a "liberal education" may still have some currency in present-day England; here, today (regrettably or otherwise), it has little or none. More and more, in the new South Africa, the call will be for instruction in law that is simple, direct, practical, free from inessential technicalities, and tailored to the needs of local communities. The peoples of this continent have, on the whole, little affinity with the achievements, legal or otherwise, of Western culture.[17] More than this is needed to justify the continued study of Roman law in African societies.

Thirdly, there is the argument based on comparative law. Systems of civil, that is to say Romanist, law hold sway over much of Europe and South America, and over parts of North America, Africa and the East. Indeed, even in Anglo-American law there is more of Roman law than is generally realised, for most of the basic principles in the law of admiralty, wills, succession, obligations, easements, liens, mortgages, adverse possession, corporations, judgments and evidence come either from the survival or the revival of Roman law in English law.[18]

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12 By parity of reasoning, it would be difficult to justify the independent study of Roman-Dutch law on the ground of its direct relevance to South African law.

13 See Zimmermann *The law of obligations: Roman foundations of the civilian tradition* (1990) (hereinafter Zimmermann) viii.

14 Coleman-Norton 474.

15 See, eg, Beinart "Roman law in South African practice" 1952 *SALJ* 145 (hereinafter Beinart) 148 ff.

16 Lee *Elements of Roman law* (1956) (hereinafter Lee) viii.

17 See Van Reenen "The relevance of the Roman(-Dutch) law for legal integration in South Africa" 1995 *SALJ* 276 (hereinafter Van Reenen) 286–288.

18 Coleman-Norton 476.

Ankum[19] describes the impact of Roman law on modern European codifications, in particular on the new Dutch Civil Code of 1992:

> "[T]he legislator of Books 3, 5, 6 and 7 of the new Dutch Civil Code took inspiration largely from Roman law and the European ius commune, based on Roman law ... The drafters of these books have drawn ... on numerous points, principles, institutions and rules with their origin in Roman law, which had not been accepted (in such a clear way) in the Dutch Civil Code of 1938. That this can be so in the case of a Code which was made nearly fifteen centuries after Justinian's legislation is striking proof of the incomparable richness of legal ideas and solutions of the Corpus Iuris Civilis."

These words indicate, not surprisingly, that the influence of Roman law on modern European law is waxing, not waning. Ankum[20] believes that a good knowledge of Roman private law will be very useful for European jurists of the coming century. In support of this view, he reminds[21] us that nearly all the older European codifications of civil law – including the French Code Civil of 1804, the Austrian ABGB of 1811, the Spanish Civil Code of 1889, the German BGB of 1900 and the Italian Codice Civile of 1942 – are influenced by Roman law.

Viewed in their entirety, these data are impressive, and it follows that the study of Roman law gives the student an overview of the law regulating much of the world today. But of what practical use is this to the growing number of black students, often from disadvantaged backgrounds, now entering our law schools?

Roman law is still taught and studied in universities in most countries of Western Europe, in the erstwhile socialist countries of Eastern Europe, in the Chinese Peoples' Republic, in all Latin-American countries, in all common law countries, in Israel, Japan and Sri-Lanka, in many of our neighbouring states – Namibia, Lesotho, Botswana, Swaziland and Zimbabwe – and in other countries.[22] Its influence on Scots law has been considerable. But unless the study of Roman law can be shown to be of direct practical utility to our students, there is no justification for its continued study, even in Southern Africa, perhaps the only part of the world in which Justinian's *Corpus iuris civilis* is still cited in courts.[23] The fact that the study of the subject is so widely diffused, however, cannot be ignored: it shows that Roman law offers something of universal and perennial value.

One undeniable advantage of offering a course in Roman law is that it is the only course in the modern legal curriculum which enables the student to gain an overview of an entire system of private law. Generally, legal training at university consists of individual subjects, the fragments of the legal structure. In this age of specialisation and diversification, the value of a course that treats law in its wholeness and unity cannot be gainsaid. But this advantage, attractive though it may be, is not strong enough to stand alone: it needs to be reinforced by some more powerful ground of justification.

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19 1994 *6* Casapis pro pravni vedu a praxi 203 (Elaborated text of a lecture given at the Faculty of Law of the Masaryk University in October 1994) (hereinafter Ankum) 221–222.

20 221.

21 *Idem* 222.

22 Stoop 179–180.

23 *Ibid.*

Valid and attractive too, though insufficient on its own, is the argument from pragmatism. Uniquely perhaps in the West, the Romans did not treat law as a set of theoretical rules; their genius was for the practical. The Roman jurist was concerned with making rules conform to the public opinion of the day. Here is Biondi's description of the archetypal Roman jurist:[24]

> "[He] did not write volumes nurtured in knowledge and erudition, but above all he was a *prudens* who, in contact with life, with a fine perception and incomparable wisdom, attempted to meet social requirements within the ambit of the law . . . He did not impose on his co-citizens the products of his speculations, but rather suggested formulae and expedients which served practical needs and propounded decisions which would correspond to justice."

And again:[25]

> "To discuss whether the Roman jurists were theoretical or practical is an idle question, for to them the separation had no meaning."

The jurists applied to the handling of their own concrete rules and problems a mastery of general principles and a love of harmony and consistency which are essentially philosophical.[26] Roman law is, in Bryce's words, perhaps the most perfect example which the range of human effort presents of the application of a body of abstract principles to the complex facts of life and society.[27]

There is much that we in this country can learn from such an admirably pragmatic, community-based approach to law. The Roman attitude to law could serve as a lifeline to an age foundering in a quagmire of legal theories, whose prolixity and abstruseness are the bane of those of us who love clarity and simplicity in law. But attractive though this argument from pragmatism undoubtedly is, it is probably not strong enough to stand up on its own.

There is another point here. The wonderful alliance of intellectual vigour and down-to-earth practicality in the work of the Roman jurists eludes most students, because of the manner in which the subject is presented to them: students are required to read and absorb a set of notes, a study guide or a textbook purporting to be a compendium of Roman law. With rare exemptions, such works turn out to be prolix, over-technical and tedious, so that that freshness, vitality and immediacy of the Roman legal texts are lost. These works do little to engender enthusiasm for the subject in the students. But this is to anticipate.

It has often been sought to justify the study of Roman law on historical grounds,[28] for it is a system of law whose history can be traced with certainty throughout its duration. The beginning and end of this historical development are marked by two legislative codes, the Twelve Tables of 451 BC and the *Corpus iuris civilis* of AD 534. The several stages of the progress of Roman law from its origin to its consolidation can be sketched in uninterrupted continuity for about thirteen hundred years. For no other system of law, ancient or modern, can such a claim be made. Both in its original history as the law of the Roman state, and as the source of fundamental principles of modern laws, Roman law, so this argument goes, is an obvious subject of historical study. Buckland,[29] like

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24 Beinart 153.
25 *Ibid*; see also Bryce 629–632.
26 *Idem* 632.
27 *Idem* 884.
28 Coleman-Norton 476.
29 Buckland *Equity in Roman law* (1911) (hereinafter Buckland I) 126–131.

Maine before him, believed that the real value of the study of Roman law lay not in becoming acquainted with the detailed rules concerning, say, the manumission of slaves, but in a consideration of the historical development of those institutions, such as marriage, property, contract and delict, which have a central place in every legal system.[30]

But is it our objective to train lawyers or legal historians? Besides, the historical argument flies in the face of the essentially ahistorical treatment of the law in Justinian's *Institutes*, which is adopted below as the basis for teaching Roman law. The method which will be championed here requires that, for teaching purposes, the law must be fixed at a particular time. Given that the Roman law which found its way into our legal system is the law as represented in the codification of Justinian,[31] the time chosen is logically the age of Justinian, and what went before is largely (if controversially) ignored. This theme will be pursued in due course.

The historical argument, therefore, also fails to convince:[32] if Roman law is incapable of offering students something of universal value, something independent of the historical matrix which begot and nourished that system, then it cannot justify its place in the curriculum.

Lee[33] claims that "the study of Roman law liberalises the mind by expanding the range of vision". This claim could be substantiated only if Roman law were to be taught and studied in accordance with Justinian's conception of law, in which, as we shall see, spiritual values and secular jurisprudence are indissolubly united. But modern textbooks on the subject almost invariably display a positivist bias, and ignore or dismiss the spiritual dimension of the law.

A common claim, finally, is that Roman law serves to train the legal mind. As one writer[34] points out, the competent lawyer needs skills of legal argument, legal analysis, legal distinction, legal definition and legal dialectic. There is indeed no better illustration of these skills than the techniques of Roman law. But it may be argued that the university law curriculum, in this country and elsewhere, includes other courses which are capable of inculcating such skills. Assuming, without deciding, that this rejoinder is sound, we must cast our net wider.

None of the arguments considered so far is, in my view, strong enough on its own to justify the study of Roman law by South African law students beyond the end of this millennium. Cumulatively, of course, these arguments do constitute a viable case for teaching Roman law. Indeed, it is reassuring, should all else fail, to be able to fall back on the cumulative force of the arguments considered thusfar. But it would be more convincing, as well as aesthetically satisfying, to be able to present students with a single, strong, self-sufficient argument which meets the case. This is the quest.

What must be demonstrated is that Roman law possesses qualities of universal and timeless validity, qualities which transcend time and place, so rendering its study useful to any society at any time. This is a great deal to ask, but Roman

30 See Newark 1959 *Tul LR* 647 (hereinafter Newark) 651 657–659.
31 See, eg, Erasmus 667–668.
32 This, of course, is not to deny the attraction of studying Roman law historically through the works of such writers as Sohm and Jolowicz: see Bray 51–52 58–59.
33 Lee viii.
34 Bray 59–60.

law, if properly taught, is equal to the task. Modern national systems of positive law are inescapably dependent on time and place: as circumstances change, so do the laws. That is as it should be. But implicit in the secular positivism which holds modern jurisprudence in bondage is a denial, or at least a forgetfulness, of legal values that are universal and all-pervading in their application. It is here that Roman law, if properly taught, can provide a most valuable reminder.[35]

The year 1994 saw the opening of a new chapter in the history of South Africa, and a most auspicious beginning it was. The peoples of this land are party to a unique experiment in unity, an experiment which the world continues to watch with keen interest. Much will be required of us in order to realise the ideals of unity and justice enshrined in the new constitutional order. Weeramantry[36] has recently reminded us that South Africa's future depends entirely on the rule of law. That, in turn, depends on whether we succeed in the great task of building a visibly just society.

Justice! Its importance in human affairs can hardly be exaggerated.[37] In the opening words of the Digest,[38] the crucial bond between law and justice is asserted by no less an authority than Ulpian:

> "A law student at the outset of his studies ought first to know the derivation of the word *jus*. Its derivation is from *justitia*. For, in terms of Celsus' elegant definition, the law is the art of goodness and fairness. Of that art we [jurists] are deservedly called the priests. For we cultivate the virtue of justice and claim awareness of what is good and fair, discriminating between fair and unfair, distinguishing lawful from unlawful, aiming to make men good not only through fear of penalties, but also indeed under allurement of rewards . . ."

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35 See Burge *Commentaries on the law of suretyship* (1847) v–vi; Coleman-Norton 476.

36 Cited by Willemse 1994 *De Rebus* 871.

37 See, eg, the memorable words of Marsilio Ficino, the neo-Platonist philosopher and guiding light of the Florentine Renaissance: *The letters of Marsilio Ficino* (transl School of Economic Science) Vol 1 (1975) 146–147.

38 1 1 1 *pr*, transl Watson. Among the peoples of antiquity, the Romans were far from the first to inquire into the great question of justice and the cognate concept of natural law. The classical Roman jurists were inheritors of the Greek Stoic philosophy of natural law. In the Western tradition, the master texts on justice are Plato's dialogues, the *Republic* and the *Gorgias*, both of which are of timeless value and will repay the closest study. Aristotle, the pupil of Plato, also speaks on the subject (see *Nichomachean ethics* 5 7; *Rhetoric* 1 10 13). (The West, to its detriment, has chosen to follow the pupil and lesser, rather than the master and greater, but that is another story for another day.) For Cicero's views on justice, see *De Republica* 3 11 22; *De legibus* Bks 1 and 2. In the East, the Vedantic tradition of India has produced such master texts as the code of the ancient lawgiver, Manu. In this work (*The laws of Manu* transl Bühler (1886) ch 8 s 12–15), we are given a vivid reminder of the timeless importance of justice:

> "12 . . . where justice, wounded by injustice, approaches and the judges do not extract the dart, there (they also) are wounded (by that dart of injustice).
>
> 13 Either the court must not be entered, or the truth must be spoken; a man who either says nothing or speaks falsely, becomes sinful.
>
> 14 Where justice is destroyed by injustice, or truth by falsehood, while the judges look on, there they shall also be destroyed.
>
> 15 Justice, being violated, destroys; justice, being preserved, preserves: therefore justice must not be violated, lest violated justice destroys us."

Can a country such as ours, ravaged by corruption, crime and violence, afford to ignore these words?

It follows from this that the conjunction of law and justice is the very foundation upon which the Roman law of Justinian rests. By reminding us of the common etymology of *jus* and *justitia*, Ulpian here does more than show that law and justice are inseparable and indivisible: he gives the lie to modern positivism, which seeks to separate law from justice, law from morality, law from religion, and, in general, the secular from the divine.

By reason of the narrowness of vision, the hair-splitting propensity, and the spurious divisions and separations implicit in positivist doctrine, its adherents cannot reconcile themselves to the reality of this bond between law and justice, a bond which signifies that an unjust law is simply not law. A typical view is that of Sandars,[39] who notes with some dismay that Celsus' definition of law as the art of goodness and fairness would "sink positive law in morality". This "confusion", he goes on, arose principally from the view of the law of nature, borrowed from Greek philosophy by the jurists. But is it the Roman jurists or the modern positivists who are confused?

Justinian himself, in a resounding proclamation, declared that it had been his purpose to erect a temple to Justice, a citadel of law:

> "Of all subjects, none is more worthy of study than the authority of Laws, which happily disposes things divine and human and puts an end to iniquity."[40]

And in the body of the *Corpus iuris*, the imperial direction to judges[41] is that "in all cases special account should be taken of justice and equity rather than of strict law". How ironic and disgraceful then, is the attitude of modern positivist writers who ignore or dismiss Justinian's own stated purpose in ordering the compilation of the *Corpus iuris civilis*.

Nor is the conjunction of law and justice confined to the Justinianic[42] Roman law, for it runs throughout the Western legal tradition: Blackstone[43] and Voet,[44] to name but two of its central figures, proclaim that timeless conjunction. In more recent times a noted jurist[45] has given this evaluation of the contribution of the Roman jurists:

> "[T]heir unique distinction ... is their conscious and successful endeavour to guide the legal judgment in the course of what is *fundamentally just*. All their expositions and decisions are penetrated by the one idea, of finding objective goodness and justice. And they are clearly cognisant, in fact, of the difference between a merely technical treatment of legal rules ... on the one hand, and a decision in accordance with the fundamental idea of law on the other ... This ... is the universal significance of the classical Roman jurists; this, their permanent worth. They had the courage to raise their glance from the ordinary questions of the day to the whole. And in reflecting on the narrow status of the

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39 *The Institutes of Justinian* (1927) (hereinafter Sandars) ix.

40 Constitutio Deo Auctore transl D'Entréves *Natural law: an introduction to legal philosophy* (1951) (hereinafter D'Entréves) 24.

41 *C* 3 1 8.

42 This adjective will be used throughout this article in preference to the more common, but phonetically horrible "Justinianian".

43 According to Blackstone (*Commentaries on the laws of England* (hereinafter Blackstone) Intro 2 44), municipal or civil law "is properly defined to be a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong". See further Blackstone Intro 2 53, where he elaborates on the latter part of this definition.

44 Johannes Voet *Commentary on the Pandects* (hereinafter Voet) 1 1 1, 6 7 11.

45 Stammler *The theory of justice* transl Husik (1925) 126–127.

> particular case, they directed their thoughts to the guiding star of all law, namely the realisation of justice in life. And as they undertook this task, the extraordinary power of subordinating the particular to the absolute unity of the whole was given them by a kind gift of fortune."

More recently still, Dlamini[46] has offered some far-sighted comments on justice in the context of legal education in this country (and the focus of this article is precisely the training of South African lawyers). His views are of particular relevance in the present context, because they are directed to the needs of disadvantaged students. These he defines[47] as "black students who have been the casualties of Bantu education or the education system provided by the Department of Education and Training". For years to come, there will be students of this description who enrol at our law schools.

Dlamini reminds us[48] that students become interested in a course if they regard it as important or as having value for them. Our legal education, while seeking to develop in students the ability to think logically and critically, has generally failed to inculcate in them something rather more important, namely a strong sense of justice.[49] The words of Mr Justice Davis[50] bear repetition:

> "Ours is a fine profession: it is the pursuit of justice and of truth, and these are surely well worth pursuing for their own sake, regardless of reward. And they should be pursued, too, regardless of consequences. He is but a poor member of that fine profession who does not undertake a case in which he believes because he knows it to be unpopular, or, if he be a judge, hesitates to give a judgment because he thinks that it would not be applauded by the newspapers or might offend powerful interests."

The influence of the policy of apartheid ensured that the importance of justice was seldom emphasised in our universities.[51] Dlamini[52] recalls how legal positivism reigned supreme in this country for so long: any consideration of the concept of justice as involving equality of treatment was accorded a back seat. Ironically, positivist doctrine was far removed from the natural-law thinking of Roman-Dutch masters like De Groot and Voet; it tended to legitimise apartheid legislation, which effectively undercut every equitable principle of Roman-Dutch law in relation to black people.[53] Dlamini[54] graphically concludes:

> "[Positivism] deals with the skeleton or perhaps even the flesh, but it does not deal with the spirit or mind of the law. These are its propelling forces. Just as any person who claims to know a human being because he has studied the skeleton and perhaps the muscles and has omitted to deal with the mind and spirit cannot be taken seriously, equally a person who claims to have dealt with the law because he has dealt with its structure and mechanics, but has not studied the concept of law as a whole, its underlying assumptions and values, cannot be taken seriously."

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46 Dlamini "The law teacher, the law student and legal education in South Africa" 1992 *SALJ* 595 (hereinafter Dlamini).

47 *Ibid.*

48 *Idem* 596.

49 *Idem* 596–597.

50 Foreword to the first edition of Herbstein and Van Winsen *The civil practice of the superior courts in South Africa* (1954), quoted by Dlamini 596–597.

51 Dlamini 597.

52 *Idem* 598.

53 *Idem* 599. Kentridge ("Civil rights in Southern Africa – The prospect for the future" 1987 *Lesotho LJ* 97) remarks that "equality under the law is one of the fundamental precepts of [the Roman-Dutch law]".

54 601.

Dlamini is right: positivism cannot be taken seriously. Yet the damage it has caused cannot lightly be dismissed; the endeavour, in conflict with the plain language of the Roman law of Justinian,[55] to separate inseparables such as law and justice has left deep wounds on our age which only time can heal.

Justice is the birthright of all;[56] it will eventually have to triumph for all South Africans.[57] Only then will the beloved country cease to cry. Fixed rules are undoubtedly the essence of law, but in order successfully to fulfil its purpose of maintaining order and peace in the community, law must be seen to be just.[58] When the technicalities of the law are allowed to defeat justice and equity, the reaction is usually swift and strong.[59]

It is to nothing less than man's eternal quest for truth, justice and unity that the study of Roman law must therefore be yoked, if it is to endure in this country and elsewhere.[60] The ultimate aim of law, implicit in most, if not all of the Roman juristic texts,[61] is the realisation of justice in the affairs of men. It is from that aim that Roman law derives its timeless and universal quality, which reflects both the values of the great jurists and the mighty vision of the Byzantine law-giver. It is that aim alone which makes the study of Roman law relevant to all societies at all times. It is that aim which, without more, justifies the study of Roman law by South African law students, now and in the new millennium. Ankum's comment[62] is apposite:

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55 See text to note 38.

56 Barend v D van Niekerk 1975 (1) *Natal Univ LR* 155.

57 Neethling "A vision of South African private law – independent coexistence or reconciliatory synthesis?" 1993 (2) *Codicillus* 60 (hereinafter Neethling). Justice in the new South Africa was the theme of a very recent address by Dr Frene Ginwala, Speaker of Parliament, to the Society of University Teachers of Law in Cape Town on 1996-01-25.

58 Church "Reflections on legal education" 1988 *THRHR* 153. See also Allen *Law in the making* (1964) (hereinafter Allen) 383. The need for visible justice is highlighted by a judicial anomaly which recently and rightly attracted adverse comment in the press: A is convicted of murdering his ex-wife whom he found cohabiting with another man several years after the divorce. A is sentenced to five years' imprisonment on the strength of his "good conduct" during the eighteen months when he was awaiting trial. B is convicted of being in possession of an unlicensed firearm, and is sentenced to six years' imprisonment. Judicial inconsistency of this order (and many similar examples could be cited) will eventually, if unchecked, convince the public that justice is no longer to be had from our courts.

59 Witness, eg, the outcry which greeted the decision in *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A). In that case, the Appellate Division declared by a majority that the *exceptio doli generalis*, the major equitable defence in our law of contract, and a precious inheritance from Roman law, does not form part of our law. In his dissenting judgment, which shines as a beacon of light in the darkness, Jansen JA related the *exceptio* to the sense of justice of the community. The view which his lordship took is in harmony with the one which is championed here, namely that Roman law is a vehicle for the propagation of timeless values of justice and reasonableness, and is not merely a collection of technical rules of positive law. See on the *Bank of Lisbon* decision the comments by Kerr *Principles of the law of contract* (1989) 477–503; Erasmus 671; Neethling 63; Van Reenen 281. For another example of a legal technicality riding roughshod over the equities, see *Boland Bank v Pienaar* 1988 3 SA 618 (A), and Domanski "Mortgage bondage" 1995 *SALJ* 159.

60 See Stoop 183.

61 One striking exception, of course, is the recognition of slavery, discussed below.

62 223. And, in an earlier age, Hugo de Groot (*Epistolae ad Gallos* (1633) CLVI transl Zimmermann v) held that the Roman law is "in itself the most worthy of study, above all national laws . . . So apparent is the equity of that law in its several parts, but especially in

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> "[I]t is fascinating to see how [the classical Roman jurists] applied explicitly and implicitly social values like *aequitas*, *humanitas*, *benignitas* and *utilitas*. If there had not been any reception of Roman law, this excellent way of lawfinding would [still] have led modern jurists to study the *Corpus Iuris Civilis*. The equity and practicability of the legal solutions applied by the classical Roman jurists are of course the main reason for the reception of the Justinian legislation."

The positivist bias which is so prevalent in modern textbooks ensures that the great institutions and juridical concepts of the Roman law are elevated to the status of ends in themselves, instead of being seen for what they are – means to the true end of justice.[63] Is it all surprising, in these circumstances, that such concepts and institutions are, without more, held sufficient[64] to justify the study of Roman law? Is it surprising that the student, confronted by a mass of fragmentary rules divorced from their unifying context of natural law, so often finds the subject technical, tedious and dry?[65]

So much for justice. Indivisibly linked to it is the cognate concept of natural law,[66] which has exerted so profound an influence on mankind. The literature on the subject is vast, and there is little one can add. But something must be said here about the law of nature, if only in order to lay the groundwork for the remainder of this article.

One of the first difficulties which men advancing in civilisation encounter, is the conflict between the law of moral duty ruling in the heart and the laws enacted by public authority which may be inconsistent with that law. The idea is nowhere more impressively stated than in Plato's *Apology*, in which Socrates speaks of himself as being bound to obey the divine will rather than the authorities of the State. Socrates regards this divine will as being directly, though internally, revealed to him by a divine sign and as being recognised by his own conscience as supreme.

There is surely no more authoritative or celebrated formulation of natural law than Cicero's:[67]

> "True law is right reason in agreement with Nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from

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those which pertain to contract and unlawful damage, that it prevails even among those peoples whom the Romans could never conquer by arms, and it does so without any force, triumphing merely by virtue of its innate justice". It is as well though, to sound a cautionary note here about disingenuous appeals to natural equity: see Allen 398 for Quintillian's amusing speech on the subject.

63 See further Bryce 876–877.

64 See, eg, Buckland I 126; Newark 657; Beinart 169; Erasmus 674.

65 Sohm (*Institutes of Roman law* (1907) transl Ledlie (hereinafter Sohm) 32) puts the point well: "[A]s in the abundance of matter we are fain to look for the unifying conception which underlies the whole, so in the abundance of legal rules we instinctively search for the one idea which dominates all. It is the ideal task of jurisprudence to satisfy this desire for unity which exists in the mind of man."

66 *I* 1 1 3 sets out fundamental directives of natural law: *honeste vivere, alterum non laedere, suum cuique tribuere*. The third of these precepts is identical in wording with the definition of justice in *I* 1 1 *pr*.

67 *De Republica* 3 33 (transl D'Entréves). See further Muirhead *Historical introduction to the private law of Rome* (1899) (hereinafter Muirhead) 279–283; Allen 394–7. Maine (*Ancient law* Pollock ed (1920) (hereinafter Maine) 77) puts it thus: "[T]he fundamental conception of natural law [is] that general rules of human conduct are at all times discoverable by human reason as being reasonable."

> wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by Senate or People, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome or at Athens, or different laws now and in the future but one eternal and unchangeable law will be valid for all nations and for all times, and there will be one master and one ruler, that is, God, over us all, for he is the author of this law, its promulgator and its enforcing judge."

This famous passage clearly sets forth the Stoic teaching of the law of nature. Mankind is a universal community. Law is its expression. Being based upon the common nature of man, it is truly universal. Being endorsed by the sovereign Lordship of God, it is eternal and immutable. This teaching passed into the *ius naturale* of the Roman jurists;[68] and when, in later centuries, the Roman Emperors wished to assign a ground for some impending enactment, they commonly spoke of Nature, or Natural Reason, or Humanity, or Equity, using these words almost indiscriminately to describe the same thing. And rightly so, for by Justinian's time, these concepts had long become fully assimilated.[69]

It is hardly surprising, then, that Justinian should have taken the idea of natural law as the cornerstone of his system. The jurists themselves refer to *ius naturale* as the ultimate principle underlying all legal differences, and as the infallible means of reducing those differences to unity.[70]

Perhaps the most striking feature of this passage is Cicero's equation of true law with reason. Natural law is not merely grounded in but actually identified with reason. The same identification is found in the inspiring words of Philo Judaeus, quoted at the head of this article: reason is indeed a fundamental and universal tenet of natural law.[71] It is thus the faculty of reason, inborn in man, which reveals the true or natural law to him. What is reasonable is lawful, what is unreasonable is not. If confirmation of that were needed, Cicero supplies it by affirming that we "need not look outside ourselves for an expounder or interpreter of it".

Cicero speaks also of the imperative quality of natural law: "it summons to duty by its commands, and averts from wrongdoing by its prohibitions". And in the words of Christian Thomasius:[72]

> "Natural law is a Divine law, written in the hearts of all men, obliging them to do those things which are necessarily consonant to the rational nature of mankind, and to refrain from those things which are repugnant to it."

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68 D'Entréves 25–26.

69 Bryce 586 588.

70 *J* 1 2 11; D'Entréves 26.

71 According to Aristotle *Politics* 3 16, the law is reason unaffected by desire. See further Jean Domat *The civil law in its natural order* transl Strahan (1850) Vol 1 (hereinafter Domat) 9 5; Watson *The making of the civil law* (1981) (hereinafter Watson) 7; Bryce 589.

72 *Inst Jurisp Div* 1 2 97, echoing Voet 1 1 1. See also Salmond *Jurisprudence* (1930) 61–63. It sometimes happens that to the direct command of natural law is added the force of legislation: the most striking example in Roman law is, of course, the three precepts set forth in *J* 1 1 3.

The same theme is fundamental to English law: Blackstone's voice[73] is fully in harmony with Cicero's:

> "This law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.
>
> But in order to apply this to the particular exigencies of each individual, it is still necessary to have recourse to reason: whose office it is to discover . . . what the law of nature directs in every circumstance of life; by considering what method will tend the most effectually to our own substantial happiness."

Finally, the treatment of natural law in the foremost institutional work of the Roman-Dutch law[74] is again entirely consonant with the views already considered.

There are those who would have us believe that the conception of natural law is vague, abstract, imprecise and elusive.[75] This, however, is little more than empty positivist propaganda. Bryce[76] reminds us that the law of nature had a pretty definite meaning to the Roman jurists and that they used it in a thoroughly practical spirit. The idea of practical convenience is frequently associated with Nature and Reason in the Roman texts; it was precisely this association that saved the Romans from the great danger that the idea of Nature, as the true guide to the making and interpreting of law, may lead to speculative vagueness.[77] For Nature and Utility, as the classical jurists well knew, are really one, the first being the source of human reason, the latter supplying the grounds on which

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73 Intro 2 41. English law has felt the pervasive influence of natural law to a far greater extent than is generally recognised (see Bryce 599–602). Those who seek constantly to emphasise the differences between the positive rules of the two major Western legal systems, the Roman and the English, should take careful note of the striking similarities between the philosophical foundations of these two systems: points of identity in the institutional works of Justinian and Blackstone will be examined below. We need pay little head to the ludicrous view of Pollock (*Jurisprudence and legal essays* selected by Goodhart (1961) 144) who would have us believe, in relation to the Law of Nature, that "Blackstone made use of it at second or third hand to ornament – though merely to ornament – the introductory chapters of his *Commentaries*". In fact, Blackstone's immortal work rests squarely on foundations of justice and reason. For an accurate and fitting appraisal of Blackstone (and of his petty detractors such as the carping, ranting Bentham), see Lord Denning *What next in the law* (1982) 13–18.

74 Voet 1 1 13–16.

75 The frightening modern loss of historical memory does not stop here: the tendency today is to ignore or even to ridicule the authoritative, historically entrenched teaching which holds that natural law is one, absolute, perennial, immutable, universally valid and identical with human reason. Instead, the thrust of modern juristic opinion, typically relativist in outlook, is that there are many doctrines of natural law and as many ways of being a natural lawyer. See, eg, the review of Finnis's *Natural law and natural rights* by MacCormick 1981 *Oxford J of Legal Studies* 99. There are even writers who, in the face of the soundest authority, deny the very existence of that law. See, for two South African examples, Wessels *History of the Roman-Dutch law* (1908) 291; De Vos *Regsgeskiedenis* (1992) 107–109. On the West's loss of historical memory, see generally Porter "The death of Western civilisation" in the literary supplement to the *Mail and Guardian* 1996-03-15–21.

76 Bryce 556–557.

77 *Idem* 589 591.

reason works.[78] But there is no need to take this on trust: in the second instalment of this article, I shall examine concrete examples of the operation of natural law in the Roman legal texts.

Rommen[79] says of the classical authors of the *Corpus iuris civilis* that "it is not merely in passing that we meet with natural law in their writings: the natural law is there pronounced valid, unconditionally binding law". Yet few modern writers of textbooks on the Justinianic Roman law have the grace to acknowledge the all-pervasive influence of natural law on that system. For the most part, they betray their positivist bias by relegating the subject of natural law to a discrete, and usually short, section or chapter. Their treatment of the subject is often cursory and perfunctory, if not dismissive. One can almost hear the sign of relief once the topic has been disposed of; the writer then feels at liberty to devote himself entirely to the technical rules of the positive law.[80]

This article, by contrast, calls for integral teaching which measures and weighs up every rule in the light of the governing values of reason and justice. Only in this way can the relevance of Roman law for all ages, our own included, be placed beyond challenge.

There are those who would deny the need to yoke the study of Roman law to these values. In this age, we have all but lost the sense of the essential divinity of man. In its place we have installed a secular human rights culture which in many countries is enshrined in a democratic constitution. We consider that such a dispensation will ensure freedom and equality for all. Perhaps it will. Indeed, in the closing years of this millennium, South Africa's new constitutional order holds out great hope and promise to its peoples. But a rude awakening awaits those naive enough to believe that we can now safely discard natural law and its attendant values as historical curiosities. Here is a very recent judicial statement:[81]

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78 *Idem* 593. Lawson in Balsdon (ed) *Roman civilisation* (1969) 103 (hereinafter Lawson II) 119–120 expresses the point well: "Perhaps the greatest contribution made by Roman law to world civilisation has been its demonstration that it is possible to construct a body of law upon a basis of common sense that can be accepted by different peoples at different stages of their development. It has been said that the difficulty with natural law is to get any detail into it. But this is what ... the Romans achieved by a converse process, by working out in ample detail the common-sense implications of certain institutions and gradually getting rid of the less rational elements in their law. Moreover they extended what had been the law for the citizens of a small city state to all the inhabitants of a large empire, irrespective of the language, literature or religion in which they had been nurtured. Roman law could not have become the universal law of the Mediterranean world without also becoming rational ..." See also Voigt *Das Just naturale ... der Römer* 341 quoted by Muirhead 283.

79 *The natural law* (1947), quoted by Brown (ed) *The natural law reader* (1960) (hereinafter Brown) 64.

80 Voet fares little better than Justinian at the hands of modern writers. Most are willing to invoke and follow Voet, as the foremost institutional writer on the Roman-Dutch law; willing, that is, so long as he confines himself to rules of positive law. But seldom is mention made of the opening title of Voet's *Commentarius ad Pandectas*, in which (1 1 13–16) he sets forth the philosophy of natural law upon which his great work rests. In those early pages, he tells us plainly that natural law exists and, crucially, that it is the touchstone for the validity of all man-made law. This is often curiously and conveniently forgotten. One is almost driven to suspect a conspiracy of silence!

81 Per Friedman JP in *Baloro v University of Bophuthatswana* 1995 4 SA 197 (BSC) 244D–F. In this passage we have, yet again, striking confirmation of the enduring, immutable

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> "Clearly the Constitution does not operate mechanically. It has to be administered and applied. Therefore the Courts and Judges are instruments that must put the law into effect. The activity of Judges will not only be confined to the interpretation of existing laws, but they will be obliged to engage in the more creative activity of generating new laws in terms of s 35,[82] which gives to the Courts in South Africa a greater and more extensive power than the Courts in the United States. This aspect becomes important if the Courts are of the view that the existing law is felt to be 'unjust, ambiguous, inefficient or simply obsolete due to changing circumstances'. Section 35 gives Judges an almost plenipotentiary judicial authority to decide according to a sense of natural justice; 'equity', '*jus naturale*', '*aequitas*' all being enshrined in the Constitution."

Our new Constitution notwithstanding, South Africa today is a country plagued by ethnic conflict, disease, fear, prejudice, ignorance, affluence alongside extreme poverty, the growing incidence of drug abuse, widespread dishonesty and corruption, and perhaps the highest incidence of crime on the planet.[83] It is precisely here that natural law with its attendant values has much to offer us. And in a civil law system such as ours, the obvious vehicle for the transmission of those values is the study of Roman law.

Blackstone[84] considered the study of natural law, as enshrined in the Justinianic texts, to be the finest foundation for the study of English law:

> "[If the law student] has impressed on his mind the sound maxims of the law of nature, the best and most authentic foundation of human laws; if ... he has contemplated those maxims reduced to a practical system in the laws of imperial Rome; if he has done this or any part of it, a student thus qualified may enter upon the study of the law with incredible advantage and reputation."

There is a proviso, however: Roman law can impress these maxims on the mind of the student only if it is taught by the proper method. More of that anon.

The objection may still be raised that we do not need Roman law to perform this function for us: some university law curricula include a course in legal ethics, designed to impress upon aspirant attorneys and advocates the importance of honest, upright conduct in legal practice. Such courses have, on the whole, failed dismally: witness the cancer of malpractice, dishonesty, corruption, subterfuge and concealment that infests the legal profession, here and elsewhere.[85] These academic courses have failed because, in general, they treat legal ethics as a separate, discrete subject of peripheral importance, divorced from the mainstream of the positive law. By contrast, in the Roman law of Justinian,

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quality of natural law – of what D'Entréves 27 describes as the "perfectly continuous history of that doctrine". Of course, while the values and principles of natural law never change, their application can and must be adapted to meet the particular needs of time and place.

82 Of the Constitution of the Republic of South Africa Act 200 of 1993.

83 A recent Business Initiative Against Corruption and Crime, attended by President Mandela, attracted front-page headlines. One report (*The Star* 1995-08-16) read: "A major business initiative ... painted a picture of South Africa ridden with crime, and warned that only 'shock treatment' could save the country from disaster." More recently still, the Commissioner of Police was reported by national television as saying that South Africa is in danger of becoming a "gangster state".

84 Intro 1 33.

85 For a recent and comprehensive survey of legal malpractice in the United States, see Ramos 1994 *Vanderbilt LR* 1657.

principles of natural law are seamlessly interwoven with rules of positive law so as to produce a single, homogeneous whole. That is the vital difference, one which will be more fully explored below.

Given the high incidence of crime in this country, the extent of unethical conduct by lawyers, often shielded from public scrutiny by the law societies, is especially alarming. In a situation where the legal profession should be setting an example of probity and upright conduct, what do we find? Here is a very small selection of recent press captions which speak for themselves: "Law society covers up scandal over bribes";[86] "It's time to curb the wanton excesses of crooked lawyers";[87] "Law Society slated for secret hearings";[88] "Legal honour remains fiction";[89] "Of course law societies care – about looking after themselves".[90] And yet, in the face of this damning evidence, we continue to assume that aspirant lawyers know that thou shalt not steal thy client's money.[91] How naive!

It may be politically incorrect, it may even smack of a moral crusade, to assert that law students must be taught the vital importance of honesty, integrity, and fairness in legal practice. Yet our students do need to hear and digest these words before they are permitted to turn their attention to the technicalities of the law. And the need is urgent. If law schools fail in this duty, if they do no more than produce graduates who are brilliant and successful legal technicians, then they betray the country and the community. And the scenario sketched above suggests that, on the whole, they have indeed failed. To measure the value of knowledge in terms of its utility for the acquisition of wealth or material success is to overlook completely the chief purpose of all education, namely the development of character as well as of intellect.[92]

The answer, then, to the first question posed in this article is that we should continue to teach Roman law to our students[93] because, if correctly taught, it is

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86 Front-page headline in the *Sunday Times* 1995-08-13.

87 *Weekend Star* 1995-03-25–26.

88 *Weekend Star* 1995-04-29–30.

89 *Sunday Times* 1994-02-24.

90 *The Star* 1994-11-22.

91 There are, however, signs that the profession, notoriously resistant to change in the past, is at last beginning to sit up and take notice. Here is an extract from a recent editorial in the South African attorneys' journal (1995 *De Rebus* 387): "There appears to have been a fairly rapid growth, in recent years, in the numbers of complaints made by disgruntled clients to the law societies. While the reasons for this regrettable state of affairs are beyond the scope of this article, it must be stated that prevention is better than cure. In this connection the importance of education in ethics at pre-admission level can hardly be overstated . . ."

92 Sherman 1911 *Univ of Penn LR* 196. See also Duff 1947 *Tul LR* 2 (hereinafter Duff) 9.

93 Here is the recent voice of an American law student (Hogerty "Reflections at the close of three years at law school: a student's perspective of the value and importance of teaching Roman law in modern American law schools" 1992 *Tul LR* (hereinafter Hogerty) 1889): "Offering a course in Roman law is the right, logical thing to do. Refusing to offer a Roman law course or accept it as legitimate is similar to the Athenians putting Socrates to death: a hasty, irrational act that in the end harms the students most of all. It is true that knowledge of Roman law is not required to become a practising lawyer today, but it will produce better lawyers. The significance of Roman law rests, as Sir Henry Maine reminded us, in 'the immensity of the ignorance to which we are condemned by ignorance of Roman law'."

pre-eminently capable of nourishing in them the noble qualities of justice and truth, of which our society stands so greatly in need today.[94] These qualities are not the exclusive preserve of any nation, culture or age. They are universal; they are Afrocentric as much as they are Eurocentric. They lend to the study of Roman law a relevance which is beyond challenge. In other words, if the teaching of Roman law is to survive, there has to be nothing less than a radical shift in emphasis from the letter to the spirit, from the technical to the ethical content of the law. The effect of such a change would be no more than to bring our perspective of the Roman law into alignment with Justinian's own vision.

I turn now to consider the method by which Roman law ought to be taught in order to realise this objective.

(*To be continued*)

94 The highly positive and practical role envisaged here for Roman law cannot be reconciled with Lawson's gloomy verdict (Lawson II 25–26). That writer – and he is not alone – maintains that the study of Roman law is now purely academic: he doubts whether any more help can be got from Roman law in the solution of modern problems.

Die begrip *ooreenkoms* – 'n bydrae tot die teorie van regsfeite*

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SUMMARY

The concept of agreement – a contribution to the theory of legal facts

An in-depth analysis of the concept of agreement has never been attempted in South African jurisprudence. An understanding of this concept has both theoretical and practical benefits. In this article the concept is examined as part of the theory of legal facts. South African jurisprudence generally accepts and uses this theory, in terms of which legal facts are grouped together when they have a common characteristic or characteristics. This method is used to discover the common characteristics of the group called agreements. The following five distinguishing characteristics of the agreement are identified and discussed: (1) Two or more expressions of will must correspond; (2) the expressions of will must be directed at the causing of legal consequences as well as the contents of the legal consequences; (3) there must be at least two independent legal persons; (4) the corresponding expressions of will must be interdependent; and (5) the legal consequences must predominantly concern the regulation of the individual relationship between the parties to the agreement and not relate exclusively to third parties.

1 INLEIDING

Die begrip *ooreenkoms* kan verskeie betekenisse dra. Die wese van hierdie begrip is nog nie in die Suid-Afrikaanse regswetenskap diepgaande ondersoek nie en die doel van hierdie artikel is om hiermee 'n begin te maak.

Hoewel begrippe in die regswetenskap 'n baie belangrike rol as hulpmiddels vervul, moet gewaak word teen die verval in 'n *Begriffsjurisprudenz* wat daaruit bestaan dat regsbegrippe losgemaak word van die regswerklikheid om sodoende daaraan 'n selfstandige bestaansreg los van die regswerklikheid te verleen.[1] 'n Begrip moet doelmatig en funksioneel wees.[2] Dit beteken dat 'n begrip na

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* Hierdie artikel is 'n verwerking van hfst 1 van die outeur se proefskrif getiteld *Die owerheidsooreenkoms – 'n administratiefregtelike ondersoek* (Unisa 1994).

1 Van Dijk ea *Van Apeldoorn's Inleiding tot de studie van het Nederlandse recht* (1985) 439; Joubert "Die realiteit van die subjektiewe reg en die betekenis van 'n realistiese begrip daarvan vir die privaatreg" 1958 *THRHR* 12; Baxter "'The state' and other basic terms in public law" 1982 *SALJ* 222.

2 Baechi "Verwaltungsakt auf Unterwerfung, zweiseitiger Verwaltungsakt oder Vertrag?" 1934 *ZöffR* 66; Jedlička *Der öffentlich-rechtliche Vertrag im Verwaltungsrecht* (proefskrif Zürich 1928) 34; Meijers *Algemene leer van het burgerlijk recht* 1 (1958) 207; Joubert 1958 *THRHR* 12; Rill *Gliedstaatsverträge* (1972) 3.

konkrete verskynsels in die regswerklikheid moet verwys[3] en ook dat die begrip 'n goeie sistematisering van die voorhande regsverskynsels moontlik moet maak.[4] Dit sou dus ondoelmatig wees om 'n begrip so eng te omskryf dat slegs enkele regsverskynsels daaronder tuisgebring kan word. Insgelyks sou dit ook ondoelmatig wees om 'n begrip so wyd te omskryf dat te veel uiteenlopende regsverskynsels daaronder betrek word.

By die analise van die begrip *ooreenkoms* sal aangesluit word by die verskillende ooreenkomste wat in die privaatreg onderskei word. Die verbintenisskeppende ooreenkoms (kontrak) is die belangrikste verskyningsvorm van ooreenkomste in die privaatreg.[5] Daarnaas word die skulddelgende,[6] saaklike[7] en familieregtelike ooreenkoms[8] onderskei. Die sluiting van 'n huwelik en 'n huweliksvoorwaardeskontrak is voorbeelde van die familieregtelike ooreenkoms.[9]

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3 Baechi 1934 *ZöffR* 62; Kormann *System der rechtsgeschäftlichen Staatsakte* (1910) 11–12; Manigk *Das rechtswirksame Verhalten* (1939) 9 15 25; Walz "Die 'Vereinbarung' als Rechtsfigur des öffentlichen Rechts" 1931 *AöR* 161 202; Vogel *Vertrag und Vereinbarung* (1932) 2–3; Van der Merwe "Die duiwel, die hof en die wil van 'n kontraktant" (hierna *Die wil*) in Gauntlett (red) *JC Noster – 'n feesbundel* (1979) 14; Joubert 1958 *THRHR* 12; Ross "On the concepts 'state' and 'state organs'" 1961 *Scandinavian Studies in Law* 113; Von Tuhr *Der Allgemeine Teil des Deutscher bürgerlichen Rechts* bd 2 1ste helfte (1957) 143 vn 2; Flume *Allgemeiner Teil des bürgerlichen Rechts* bd 2 (1965) 23; Van der Hoeven *De magische lijn* in *Honderd Jaar Rechtsleven. De Nederlandse Juristen-Vereniging 1870–1970* (1970) 203–204; Van der Woude "Is een Wetboek van de Arbeid (Sociaal Wetboek) gewenst" 1969 *NJB* 113 119. Die vraag na wat die regswerklikheid behels, word ter syde gelaat omdat dit vir doeleindes van begripsvorming in die Suid-Afrikaanse regswetenskap voldoende is om die huidige Suid-Afrikaanse positiewe reg as die regswerklikheid te beskou. Vir 'n wyer beskouing van die regswerklikheid sien Joubert 1958 *THRHR* 12 vn 1.

4 Meijers *Algemene leer* 23 207; Joubert 1958 *THRHR* 12; Van der Woude 1969 *NJB* 119.

5 Sien bv De Wet en Van Wyk *Die Suid-Afrikaanse kontraktereg en handelsreg* vol 1 (1992); Christie *The law of contract in South Africa* (1991); Kerr *The principles of the law of contract* (1989); Joubert *General principles of the law of contract* (1987); Lubbe en Murray *Farlam and Hathaway: Contract. Cases, materials and commentary* (1988); Van der Merwe ea *Contract. General principles* (1993).

6 De Wet en Van Wyk *Kontraktereg* 5; Nienaber "Cession" in 2 (1993) *LAWSA* par 228; Hosten ea *Introduction to South African law* (1995) 760; Lubbe en Murray *Contract* 19.

7 De Wet en Van Wyk *Kontraktereg* 5; Cronjé *Eiendomsvoorbehoud by 'n huurkoopkontrak van roerende sake* (LLD-proefskrif RAU 1977) 117–176; Scott "Sessie en die saaklike ooreenkoms" 1979 *TSAR* 48; Nienaber "Cession" par 228; Van der Merwe *Sakereg* (1987) 16–17; Hosten ea *Introduction* 638 vn 83; Lubbe en Murray *Contract* 19.

8 De Wet en Van Wyk *Kontraktereg* 5; Lubbe en Murray *Contract* 19.

9 Die sluiting van 'n huwelik word deur sommige skrywers beskou as 'n gewone kontrak (verbintenisskeppende ooreenkoms) – Hahlo *The South African law of husband and wife* (1985) 21–22; Hunt "Error in the contract of marriage" 1962 *SALJ* 423; Aquilius "Engelbrecht's case v Willenberg's case" 1944 *SALJ* 239. Hierdie beskouing is egter nie korrek nie omdat die regsgevolge naas gewone verbintenisse ook gevolge insluit wat nie in terme van subjektiewe regte en verpligtinge uitgedruk kan word nie (die sg *consortium omnis vitae*) – Erasmus ea *Family and succession* (1983) 15 40–43 48–50; Hahlo *Husband and wife* 22; Hosten ea *Introduction* 582; Christie *Contract* (1991) 106; Aquilius 1944 *SALJ* 239. Die ander onderskeide wat voorgestel word deur Lubbe en Murray *Contract* 19 is nie wesenlik nie. Huweliksluiting is wel 'n ooreenkoms omdat wilsooreenstemming 'n vereiste is – De Wet en Van Wyk *Kontraktereg* 5. Hahlo *Husband and wife* 258 278–279 beskou die huweliksvoorwaardeskontrak as 'n verbintenisskeppende ooreenkoms. Ander weer beskou dit as 'n ooreenkoms sonder om presies aan te dui watter soort ooreenkoms hulle daarmee bedoel – Erasmus ea *Family* 104; *Enyati Resources Ltd v Thorne* 1984 2 SA 551 (K). 'n Huweliksvoorwaardeskontrak is nie 'n verbintenisskeppende ooreenkoms nie maar

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Daarteenoor het die administratiefregtelike en staatsregtelike ooreenkoms nog min aandag in die Suid-Afrikaanse regswetenskap geniet.[10]

Daar is egter 'n gevaar verbonde daaraan om die privaatreg as vertrekpunt te gebruik by die vasstelling van die onderskeidingskenmerke van die begrip *ooreenkoms*, omdat die unieke eienskappe wat die ooreenkoms in die privaatreg het maklik verhef kan word tot onderskeidingskenmerke van die begrip *ooreenkoms*.[11] Dit kan daartoe lei dat die begrip aan sy nuttigheid inboet of dat daar selfs tot die gevolgtrekking gekom word dat die begrip geensins aanwendbaar is by die bestudering van die publiekreg nie.

By die analise van die regsbegrip *ooreenkoms* sal verder regsvergelykend te werk gegaan word.[12] Die Duitse en Nederlandse regswetenskap is veral hier van belang omdat hulle reeds uitvoerige studies oor die onderskeidingskenmerke van die ooreenkoms en die toepasbaarheid daarvan in die publiekreg onderneem het. As subspesie van die regshandeling het die begrip immers veral vanaf die agtiende eeu aandag gekry in die Duitse regswetenskap wat weer wêreldwyd inslag gevind het, ook in Suid-Afrika.[13]

Benewens die vanselfsprekende teoretiese en sistematiese waarde wat die vasstelling van die onderskeidingskenmerke van die *ooreenkoms* het, het dit ook praktiese waarde by die oplossing van die volgende onderskeide wat in die regspraak voorkom:

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wel 'n familieregtelike ooreenkoms, want dit reël naas die skep van verbintenisse ook familieregtelike status en erfregtelike aangeleenthede – Hahlo *Husband and wife* 258; Cronjé *Persone- en familiereg* (1990) 288. 'n Verlowing is egter 'n *sui generis* kontrak – Hahlo *Husband and wife* 45–63.

10 Vir skrywers wat wel die publiekregtelike en meer bepaald die administratief- en staatsregtelike ooreenkoms ken, sien D'Oliviera *State liability for the wrongful exercise of discretionary powers* (LLD-proefskrif Unisa 1976) 7 39 vn 90 482; Hahlo en Kahn *The South African legal system and its background* (1968) 101 vn 14; Wiechers *Die sistematiek van die administratiefreg* (LLD-proefskrif UP 1964) 170–171, *Administratiefreg* (1984) 63 130–136; Van Wyk *Persoonlike status in die Suid-Afrikaanse publiekreg* (LLD-proefskrif Unisa 1979) 320–322 357; Floyd *Owerheidsooreenkoms*, "Pre-independence agreements between South Africa and the Black Homelands" 1980 *SAYIL* 91–92; Lowe "Bophuthatswana agreements. International treaties or binding legislation?" 1982 *De Rebus* 470; Booysen "A survey of legal relations flowing from state agreements" 1984 *SAYIL* 80–90, *Volkereg en sy verhouding tot die Suid-Afrikaanse reg* (1989) 414–417; Ferreira "Enkele gedagtes oor die onderskeid tussen publiek- en privaatreg in die Suid-Afrikaanse reg" 1990 *SA Publiekreg* 63. Ander skrywers oor ooreenkomste noem egter nie eers die moontlikheid dat ooreenkomste in die publiekreg kan voorkom nie – De Wet en Van Wyk *Kontraktereg* 5–6; Nienaber "Cession" par 228. Die administratief- en staatsregtelike ooreenkoms is ook onbekend in die regspraak.

11 Jedlička *Der öffentlich-rechtliche Vertrag* 39; Baechi 1934 *ZöffR* 69–73; Floyd *Owerheidsooreenkoms* 36–37. Dit geld veral die kenmerke van die privaatregtelike kontrak.

12 Burckhardt "Der Vertrag im Privatrecht und im öffentlichen Recht" in *Festgabe zur Feier des Fünfzigjährigen Bestehens dem Schweizerischen Bundesgerichte* (1924) 2 gaan selfs so ver as om die ooreenkoms as 'n universele regsbegrip te beskou wat in alle regstelsels aanwending vind.

13 Flume *Allgemeiner Teil* 28–31; Cronjé *Eiendomsvoorbehoud* 126–130; Ferid *Das französische Zivilrecht* (1971) 239–244; Van der Merwe *Die wil* 15 en die skrywers deur hom aangehaal in vn 11; Hahlo en Kahn *Legal system* 100–101; *Potter v Rand Township Registrar* 1945 AD 277 287; *Frankel's Estate v The Master* 1950 1 SA 220 (A) 249; *LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd* 1974 1 SA 747 (A) 762; *Preller v Jordaan* 1956 1 SA 483 (A) 496 499 503.

(a) Die onderskeid tussen kontrak en beskikking[14] val grotendeels saam met die onderskeid tussen die ooreenkoms en ander meersydige regshandelinge.

(b) 'n Onderskeid kan gemaak word tussen ooreenkomste met regsgevolge en buitegeregtelike ooreenkomste.[15]

(c) Ooreenkomste en huishoudelike wetgewing (soos die kollektiewe arbeidsooreenkoms)[16] kan van mekaar onderskei word.

Die howe is onbekend met die ooreenkomste in die publiekreg en toets slegs of 'n skynbaar meersydige publiekregtelike regshandeling 'n privaatregtelike kontrak is.[17] Hierdie werkswyse is onbevredigend aangesien dit duidelik is dat ooreenkomste ook in die publiekreg voorkom.[18] Die staatsregtelike en administratiefregtelike ooreenkoms is die belangrikste verskyningsvorme van sulke ooreenkomste. Indien die howe die bestaan van publiekregtelike ooreenkomste erken, kan dit daartoe lei dat hulle die kontraktuele reëls wat op wilsooreenstemming toegepas word ook met die nodige wysigings op publiekregtelike ooreenkomste toepas. 'n Deeglike begrip van die onderskeidingskenmerke van die *ooreenkoms* sal tot so 'n erkenning bydra.

2 DIE VERSKILLENDE BETEKENISSE VAN DIE BEGRIP *OOREENKOMS*

2 1 Die nie-juridiese gebruik van die begrip *ooreenkoms*

Die begrip word dikwels in 'n nie-juridiese betekenis gebruik wat tot verwarring kan lei indien dit ook in dieselfde betekenis in die regswetenskap aanwending vind.[19] Hierdie verskynsel doen hom veral in die staats- en regsfilosofie voor. 'n Voorbeeld is die begrip *sosiale kontrak*.[20] Die gebruik van die regsbegrip

14 *Tutu v Minister of Internal Affairs* 1982 4 SA 571 (T); *Mossel Bay Municipality v Ebrahim* 1952 1 SA 567 (K); *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 3 SA 498 (K) (1971 4 SA 522 (K)); *Transvaalse Raad vir die Ontwikkeling van Buite-Stedelike Gebiede v Steyn Uitzicht Beleggings (Edms) Bpk* 1977 3 SA 351 (T); *De Vroeg v Stadsraad van Randburg* 1970 2 SA 132 (T); *Ritch v Union Government (Minister of Justice)* 1912 AD 719; *Minister of Lands v Poort Sugar Planters (Pty) Ltd* 1963 3 SA 352 (A); *Administrator (Transvaal) v Industrial & Commercial Timber & Supply Co Ltd* 1932 AD 25; *City Council of Johannesburg v Ferreira Estate Co Ltd* 1939 WLD 256; *Administrator, Cape Province v Ruyteplaats Estates (Pty) Ltd* 1952 1 SA 541 (A) 551; *Permanent Estate and Finance Co Ltd v Johannesburg City Council* 1952 4 SA 249 (W); *Estate Breet v Peri-Urban Areas Health Board* 1955 3 SA 523 (A); *Attorney-General OFS v Cyril Anderson Investments (Pty) Ltd* 1965 4 SA 628 (A); *Oertel v Director of Local Government* 1981 4 SA 491 (T); *Peri-Urban Areas Health Board v Estate Breet* 1954 1 SA 451 (T); *Basson v Postmaster-General* 1994 3 SA 224 (OK).

15 Sien die regspraak in vn 83 *infra*.

16 *S v Prefabricated Housing Co (Pty) Ltd* 1974 1 SA 535 (A); *National Union of Textile Workers v Nouwens Carpets (Pty) Ltd* (1988) 9 ILJ 478 (NH); *Consolidated Frame Cotton Co v Minister of Manpower* 1985 1 SA 191 (D); *Nouwens Carpets (Pty) Ltd v National Union of Textile Workers* 1989 2 SA 363 (N).

17 Sien die sake aangehaal in vn 14 *supra*.

18 Sien die skrywers in vn 10 *supra*.

19 Feenstra en Ahsmann *Contract* (1980) 1; Walz 1931 *AöR* 161.

20 Gough *The social contract* (1963); Rahmsdorf "Zur Renaissance der Sozialvertragstheorien in den Wirtschaftswissenschaften und ihrer interdisziplinären Relevanz" 1986 *Der Staat* 269; Feenstra en Ahsmann *Contract* 31; Kriek "Federal forms of government" in Van Vuuren en Kriek (reds) *Political alternatives for Southern Africa. Principles and perspectives* 173; Jolowicz *Der öffentlich-rechtliche Vertrag im*

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stilswyende ooreenkoms, ter verklaring van sowel die gelding van die gewoontereg as die aanvanklike gelding van die Romeins-Hollandse reg as gemenereg in Suid-Afrika,[21] is voorbeelde van die gebruik van die begrip in 'n nie-juridiese betekenis. Die begrip *ooreenkoms* word ook dikwels gebruik in die betekenis van 'n sosiale verskynsel of verhouding.[22] 'n Voorbeeld hiervan is die algemene gebruik van die begrip *gentlemen's agreement* om 'n kontrak aan te dui waar die partye nie die bedoeling het om enige regsgevolge te skep nie.[23]

2 2 Die juridiese gebruik van die begrip *ooreenkoms*

In die spraakgebruik van die regspraktyk en -wetenskap word drie betekenisse geheg aan die begrip *ooreenkoms*:

(a) Die sluiting van 'n ooreenkoms, dit wil sê die regshandeling self.[24]

(b) Die regsverhouding wat tussen die partye tot die ooreenkoms tot stand kom.[25]

(c) Die fisiese dokument wat deur die partye opgestel word as bewys daarvan dat hulle die regshandeling verrig het, of as regshandeling self.[26]

Verwaltungsrecht (proefskrif Zürich 1928) 76–93; Wiechers *Verloren van Themaat Staatsreg* (1981) 19–20. Die kern van die kritiek teen hierdie gebruik van die begrip *ooreenkoms* is: "Political theory has always, and naturally, borrowed much of its phraseology from law, and seeing that the essence of both the social contract and the ordinary civil contract consists in there being mutual and reciprocal agreements between two (or more) parties, with rights and obligations on both sides, an easily intelligible analogy led to the word 'contract' being used for its political counterpart" – Gough *The social contract* 5.

21 Van der Vyver "Die regsbegrip" 1962 *THRHR* 10.

22 Rutten *Asser's handleiding tot het beoefening het Nederlands burgerlijk recht. Verbintenissenrecht. Deel 2. Algemene leer der overeenkomsten* (1982) 15; Hartkamp *Asser's handleiding tot het beoefening het Nederlands burgerlijk recht. Verbintenissenrecht. Deel 2. Algemene leer der overeenkomsten* (1993) 12; Ruppert *Der öffentlichrechtliche Vertrag im Verwaltungsrecht* (proefskrif Würzburg 1935) 6–7; Buddeberg "Rechtssoziologie des öffentlich-rechtlichen Vertrages" 1925 *AöR* 123; Reinach *Die aprioristischen Grundlagen des bürgerlichen Rechtes* (1922) 688; Gitzinger *Verwaltungsakt auf Unterwerfung antragsbedingter Verwaltungsakt oder öffentlichrechtlicher Vertrag – Ein Beitrag zur systematik mitwirkungsbedürftiger Staatsakte* (proefskrif Saarland 1963) 20; Steffen *Der öffentlichrechtliche Vertrag im heutigen Recht* (1938) 15–16; Stern "Zur Grundlegung einer Lehre des öffentlich-rechtlichen Vertrages" 1958 *VerwArch* 122–124.

23 Sien die teks tussen vn 83 en 84 *infra*.

24 Rutten *Overeenkomsten* 15; Hartkamp *Overeenkomsten* 9; Corbin "Offer and acceptance and some of the resulting legal relations" 1917 *YLJ* 169; Bloembergen en Kleyn (reds) *Contractenrecht* hfst 1 par 19; Schut *Rechtshandeling, overeenkomst en verbintenis volgens BW en NBW* (1987) 46; *Preller v Jordaan supra* 499; Foulkes *Administrative law* (1990) 413. Sommige skrywers stel die ooreenkoms gelyk aan wilsooreenstemming wat in werklikheid 'n element van die regshandeling is. Sien teks tussen vn 57 en 58 *infra*. Schut *Rechtshandeling* 46–47 onderskei tussen die handeling, die inhoud van dit waarop ooreengekom is (die afspraak) en die regsverhoudings wat daaruit ontstaan (die verbintenis). Hy meen dat die handeling gou afloop terwyl die afspraak langer betekenis het. Daarom behoort die afspraak die betekenis van *ooreenkoms* te dra.

25 Rutten *Overeenkomsten* 15; Hartkamp *Overeenkomsten* 9–10; Corbin 1917 *YLJ* 169; Treitel *The law of contract* (1991) 3–4; Bloembergen en Kleyn *Contractenrecht* hfst 1 par 19; Schut *Rechtshandeling* 46; Labuschagne *Staatskontrakte ter verkryging van goedere, dienste en werke* (LLD-proefskrif Unisa 1985) 7; *Preller v Jordaan supra* 499; Foulkes *Administrative law* 413. Dit word ook ooreenstemmend in die betekenis van die afspraak gebruik (inhoud waarop ooreengekom is) – Hartkamp *Overeenkomsten* 9–10.

26 Corbin 1917 *YLJ* 169; De Vos "Mistake in contract" 1974 *Acta Juridica* 177 187.

Die regsbegrip *ooreenkoms* word dikwels in dieselfde stuk in al drie betekenisse gebruik sonder om dit duidelik te stel welke betekenis dit telkens dra. Veral die betekenisse as regsverhouding en regshandeling word om die beurt gebruik sonder om aan te dui welke betekenis in die spesifieke geval bedoel word.[27] Dit kan maklik tot verwarring lei.[28]

Die vraag is nou welke betekenis as die primêre beskou kan word. Hiermee word geensins te kenne gegee dat die ooreenkoms slegs een betekenis mag hê nie. Die betekenis van ooreenkoms as die fisiese dokument is wel vatbaar vir kritiek want die fisiese dokument kan nooit self die ooreenkoms uitmaak nie; dit is slegs 'n bewys of weergawe van die ooreenkoms.[29] Die verskil tussen die betekenis van die ooreenkoms as handeling en as regsverhouding kom duidelik na vore as gelet word op die teorie van regsfeite.

Regsteoretici probeer met hierdie teorie die werking van regsreëls verklaar en uiteensit.[30] Hulle sluit aan by die waarneming dat die objektiewe reg gewoonlik die samelewing orden deur middel van abstrakte regsreëls wat algemene gelding het en wat nie konkrete, individuele gevalle reël nie. Die werking van 'n regsreël word afhanklik gestel van die bestaan van feite, gebeurtenisse, omstandighede of toestande wat regsfeite genoem word. Indien die vereiste elemente van die regsfeit voorhande is, koppel die reg sekere gevolge aan die regsfeit en die gevolge word regsgevolge genoem.[31] Die onderskeid tussen regsfeit en regsgevolg stem ooreen met die betekenisse van die ooreenkoms as handeling en as regsverhouding.

Die regsbegrip *ooreenkoms* het dan die betekenis van regsfeit vir regsteoretici wat hul met die teorie van regsfeite besig hou.[32] Hierdie betekenis kan dan ook as die primêre betekenis beskou word, omdat 'n onderskeid tussen ooreenkomste en ander regsfeite dan moontlik is.[33] Daar is egter 'n behoefte in die praktyk om van nietige ooreenkomste ('n ooreenkoms wat geen regsgevolge het nie omdat een van die elemente van die regsfeit ontbreek) te praat.[34] Sodanige ooreenkomste is eintlik geen ooreenkomste nie.

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27 Holland *The elements of jurisprudence* 260; Paton *A textbook of jurisprudence* (1972) 319 437; Baechi 1934 *ZöffR* 76; Benkö *Der Steuervertrag* (proefskrif Zürich 1931) 28 91; Jedlička *Der öffentlich-rechtliche Vertrag* 3 23 42; Bloembergen en Kleyn *Contractenrecht* hfst 1 par 19.

28 Baechi 1934 *ZöffR* 75–76. Die eienskappe van die regsgevolge van veral die privaatregtelike kontrak word maklik verhef tot wesenseienskappe van die regsfeit *ooreenkoms* – Floyd *Owerheidsooreenkoms* 36–37.

29 De Vos 1974 *Acta Juridica* 187; De Wet en Van Wyk *Kontraktereg* 30 vn 91.

30 Von Tuhr *Der Allgemeine Teil* 3–6; Manigk *Das rechtswirksame Verhalten* 1; Steenbeek *Rechtshandeling* 12–14; Suijling *Inleiding tot het burgerlijk recht* bd 1 (1948) 299; Minas Von Savigny *Ein Beitrag zur Rechtssatz- und Konkurrenzlehre* (1972) 8; Hahlo en Kahn *Legal system* 100–103; Wolf *Allgemeiner Teil des bürgerlichen Rechts* (1973) 201–203; Wolff "Der Unterschied zwischen öffentlichem und privatem Recht" 1950 *AöR* 208.

31 Daar word in hierdie verband onderskei tussen die regsreël en die regsnorm wat dit bepaal – Wolf *Zur Methode der Bestimmung von privatem und öffentlichem Recht* in *Festschrift für Erich Molitor zum 75. Geburtstag 3 Oktober 1961* (1962) 13. Die regsnorm lui: indien 'n regsfeit aanwesig is, tree die regsgevolge in.

32 Sien bv Hahlo en Kahn *Legal system* 101; Rutten *Overeenkomsten* 4; Hartkamp *Overeenkomsten* 4; Bloembergen en Kleyn *Contractenrecht* hfst 1 par 3 19; Paton *Jurisprudence* 437.

33 Kelsen Boekbespreking 1919 *ZöffR* 165 167; Rutten *Overeenkomsten* 14–26; Hartkamp *Overeenkomsten* 9–14.

34 Cronjé *Eiendomsvoorbehoud* 133–134; Christie *Contract* (1991) 2 vn 6; Van Rensburg ea "Contract" 5 (1979) *LAWSA* par 110 vn 1.

Daarteenoor is daar skrywers wat van mening is dat die betekenis as regsverhouding voorkeur behoort te geniet.[35] Hierdie beskouing is verkeerd omdat die regsgevolge van die verskillende soorte ooreenkomste so uiteenlopend van aard is dat geen gemeenskaplike kenmerk(e) gevind sal kan word om ooreenkomste te onderskei van ander regsfeite nie.[36] Die betekenis as regsverhouding kan dus nie die primêre betekenis wees nie. Dit is wel die sekondêre betekenis van ooreenkoms want dit is 'n erkende gebruik in die kontraktereg om van die *nietigverklaring van 'n kontrak, kontrakbreuk* en *terugtrede uit 'n kontrak* te praat. Daar is selfs 'n opvatting dat ooreenkoms beide betekenisse moet dra sonder dat voorkeur aan een verleen word.[37]

Dikwels word aan die begrip *ooreenkoms* eienskappe toegedig wat afkomstig is van beide die regsfeit en die regsgevolg.[38] Dit lei tot 'n onnodige beperking van die aanwendingsgebied van die regsbegrip *ooreenkoms*.[39]

Die regsbegrip *ooreenkoms* het dus primêr die betekenis van regshandeling en sekondêr die betekenis van regsverhouding.

3 DIE INDELING VAN REGSFEITE AAN DIE HAND VAN ONDERSKEIDINGSKENMERKE

Daar bestaan 'n wye verskeidenheid moontlike indelings van regsfeite.[40] Die meeste skrywers maak hulle indelings sonder om hulle werkswyse uiteen te sit. Die skrywers wat dit wel doen, huldig verskillende standpunte.

Meijers wys daarop dat daar drie weë oop is by die groepering van individuele regsfeite onder 'n enkele begrip:[41]

(a) 'n Besondere regsfeit word om historiese redes op die voorgrond gestel en die ander regsfeite wat identiese regsgevolge het, word daarnaas vermeld.[42]

(b) Die aanwesigheid van die hoofgeval word geag aanwesig te wees by ander gevalle waar dieselfde regsgevolge intree as wat gewoonlik by die hoofgeval intree.[43]

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35 Corbin 1917 *YLJ* 169 170; Paton *Jurisprudence* 32.

36 So kan ooreenkomste in die privaatreg oa die ontstaan of tenietgaan van 'n verbintenis, die oorgang van 'n saaklike of vorderingsreg of die reëling van 'n familieregtelike statusverhouding tot gevolg hê. Daar is ook geen verskil in struktuur tussen verbintenisse wat uit 'n kontrak, huweliksluiting, 'n wet, delik of 'n administratiewe beskikking ontstaan nie. Die enigste moontlike gemeenskaplike kenmerk van ooreenkomste wat gevind kan word, is dat die regsgevolge primêr die partye raak en nie uitsluitlik derdes nie. Sien later par 4 6. Dit is egter 'n kenmerk van alle regshandelinge in die privaatreg en dus nie 'n geskikte kriterium nie – Flume *Allgemeiner Teil* 7–12. Die vind van gemeenskaplike elemente is die metode wat gevolg sal word by die ontwikkeling van die regsbegrip *ooreenkoms*. Sien die teks na vn 41 *infra*.

37 Van Schilfgaarde "Boekbespreking" 1978 *RMTh* 459–460.

38 Sien hieroor Floyd *Owerheidsooreenkoms* 35–37. Die enigste eienskap van die regsgevolg van die ooreenkoms wat wel opgeneem behoort te word, is dat dit primêr die partye tot die ooreenkoms moet raak. Sien par 4 6 *infra*.

39 Baechi 1934 *ZöffR* 68–69.

40 Bv Rutten *Overeenkomsten* 3–4; Hartkamp *Overeenkomsten* 3–4; Hahlo en Kahn *Legal system* 100–103; Pollock *A first book of jurisprudence for students of the common law* (1918) 142–147; Nawiasky *Allgemeine Rechtslehre als System der rechtlichen Grundbegriffe* (1948) 207–210; Wolf *Allgemeiner Teil* 210–224; Wiechers *Die sistematiek* 80.

41 *Algemene leer* 208.

42 Sien ook Von Tuhr *Der Allgemeine Teil* 12–13.

43 Sien ook *idem* 13–14.

(c) Alle regsfeite wat 'n gemeenskaplike kenmerk of kenmerke vertoon, word onder een begrip byeengebring.[44] Hierdie soeke na 'n gemeenskaplike kenmerk of kenmerke is moontlik omdat die meeste regsfeite meerledig van aard is.[45] Hierdie metode sal gevolg word by die analise van die regsbegrip *ooreenkoms*.

Daar bestaan nog drie ander redes waarom 'n sekere element of elemente van 'n bepaalde groep regsfeite beklemtoon kan word:

(a) Oorgelewerde tradisie.[46]

(b) Die element of elemente word as die eintlike rede beskou waarom die regsgevolge intree. Die wil van die betrokkenes by die regshandeling in die algemeen en die ooreenkoms in die besonder word byvoorbeeld deur sommiges gesien as die eintlike rede waarom die regsgevolge intree.[47]

(c) Manigk onderskei tussen *Tatbestandselementen* en *Wirksamkeitsvoraussetzungen* op grond daarvan dat "[d]er Tatbestand begrenzt regelmässig die Beweistlast, während Wirksamkeitshemmungen zur Exception gesteld sind".[48]

Die eerste twee redes waarom sekere element(e) van regsfeite beklemtoon word, is onaanvaarbaar omdat hierdie redes buite die positiewe reg gevind word. Die oorbeklemtoning van die wil by die tweede rede kan verder daartoe lei dat ooreenkomste waar die wil van die partye óf glad nie óf slegs in 'n geringe mate die inhoud van die regsgevolge kan bepaal, nie as ooreenkomste beskou word nie. Dit sou eerstens die begrip *ooreenkoms* onnodig beperk en 'n kenmerk van die regsgevolge betrek by die omskrywing van die begrip *ooreenkoms*.[49] Hierdie opvatting verloor tweedens uit die oog dat die positiewe reg bepaal wanneer die regsgevolge intree en in welke mate die wil 'n rol mag speel by die bepaling van die inhoud van die regsgevolge.[50] Derdens word uit die oog verloor dat al die elemente van 'n regsfeit ewe onontbeerlik vir die intrede van die regsgevolge is.[51] Die derde rede is gegrond op die bewysreg en is daarom onaanvaarbaar.

Sommige skrywers is van mening dat slegs waar die elemente en regsgevolge van 'n groep regsfeite deur gemeenskaplike regsreëls beheers word, 'n eie benaming vir die groep regsfeite geregverdig is.[52] Hierdie vereiste gaan nie op nie omdat dit die draagwydte van 'n regsbegrip te veel sal beperk.

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44 Die soeke na 'n gemeenskaplike kenmerk of kenmerke is kenmerkend van begripsvorming in die regswetenskap – Meijers *Algemene leer* 30.

45 Von Tuhr *Der Allgemeine Teil* 14; Suijling *Inleiding* 299; Manigk *Das rechtswirksame Verhalten* 12; Meijers *Algemene leer* 287.

46 Meijers *Algemene leer* 228.

47 Van Schilfgaarde 1978 *RMTh* 548; Von Tuhr *Der Allgemeine Teil* 18 148; Wolf *Algemeiner Teil* 204–205; Van der Merwe *Die wil* 16; Imboden "Der verwaltungsrechtliche Vertrag" 1958 2 *ZSR* 38. Sommige gaan selfs verder en verklaar dat die ooreenkoms regskeppende krag in sigself besit onafhanklik van die positiewe reg – Ruppert *Der öffentlich-rechtliche Vertrag* 6–7; Buddeberg 1925 *AöR* 123; Reinach *Grundlagen* 688; Gitzinger *Verwaltungsakt auf Unterwerfung* 20; Steffen *Der öffentlichrechtliche Vertrag* 15. Vir 'n bespreking van hierdie beskouing sien Rill *Gliedstaatsverträge* 8–16; Friauf "Zur Problematik des verfassungsrechtlichen Vertrages" 1963 *AöR* 278.

48 *Das rechtswirksame Verhalten* 119.

49 Vir vbc sien Floyd *Owerheidsooreenkoms* 36–37.

50 Kelsen 1919 *ZöffR* 166, 1913 *AöR* 53 195; Reusch *Der Vertrag im Verwaltungsrecht* (proefskrif Frankfurt 1929) 6–7.

51 Flume *Allgemeiner Teil* 2; Von Tuhr *Der Allgemeine Teil* 18.

52 Walz 1931 *AöR* 219.

4 DIE ONDERSKEIDINGSKENMERKE VAN DIE OOREENKOMS

4 1 Inleiding

Soos reeds aangetoon, sal die onderskeidingskenmerke van die ooreenkoms vasgestel word deur die gemeenskaplike element of elemente van die groep regsfeite te bepaal wat in die privaatreg as ooreenkomste bekend staan.

Die meeste skrywers huldig die mening dat die wilsuiting (met of sonder die onderliggende wil) die onderskeidingskenmerk van 'n regshandeling is.[53] Daar word 'n onderskeid tussen eensydige en meersydige regshandelinge gemaak afhangende van die aantal wilsuitings van selfstandige regsubjekte wat betrokke is.[54] Die ooreenkoms word as 'n meersydige regshandeling beskou.[55] Hieruit is dit duidelik dat meer as een wilsuiting 'n kenmerk van die ooreenkoms is. Die meeste regswetenskaplikes in Duitsland, Nederland en Suid-Afrika is dit eens dat wilsooreenstemming die onderskeidingskenmerk van die ooreenkoms is en dat hierdie kenmerk die ooreenkoms van alle ander meersydige regshandelinge onderskei.[56] By beantwoording van die vraag wat presies met wilsooreenstemming bedoel word, loop die antwoorde uiteen.[57]

Daar is egter 'n groep skrywers wat die ooreenkoms as benaming vir die groep regsfeite wat wilsooreenstemming as gemeenskaplike element het,

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53 Suijling *Inleiding* 325; Meijers *Algemene leer* 288; Rutten *Overeenkomsten* 3–4; Hartkamp *Overeenkomsten* 3–5; Bloembergen en Kleyn *Contractenrecht* hfst 1 par 4; Flume *Allgemeiner Teil* 23; Rothoeft *System der Irrtumslehre als Methodenfrage der Rechtsvergleichung* (1968) 119; Holland *Jurisprudence* 118; Markby *Elements of law considered with reference to principles of general jurisprudence* (1905) 125; Fitzgerald *Salmond on jurisprudence* (1966) 334; Hahlo en Kahn *Legal system* 100; Van Zyl en Van der Vyver *Inleiding tot die regswetenskap* (1982) 506–507.

54 Flume *Allgemeiner Teil* 135; Von Tuhr *Der Allgemeine Teil* 147; Wolf *Allgemeiner Teil* 283; Steenbeek *Rechtshandeling* 85; Wiarda *Overeenkomsten met overheidslichamen* (proefskrif Amsterdam 1939) 4; Bloembergen en Kleyn *Contractenrecht* hfst 1 par 9. Ander onderskei nog verder 'n tweesydige regshandeling – Hahlo en Kahn *Legal system* 100–101; Von Tuhr *Der Allgemeine Teil* 220; Pitlo *Het systeem van het Nederlandse privaatrecht* (1972) 128.

55 Von Tuhr *Der Allgemeine Teil* 220; Rutten *Overeenkomsten* 3–4; Hartkamp *Overeenkomsten* 4; Steenbeek *Rechtshandeling* 85; Wiarda *Overeenkomsten* 4; Van Zyl en Van der Vyver *Inleiding* 507.

56 Goltz *Motivirrtum und Geschäftsgrundlage im Schuldvertrag* (1973) 6 157; Rothoeft *System* 119; Von Tuhr *Der Allgemeine Teil* 225; Wolf *Allgemeiner Teil* 286; Larenz *Allgemeiner Teil des Deutschen Bürgerlichen Rechts* (1980) 482; Schimpf *Der verwaltungsrechtliche Vertrag unter besonderer Berücksichtigung seiner Rechtswidrigkeit* (1982) 33; Büchner *Die Bestandskraft verwaltungsrechtlicher Verträge* (1979) 88; Stelkens ea *Verwaltungsverfahrensgesetz* (1990) 1011; Rutten *Overeenkomsten* 8; Van der Ven "Bijdrage tot de kennis van het publieke contractenrecht" 1938 *NJB* 155–156; Van Poelje ea *Nederlands bestuursrecht* dl 1 (1974) 395; Bloembergen en Kleyn *Contractenrecht* hfst 1 par 20; Hartkamp *Overeenkomsten* 10; Suijling *Inleiding* 364; De Wet en Van Wyk *Kontraktereg* 7 9; Van Rensburg ea *Contract* par 111; Kerr *Contract* (1989) 3; Cronjé *Eiendomsvoorbehoud* 118–119; Kritzinger "Approach to contract: a reconciliation" 1983 *SALJ* 47; Van der Vyver en Joubert *Persone- en familiereg* (1991) 492. Sien ook *Willmore v South Eastern Electricity Board* 1957 2 Lloyd's Rep 375 380; *Pfizer Co v Ministry of Health* 1965 AC 512 535–536 548; *Read v Croydon Corporation* 1938 4 All ER 631 648; *Ondombo Beleggings (Edms) Bpk v Minister of Mineral and Energy Affairs* 1991 4 SA 718 (A) 724; *Minister of Home Affairs v American Ninja IV Partnership* 1993 1 SA 257 (A) 269.

57 Kritzinger 1983 *SALJ* 47.

verwerp en die ooreenkoms aan wilsooreenstemming gelykstel.[58] Hierdie opvatting verloor uit die oog dat die positiewe reg dikwels ook die aanwesigheid van ander elemente naas wilsooreenstemming vir die intreding van die regsgevolge vereis.[59] Die regsfeit kan dus nie aan 'n element van die regsfeit self gelykgestel word nie.

Wiarda[60] se bespreking van die onderskeidingskenmerke van die ooreenkoms kan as vertrekpunt dien omdat sy bespreking myns insiens die naaste aan korrek is. Hy aanvaar as uitgangspunt die omskrywing van 'n ooreenkoms as die ooreenstemming van twee of meer wilsverklarings wat op die intreding van dieselfde regsgevolge gerig is en vul die omskrywing met drie addisionele vereistes aan:

(a) Die wilsverklarings moet afkomstig van selfstandige regsubjekte wees.

(b) Daar moet 'n onderlinge afhanklikheid tussen die ooreenstemmende wilsverklarings bestaan.

(c) Die regsgevolge moet in beginsel die onderlinge verhouding van die betrokkenes self reël en nie uitsluitlik derdes raak nie.

Vervolgens kan die kenmerke wat inderdaad onderskeidingskenmerke van die ooreenkoms is, bespreek word.

4 2 Ooreenstemming van twee of meer wilsuitings[61]

Die vraag wat hier ontstaan, is of daar naas die uiterlike ooreenstemmende wilsuitings ook werklike of subjektiewe ooreenstemming van die partye se wil moet wees. Die regsposisie in die Suid-Afrikaanse reg is enigsins onduidelik wat die ander ooreenkomste in die privaatreg buiten die kontrak betref.

Werklike subjektiewe wilsooreenstemming word as uitgangspunt vereis by die saaklike ooreenkoms.[62] Hierdie uitgangspunt word enigsins gekwalifiseer deurdat die vereiste wilsooreenstemming uit die omringende omstandighede afgelei word.[63] Dit is onseker of hier dan enigsins sprake van subjektiewe wilsooreenstemming is.

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58 Cronjé *Eiendomsvoorbehoud* 134; Van der Merwe *Sakereg* 301; Olivier "Vonnisbespreking" 1981 *THRHR* 210. *Agreement* word dikwels in Engels gebruik om wilsooreenstemming aan te dui – Christie *Contract* (1991) 21; Treitel *Contract* 1 8; Paton *Jurisprudence* 435.

59 Vgl Cronjé *Eiendomsvoorbehoud* 126–148; Christie *Contract* (1991) 106.

60 *Overeenkomsten* 14–16, "Publiekrechtlijke overeenkomsten" preadvies in *Geschriften van de Vereniging voor Administratief Recht* dl 8 (1943) 26–27. Verskeie ander Nederlanders gee ooreenstemmende omskrywings: Vegting *Het algemeen Nederlands administratiefrecht* dl 1 (1954) 210; Van der Linde "Dient de wetgever regelen te geven met betrekking tot overeenkomsten met de overheid?" preadvies in *Handelingen der Nederlandse Juristen-Vereniging* dl 1 (1965) 223; Rutten *Overeenkomsten* 8; Hartkamp *Overeenkomsten* 9–14. Hartkamp *Overeenkomsten* 9 betwyfel egter die moontlikheid om 'n uitputtende leerstellige opsomming te gee van al die kenmerke waaraan 'n regshandeling moet voldoen om 'n ooreenkoms te wees.

61 Wilsuiting is 'n beter benaming as wilsverklaring omdat dit die gedagte beter weergee dat die wil by die verbintenisskeppende ooreenkoms deur gedrag, gebare, spraak of skrif tot uiting kan kom – Kerr *Contract* 5; Schut *Rechtshandeling* 12.

62 Cronjé *Eiendomsvoorbehoud* 154 175; Van der Merwe *Sakereg* 302–303 312.

63 By lewering word dit afgelei uit die verbintenisskeppende ooreenkoms en by registrasie uit die volmag van 'n aktebesorger wat die oordraggewer teken om oordrag te magtig – Van der Merwe *Sakereg* 303; Cronjé "Die belang van die saaklike ooreenkoms by roerende sake in 'n abstrakte en kousale stelsel van eiendomsoordrag" 1984 *THRHR* 201.

Daar word ook bloot volstaan met die stelling dat die algemene reëls ten aansien van handelingsbevoegdheid en dwaling vir ooreenkomste ook vir die saaklike ooreenkoms geld.[64] Die probleem is egter dat daar in ons reg nie sulke algemene reëls bestaan nie tensy daar aan die reëls van die kontraktereg algemene gelding verleen word. Die rede waarom die saaklike ooreenkoms in ons regspraak en regsliteratuur nog nie indringende bespreking beleef het wat wilsooreenstemming betref nie, is geleë in die feit dat die praktiese waarde van die konstruksie van die saaklike ooreenkoms in twyfel getrek word omdat die verbintenisskeppende en saaklike ooreenkoms dikwels in een waarneembare gebeurtenis saamval.[65]

Sekere aspekte van wilsooreenstemming by huweliksluiting het al aandag gekry[66] maar dit is om verskeie redes onseker of werklike of bloot skynbare wilsooreenstemming by huweliksluiting voldoende is.[67] Die reëls met betrekking tot wilsooreenstemming by kontrakte is met enkele wysigings van toepassing op die skulddelgende ooreenkoms.[68]

Uit die voorafgaande wil dit voorkom of die reëls van wilsooreenstemming soos dit by kontrakte bestaan ook op ander ooreenkomste in die privaatreg (minstens wat die saaklike en skulddelgende ooreenkoms betref) met enkele

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64 Cronjé *Eiendomsvoorbehoud* 124 154.

65 *Idem* 169–172, 1984 *THRHR* 204; Scott "Vonnisbespreking" 1981 *THRHR* 188–189.

66 Hahlo *Husband and wife* 83; Cronjé *Persone- en familiereg* 194–197; Van der Vyver en Joubert *Personereg en familiereg* 492–500.

67 (1) Die gewone kontraktuele reëls tav wilsooreenstemming is nie ten volle aanwendbaar nie omdat die openbare belang so 'n belangrike rol by die huwelik speel – Erasmus ea *Family* 36. Sommige skrywers is selfs van mening dat wesenlike dwaling die huwelik nie nietig nie maar slegs vernietigbaar maak – Hahlo *Husband and wife* 84; Erasmus ea *Family* 36–37. (2) Werklike wilsooreenstemming word skynbaar vereis – Hahlo *Husband and wife* 83; Van der Vyver en Joubert *Persone- en familiereg* 492–493; Cronjé *Persone- en familiereg* 194. Hierdie vereiste word afgewater deur die feit dat die howe die vervulling van 'n huwelik deur byslaap as 'n sterk aanduiding beskou dat daar geen dwaling was nie – Hahlo *Husband and wife* 88. Die vraag of 'n huwelik aanvegbaar is waar daar 'n wesenlike dwaling was, kom in elk geval selde in die praktyk voor. Die vereiste dat die dwaling redelik moet wees kom ten eerste al ter sprake by impotensie. Impotensie word deur sommige as 'n vorm van dwaling beskou – Erasmus ea *Family* 36. Alvorens 'n party egter op grond hiervan die huwelik kan aanveg, moet hy bewys dat hy daarvan onbewus was en dat dit nie redelikerwys voorsienbaar was nie – Erasmus ea *Family* 38 vn 1. Die vereiste van redelikheid is ten tweede ook bespreek tav dwaling oor die identiteit van 'n party en *error in negotio* – Hunt "Error in the contract of marriage" 1963 *SALJ* 236 250–251. Die redelike vertroue van 'n party kan nie op dieselfde wyse as by kontrakte beskerm word nie – Hunt 1963 *SALJ* 236. (3) Geen eenstemmigheid bestaan oor die vraag onder welke hoof die onderskeie gronde waarop die geldigheid van 'n huwelik aangeveg kan word, behandel moet word nie, nl onder dwaling, wanvoorstelling of veronderstelling – Hunt 1962 *SALJ* 424–442, 1963 *SALJ* 107–109; Hahlo *Husband and wife* 83–86; Van der Vyver en Joubert *Personereg en familiereg* 492–500.

68 De Wet en Van Wyk *Kontraktereg* 260–266; *Cave's Imperial Brewery v The Cape Government Railways* 2 (1904) BAC 151; *Blackie Swart Argitekte v Van Heerden* 1986 1 SA 249 (A) 262 (die betoog van die respondent se advokaat); *Matador Buildings (Pty) Ltd v Harman* 1971 2 SA 21 (K) 25; *Barclays National Bank v Waisbrod* 1975 1 SA 45 (D); *Blumberg v Atkinson* 1974 4 SA 551 (T) 559; *Cecil Jacobs (Pty) Ltd v Macleod & Sons* 1966 4 SA 41 (N); *Tractor & Escavator Spares (Pty) Ltd v Lucan J Botha (Pty) Ltd* 1966 2 SA 740 (T). Die skulddelgende ooreenkoms neem verskillende vorme aan, nl voldoening van 'n verbintenis, skuldkwytskelding, novasie, delegasie en skikking. In lg drie gevalle kom die skulddelgende en verbintenisskeppende ooreenkoms saam in een transaksie voor.

wysigings toepassing vind. Die probleem van subjektiewe of skynbare wilsooreenstemming kan dus aan die hand van die Suid-Afrikaanse kontraktereg bespreek word. 'n Verdere rede vir laasgenoemde werkswyse is daarin geleë dat ons howe al hul gewilligheid getoon het om die reëls van die kontraktereg ten aansien van wilsooreenstemming in die publiekreg toe te pas.[69]

Hierdie vraag na wat wilsooreenstemming by kontrakte behels, word gewoonlik bespreek met verwysing na die wils-, verklarings- en vertrouensteorie.[70] Die wilsteorie vereis naas uiterlike wilsooreenstemming werklike of subjektiewe wilsooreenstemming alvorens kontraktuele aanspreeklikheid ontstaan. Die verklaringsteorie vereis slegs uiterlike ooreenstemmende wilsuitings, terwyl die vertrouensteorie die klem laat val op die vertroue wat die wilsuitings by die partye wek. Daar kan met 'n redelike mate van sekerheid gestel word dat die wilsteorie gekwalifiseer deur die vertrouensteorie tans in die regspraak by kontrakte geld.[71] Die vertrouensteorie kom as beide direkte[72] en indirekte vertrouensbeskerming (*iustus error*)[73] voor.

Die vereistes vir direkte vertrouensbeskerming is skynbaar dieselfde as dié vir indirekte vertrouensbeskerming by die *iustus error*-benadering.[74] Daar is geen sekerheid oor welke vereistes aanwesig moet wees by sowel die direkte as indirekte vertrouensbeskerming nie. Daar is wel sekerheid oor twee elemente wat aanwesig moet wees, naamlik 'n optrede aan die kant van die een party (die kontrakontkenner) wat aanleiding gee tot die verwekking van 'n redelike vertroue van gebondenheid of van wilsooreenstemming by die ander party (die kontrakbeweerder).[75] Laasgenoemde party se vertroue is afwesig indien hy weet

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69 *A to Z Bazaars (Pty) Ltd v Minister of Agriculture* 1975 3 SA 468 (A) 476–478; *Peri-Urban Areas Health Board v Breet* 1958 3 SA 783 (T) 789–790; *Broodryk v Smuts* 1942 TPD 47; *Rhode v Minister of Defence* 1943 CPD 40. Vir 'n bespreking van hierdie sake sien Floyd *Owerheidsooreenkoms* 440–442.

70 De Wet en Van Wyk *Kontraktereg* 9–15; Joubert *General principles of the law of contract* (1987) 79–80; Kritzinger 1983 *SALJ* 47.

71 Vir 'n bespreking sien Floyd *Owerheidsooreenkoms* 17–25; Lubbe en Murray *Contract* 163–168; Christie *Contract* (1991) 21–28; Van der Merwe ea *Contract* 14–41; *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* 1992 3 SA 234 (A); *Steyn v LSA Motors Ltd* 1994 1 SA 49 (A).

72 *Spes Bona Bank (Pty) Ltd v Portals Water Treatment South Africa (Pty) Ltd* 1983 1 SA 978 (A); *Steyn v LSA Motors Ltd supra.*

73 Sien bv *Logan v Beit* 1890 SC 197; *Maritz v Pratley* 1894 SC 345; *George v Fairmead (Pty) Ltd* 1958 2 SA 465 (A); *National and Overseas Distributors Co (Pty) Ltd v Potato Board* 1958 2 SA 473 (A); *Van Wyk v Otten* 1963 1 SA 415 (O); *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 4 SA 164 (D); *Nasionale Behuisingskommissie v Greyling* 1986 4 SA 917 (T); *Standard Credit Co Ltd v Naicker* 1987 2 SA 49 (N). Die *iustus error*-benadering kom kortliks daarop neer dat waar daar oënskynlik wilsooreenstemming is die kontrakontkenner eers moet bewys dat daar dwaling by hom aanwesig is wat wesenlik en redelik is.

74 Lubbe en Murray *Contract* 168; *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis supra* (*obiter*). Sien egter Reinecke "Regstreekse of onregstreekse toepassing van die vertrouensteorie?" 1989 *TSAR* 511–512 wat beweer dat die gronde vir redelikheid van 'n dwaling nie die presiese keersy van die vereiste vir vertrouensbeskerming is nie.

75 Christie *The law of contract in South Africa* (1981) 16; Van der Merwe *Die wil* 31 veral vn 39; Lubbe en Murray *Contract* 165; *George v Fairmead (Pty) Ltd supra* 471; *National and Overseas Distributors Co (Pty) Ltd v Potato Board supra*; *Shepherd v Farrels Estate Agency* 1921 TPD 62; *Van Wyk v Otten supra*; *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 1 SA 303 (A) 316; *Du Toit v Atkinson Motors Bpk* 1985 2 SA 893 (A); *Sonap Petroleum (SA) Ltd v Pappadogianis supra.*

lie ander party dwaal en onredelik indien hy redelikerwys moes weet van die r party se dwaling.[76] Waar die kontrakbeweerder die ander party se dwaling s onskuldig of by wyse van 'n late) veroorsaak, ontbreek die vereiste kou- verband waar die oorsaak vir die vertroue die optrede van die kontrakbe- rder is.[77] Hoewel dit vroeër onseker was of dit 'n vereiste is dat die kon- ntkenner skuldig 'n redelike vertroue by die kontrakbeweerder moet ver- aak,[78] het die appèlhof hom onlangs uitdruklik daarteen uitgespreek.[79] die beskouing is vatbaar vir kritiek omdat die blaam (skuld of risiko) van die ve wel in sekere gevalle relevant kan wees by die beantwoording van die vraag i kontrak tot stand kom.[80] Daar is ten slotte weinig gesag vir die vereiste van el aan die kant van die party by wie 'n redelike vertroue opgewek is.[81]

it die voorafgaande bespreking is dit duidelik dat in die geval van werklike ooreenstemming die volgende aanwesig moet wees:

Die ooreenstemmende wilsuitings van die partye.

Die onderliggende subjektiewe wil van die partye wat inderdaad ooreenstem hulle wilsuitings.

ie geval van vertrouensbeskerming moet skynbaar die volgende aanwesig s:

Die ooreenstemmende wilsuitings van die partye.

Die onderliggende subjektiewe wil van die party wie se vertroue gehandhaaf d en die ooreenstemming van sy wil met sy wilsuiting.[82]

'n Blaamwaardige opwekking van 'n redelike vertroue deur die skynver- ker.

'n Redelike vertroue van gebondenheid of van wilsooreenstemming by die ve wie se vertroue gehandhaaf word.

Lubbe en Murray *Contract* 165; *Spes Bona Bank (Pty) Ltd v Portals Water Treatment supra* 984–985; *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis supra* 240.

Lubbe en Murray *Contract* 166.

Die regspraak stel skuld nie as 'n vereiste by direkte vertrouensbeskerming nie. Sien die sake aangehaal deur Van der Merwe *Die wil* 32 vn 142. Die gesag dat skuld 'n vereiste is, is ietwat sterker by die *iustus error*-benadering – Van Rensburg ea *Contract* par 127 vn 11; Van der Merwe *Die wil* 33; De Vos 1974 *Acta Juridica* 180–181; Malan "Vonnisbe- spreking" 1985 *THRHR* 231; *Horty Investments (Pty) Ltd v Interior Acoustics (Pty) Ltd* 1984 3 SA 537 (W) 539 540; *Standard Credit Co Ltd v Naicker supra* 53. Vir skrywers wat ontken dat skuld enigsins 'n vereiste is, sien Christie *Contract* (1991) 26; Kerr *Contract* 17; Beck "Mistake and fault" 1985 *SALJ* 8; Sharrock "Fault and iustus error" 1985 *SALJ* 3–4; Hoffmann "The basis of the effect of mistake on contractual obligations" 1935 *SALJ* 436; Hutchison en Van Heerden "Mistake in contract: a comedy of (justus) errors" 1987 *SALJ* 528; Lubbe en Murray *Contract* 165. Vir 'n bespreking van die vraag of blote onag- saamheid of agterlosigheid voldoende is, sien Van der Merwe en Van Huysstcen "Dissensus, reasonableness and contractual liability" 1987 *THRHR* 446–447.

Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis supra 240.

dat die ander party dwaal en onredelik indien hy redelikerwys moes weet van die ander party se dwaling.[76] Waar die kontrakbeweerder die ander party se dwaling (selfs onskuldig of by wyse van 'n late) veroorsaak, ontbreek die vereiste kousale verband waar die oorsaak vir die vertroue die optrede van die kontrakbeweerder is.[77] Hoewel dit vroeër onseker was of dit 'n vereiste is dat die kontrakontkenner skuldig 'n redelike vertroue by die kontrakbeweerder moet veroorsaak,[78] het die appèlhof hom onlangs uitdruklik daarteen uitgespreek.[79] Hierdie beskouing is vatbaar vir kritiek omdat die blaam (skuld of risiko) van die partye wel in sekere gevalle relevant kan wees by die beantwoording van die vraag of 'n kontrak tot stand kom.[80] Daar is ten slotte weinig gesag vir die vereiste van nadeel aan die kant van die party by wie 'n redelike vertroue opgewek is.[81]

Uit die voorafgaande bespreking is dit duidelik dat in die geval van werklike wilsooreenstemming die volgende aanwesig moet wees:

(a) Die ooreenstemmende wilsuitings van die partye.

(b) Die onderliggende subjektiewe wil van die partye wat inderdaad ooreenstem met hulle wilsuitings.

In die geval van vertrouensbeskerming moet skynbaar die volgende aanwesig wees:

(a) Die ooreenstemmende wilsuitings van die partye.

(b) Die onderliggende subjektiewe wil van die party wie se vertroue gehandhaaf word en die ooreenstemming van sy wil met sy wilsuiting.[82]

(c) 'n Blaamwaardige opwekking van 'n redelike vertroue deur die skynverwekker.

(d) 'n Redelike vertroue van gebondenheid of van wilsooreenstemming by die partye wie se vertroue gehandhaaf word.

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76 Lubbe en Murray *Contract* 165; *Spes Bona Bank (Pty) Ltd v Portals Water Treatment supra* 984–985; *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis supra* 240.

77 Lubbe en Murray *Contract* 166.

78 Die regspraak stel skuld nie as 'n vereiste by direkte vertrouensbeskerming nie. Sien die sake aangehaal deur Van der Merwe *Die wil* 32 vn 142. Die gesag dat skuld 'n vereiste is, is ietwat sterker by die *iustus error*-benadering – Van Rensburg ea *Contract* par 127 vn 11; Van der Merwe *Die wil* 33; De Vos 1974 *Acta Juridica* 180–181; Malan "Vonnisbespreking" 1985 *THRHR* 231; *Horty Investments (Pty) Ltd v Interior Acoustics (Pty) Ltd* 1984 3 SA 537 (W) 539 540; *Standard Credit Co Ltd v Naicker supra* 53. Vir skrywers wat ontken dat skuld enigsins 'n vereiste is, sien Christie *Contract* (1991) 26; Kerr *Contract* 17; Beck "Mistake and fault" 1985 *SALJ* 8; Sharrock "Fault and iustus error" 1985 *SALJ* 3–4; Hoffmann "The basis of the effect of mistake on contractual obligations" 1935 *SALJ* 436; Hutchison en Van Heerden "Mistake in contract: a comedy of (justus) errors" 1987 *SALJ* 528; Lubbe en Murray *Contract* 165. Vir 'n bespreking van die vraag of blote onagsaamheid of agterlosigheid voldoende is, sien Van der Merwe en Van Huyssteen "Dissensus, reasonableness and contractual liability" 1987 *THRHR* 446–447.

79 *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis supra* 240.

80 Floyd en Pretorius "A reconciliation of the different approaches to contractual liability in the absence of actual *consensus*" 1992 *THRHR* 671–673. Van der Merwe en Van Huyssteen "Kontraksluiting en toerekenbare skyn" 1993 *TSAR* 496 wil die skuld van die partye in ag neem by die beoordeling van die vraag of 'n voorstelling redelik is.

81 De Wet *Dwaling en bedrog by die kontraksluiting* (1943) 4; Lubbe en Murray *Contract* 167–168; Christie *Contract* (1981) 18–20.

82 Reinecke en Van der Merwe "Vonnisbespreking" 1984 *TSAR* 293.

4 3 Die ooreenstemmende wilsuitings moet gerig wees op die intreding van regsgevolge asook op die inhoud van die regsgevolge

Hierdie vereiste vorm deel van die element van wilsooreenstemming of skynbare wilsooreenstemming. Die eenstemmigheid moet gerig wees op die intreding van regsgevolge.[83] Dit is juis hierdie wil wat 'n ooreenkoms onderskei van 'n sosiale afspraak en die *gentlemen's agreement*.[84]

Die eenstemmige wilsuitings moet ook op die inhoud van die regsgevolge gerig wees.[85] 'n Vraag wat hier ontstaan, is of die wilsuitings van beide partye op die volledige inhoud van die regsgevolge gerig moet wees. Die partye se wilsuitings moet wel sodanig wees wat betref die regsgevolge waaroor die partye self kan besluit en inderdaad self ook besluit, maar nie wat betref die regsgevolge wat van regsweë intree nie.[86] Waar die reg die meeste van die regsgevolge self voorskryf, moet die partye se wil wel op die gevolge gerig wees wat van regsweë intree en wat die bepaalde soort ooreenkoms tipeer.[87] Die wilsuitings moet ook gerig wees op die identiteit van die partye tussen wie die beoogde regsgevolge gaan ontstaan of wat deur die beoogde regsgevolge geraak gaan word.[88]

Die Duitse voorstanders van die *Vereinbarung*- en *Gesamtakt*-begrip vereis dat die wil van die partye tot 'n ooreenkoms gerig moet wees op die intreding van verskillende regsgevolge omdat die partye verskillende behoeftes wil bevredig.[89] So meen hulle dat die koper se wil op die skep van 'n leweringsverpligting

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83 Sien in die algemeen Wolf *Allgemeiner Teil* 284; Von Tuhr *Der Allgemeine Teil* 161; Rutten *Overeenkomsten* 11; Hartkamp *Overeenkomsten* 12; Wiarda *Overeenkomsten* 4; Paton *Jurisprudence* 433; Bloembergen en Kleyn *Contractenrecht* hfst 1 par 21. Tav kontrakte sien Van Rensburg ea *Contract* par 111; Christie *Contract* (1991) 30–33 104–106; *Conradie v Rossouw* 1919 AD 279; *Robinson v Randfontein Estates Gold Mining Co Ltd* 1925 AD 173; *Kilburn v Estate Kilburn* 1931 AD 501; *Kock v Alma Modehuis (Edms) Bpk* 1959 3 SA 308 (A); *Kerkraad van Vanderbijlpark-Wes Gemeente van die NG Kerk Tvl v Van der Wath* 1964 3 SA 64 (A); *Phillips v Aida Real Estate (Pty) Ltd* 1975 3 SA 198 (A) 206; *Dilokong Chrome Mines v Direkteur-Generaal, Handel en Nywerheid* 1992 4 SA 1 (A) 18; *Electronic Building Elements v Huang* 1992 2 SA 384 (W). Tav huweliksluiting sien Hahlo *Husband and wife* 86; Van der Vyver en Joubert *Persone- en familiereg* 492; *Ress v Shapiro* 1914 EDL 390; *Martens v Martens* 1952 3 SA 771 (W). Tav die saaklike ooreenkoms sien Van der Merwe *Sakereg* 302; *Mannesmann Engineering and Tubes (Pty) Ltd v LTA Construction Ltd* 1972 3 SA 773 (W) 773.

84 Rutten *Overeenkomsten* 11; Hartkamp *Overeenkomsten* 12; De Wet en Van Wyk *Kontraktereg* 4–5; Christie *Contract* (1991) 104; Von Tuhr *Der Allgemeine Teil* 170–172; Bloembergen en Kleyn *Contractenrecht* hfst 1 par 21 en 22; Wessels *Gentlemen's agreements* (1984); Booysen 1984 *SAYIL* 87.

85 Wolf *Allgemeiner Teil* 284–285; Von Tuhr *Der Allgemeine Teil* 480–481; Baechi 1934 *ZöffR* 64; Van der Merwe ea *Contract* 14–15.

86 Van Rensburg ea *Contract* par 169; *Horty Investments (Pty) Ltd v Interior Acoustics (Pty) Ltd supra* (dwaling oor die termyn van 'n huurkontrak); Van der Ven 1938 *NJB* 157.

87 Meijers *Algemene leer* 234 ev; Schut *Rechtshandeling* 26. Dit blyk ook uit die feit dat dwaling tav die huwelikseremonie in ons reg wel wilsooreenstemming uitsluit maar nie dwaling tav die regsgevolge van 'n huwelik nie – Hunt 1963 *SALJ* 249; Hahlo *Husband and wife* 84. So hoef die wil van die partye tot 'n kontrak ook glad nie op die *naturalia* van die kontrak gerig te wees nie – Kerr *Contract* 284–285.

88 Van Rensburg ea *Contract* par 111; Kerr *Contract* 39–42; *Bird v Summerville* 1961 3 SA 194 (A); *Levin v Drieprok Properties* 1975 3 SA 397 (A); Hahlo *Husband and wife* 82.

89 Walz 1931 *AöR* 188; Kuntze "Der Gesammtakt, ein neuer Rechtsbegriff" in *Festgabe der Leipziger Juristenfakultät für dr jur Otto Müller zum 14 mai 1892* (1892) 43; Steffen *Der öffentlichrechtliche Vertrag* 30; Flume *Allgemeiner Teil* 7; Wiarda *Overeenkomsten* 17–18.

die saak gerig is terwyl die verkoper se wil op die skep van 'n lewer-sverpligting van die prys gerig is. Waar die partye se wil nie op verskillende sgevolge gerig is nie, het 'n mens volgens hulle te doen met 'n *Gesamtakt* of *einbarung*.[90]

Hierdie gewaande onderskeidingskenmerk van die ooreenkoms gaan om die gende redes nie op nie:

Hierdie kenmerk is 'n kenmerk van die wederkerige kontrak en nie van alle eenkomste nie.[91]

Dit betrek die onderliggende motiewe van die partye in die onderskeidings-merke terwyl die wil van die partye inderdaad op die intreding van presies elfde regsgevolge gerig is.[92] So is beide die koper en verkoper se wil op die o van die leweringsverpligtings ten opsigte van die prys en die saak gerig.

gtans vereis verskeie skrywers in Duitsland en Nederland nog hierdie ge-nde kenmerk vir ooreenkomste.[93]

Minstens twee selfstandige regsubjekte

r is gewoonlik twee partye (wat elk uit meerdere regsubjekte kan bestaan) by ooreenkoms betrokke[94] maar daar kan meer as twee partye by sommige eenkomste betrokke wees.[95] Daar moet egter minstens twee selfstandige subjekte wees wat as partye teenoor mekaar staan.[96] Dit is onseker of die-de regsubjek met homself in verskillende hoedanighede mag kontrakteer.[97]

Vir 'n bespreking van die ontwikkeling van hierdie begrippe in Duitsland sien Walz 1931 *AöR* 177–201; Vogel *Vertrag* 4–8. Naas parallelle en ooreenstemmende wil word ook ander vereistes vir hierdie begrippe gestel. Daar is ook voorstanders van hierdie begrippe in Nederland – Wiarda *Overeenkomsten* 216.

Wiarda *Overeenkomsten* 18–19; Vegting *Administratiefrecht* 212; Nawiasky *Allgemeine Rechtslehre* 221.

Hahlo en Kahn *Legal system* 101; Von Tuhr *Der Allgemeiner Teil* 235; Apelt *Der verwaltungsrechtliche Vertrag* (1964) 63–64.

Bloembergen en Kleyn *Contractenrecht* hfst 1 par 12; *Von Tuhr* Der Allgemeine Teil 232; Steenbeek *Rechtshandeling* 85; Flume *Allgemeiner Teil* 602; Salzwedel *Die Grenzen der Zulässigkeit des öffentlich-rechtlichen Vertrages* (1958) 31.

Sommige skrywers skep die indruk dat daar slegs twee partye betrokke kan wees deurdat hulle die ooreenkoms 'n tweesydige regshandeling noem – Bloembergen en Kleyn *Contractenrecht* hfst 1 par 12; Ferid *Das französische Zivilrecht* 255; Wolf *Allgemeiner Teil* 283.

Bloembergen en Kleyn *Contractenrecht* hfst 1 par 24; Von Tuhr *Der Allgemeine Teil* 228; Hahlo *Husband and wife* 258 (huweliksvoorwaardeskontrak); Flume *Allgemeiner Teil* 135; Rutten *Overeenkomsten* 10; Hartkamp *Overeenkomsten* 11. Dit wil voorkom of daar slegs twee partye by sommige ooreenkomste betrokke kan wees (soos die verlowing en huweliksluiting) weens die besondere aard van die regsverhouding wat beoog word. Voorstanders van die *Vereinbarung*- en *Gesamtakt*-begrip meen ten onregte dat slegs twee partye by 'n ooreenkoms betrokke kan wees – Walz 1931 *AöR* 188; Kuntze *Der Gesamtakt* 31–32 43; Wiarda *Overeenkomsten* 19.

van die saak gerig is terwyl die verkoper se wil op die skep van 'n leweringsverpligting van die prys gerig is. Waar die partye se wil nie op verskillende regsgevolge gerig is nie, het 'n mens volgens hulle te doen met 'n *Gesamtakt* of *Vereinbarung*.[90]

Hierdie gewaande onderskeidingskenmerk van die ooreenkoms gaan om die volgende redes nie op nie:

(a) Hierdie kenmerk is 'n kenmerk van die wederkerige kontrak en nie van alle ooreenkomste nie.[91]

(b) Dit betrek die onderliggende motiewe van die partye in die onderskeidingskenmerke terwyl die wil van die partye inderdaad op die intreding van presies dieselfde regsgevolge gerig is.[92] So is beide die koper en verkoper se wil op die skep van die leweringsverpligtings ten opsigte van die prys en die saak gerig.

Nogtans vereis verskeie skrywers in Duitsland en Nederland nog hierdie gewaande kenmerk vir ooreenkomste.[93]

4 4 Minstens twee selfstandige regsubjekte

Daar is gewoonlik twee partye (wat elk uit meerdere regsubjekte kan bestaan) by 'n ooreenkoms betrokke[94] maar daar kan meer as twee partye by sommige ooreenkomste betrokke wees.[95] Daar moet egter minstens twee selfstandige regsubjekte wees wat as partye teenoor mekaar staan.[96] Dit is onseker of dieselfde regsubjek met homself in verskillende hoedanighede mag kontrakteer.[97]

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90 Vir 'n bespreking van die ontwikkeling van hierdie begrippe in Duitsland sien Walz 1931 *AöR* 177–201; Vogel *Vertrag* 4–8. Naas parallelle en ooreenstemmende wil word ook ander vereistes vir hierdie begrippe gestel. Daar is ook voorstanders van hierdie begrippe in Nederland – Wiarda *Overeenkomsten* 216.

91 Wiarda *Overeenkomsten* 18–19; Vegting *Administratiefrecht* 212; Nawiasky *Allgemeine Rechtslehre* 221.

92 Hahlo en Kahn *Legal system* 101; Von Tuhr *Der Allgemeiner Teil* 235; Apelt *Der verwaltungsrechtliche Vertrag* (1964) 63–64.

93 Bloembergen en Kleyn *Contractenrecht* hfst 1 par 12; *Von Tuhr* Der Allgemeine Teil 232; Steenbeek *Rechtshandeling* 85; Flume *Allgemeiner Teil* 602; Salzwedel *Die Grenzen der Zulässigkeit des öffentlich-rechtlichen Vertrages* (1958) 31.

94 Sommige skrywers skep die indruk dat daar slegs twee partye betrokke kan wees deurdat hulle die ooreenkoms 'n tweesydige regshandeling noem – Bloembergen en Kleyn *Contractenrecht* hfst 1 par 12; Ferid *Das französische Zivilrecht* 255; Wolf *Allgemeiner Teil* 283.

95 Bloembergen en Kleyn *Contractenrecht* hfst 1 par 24; Von Tuhr *Der Allgemeine Teil* 228; Hahlo *Husband and wife* 258 (huweliksvoorwaardeskontrak); Flume *Allgemeiner Teil* 135; Rutten *Overeenkomsten* 10; Hartkamp *Overeenkomsten* 11. Dit wil voorkom of daar slegs twee partye by sommige ooreenkomste betrokke kan wees (soos die verlowing en huweliksluiting) weens die besondere aard van die regsverhouding wat beoog word. Voorstanders van die *Vereinbarung*- en *Gesamtakt*-begrip meen ten onregte dat slegs twee partye by 'n ooreenkoms betrokke kan wees – Walz 1931 *AöR* 188; Kuntze *Der Gesamtakt* 31–32 43; Wiarda *Overeenkomsten* 19.

96 Bloembergen en Kleyn *Contractenrecht* hfst 1 par 12; Christie *Contract* (1991) 21; Rutten *Overeenkomsten* 9; Hartkamp *Overeenkomsten* 11; Wiarda *Overeenkomsten* 15; Ruppert *Der öffentlich-rechtliche Vertrag* 3.

97 De Wet "*Agency and representation*" 1 (1993) *LAWSA* par 106 107 meen dat dit nie moontlik is nie. Sien daarteenoor *Joel Melamet and Hurwitz v Cleveland Estates (Pty) Ltd* 1984 3 SA 155 (A) 164 (die hof het dit bloot aanvaar); Von Tuhr *Der Allgemeine Teil* 228; Rutten *Overeenkomsten* 9; Hartkamp *Overeenkomsten* 11; Bloembergen en Kleyn *Contractenrecht* hfst 1 par 19.

Hierdie vereiste is veral van belang by die vraag of verskillende owerheidsliggame met mekaar ooreenkomste mag sluit omdat die Suid-Afrikaanse staat deur die regspraak as 'n eenheid gesien word en die owerheidsliggame moontlik organe van dieselfde regspersoon (staat) kan wees.[98]

4 5 Interafhanklikheid van die ooreenstemmende wilsuitings

Hierdie kenmerk vorm ook streng gesproke deel van die element van wilsooreenstemming of skynbare wilsooreenstemming. Dit dui op die vereiste dat die partye hulle tot mekaar moet rig en bewustelik wilsooreenstemming moet bereik. Die een party maak gewoonlik 'n wilsuiting aan die ander party of partye in afwagting dat die ander party of partye daarop sal reageer en ook 'n ooreenstemmende wilsuiting sal maak wat dan ook inderdaad gebeur.[99]

Hierdie vereiste blyk duidelik uit die verbintenisskeppende ooreenkoms (kontrak). 'n Kontrak word gewoonlik geanaliseer in 'n aanbod en aanname,[100] al is dit nie altyd moontlik om in die onderhandelingsproses 'n aanbod en 'n aanname te onderskei nie.[101] 'n Aanbod moet gerig wees aan 'n bepaalde regsubjek of regsubjekte en moet tot die geadresseerde se kennis kom.[102] Die aanname moet weer in reaksie op die aanbod gemaak word[103] en moet gewoonlik tot die kennis van die aanbieder kom.[104]

Waar hierdie interafhanklikheid ontbreek, is die regshandeling nie 'n ooreenkoms nie maar wel 'n ander ongespesifiseerde meersydige regshandeling,[105] al is die aanwesigheid van meerdere wilsuitings noodsaaklik vir die intreding van die regsgevolge. 'n Voorbeeld hiervan is die regshandeling *besluit*.[106] Die regsgevolge tree dikwels in na slegs een party se wilsuiting al kom meerdere wilsuitings voor. 'n Eensydige regshandeling kom dan voor.[107]

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98 Apelt *Der verwaltungsrechtliche Vertrag* 101; Wiarda *Overeenkomsten* 15–16.

99 Wiarda *Overeenkomsten* 15–16; Rutten *Overeenkomsten* 10; Hartkamp *Overeenkomsten* 11; Suijling *Inleiding* 365; Vegting *Administratiefrecht* 211; Flume *Allgemeiner Teil* 618; Von Tuhr *Der Allgemeine Teil* 224 427 429 461 473; De Wet en Van Wyk *Kontraktereg* 31; Apelt *Der verwaltungsrechtliche Vertrag* 101; Kohl *Die Möglichkeit öffentlichrechtlicher Verträge im Verwaltungsrecht* (proefskrif Freiburg 1934) 3; Friauf 1963 *AöR* 265 vn 39.

100 Kerr *Contract* 51; De Wet en Van Wyk *Kontraktereg* 32; Van der Merwe ea *Contract* 42.

101 De Wet en Van Wyk *Kontraktereg* 32.

102 *Bloom v The American Swiss Watch Co* 1915 AD 100; Christie *Contract* (1991) 50–51; Kerr *Contract* 5; Kahn "Some mysteries of offer and acceptance" 1955 *SALJ* 247; Suijling *Inleiding* 365.

103 *Bloom v The American Swiss Watch Co supra*; Christie *Contract* (1991) 66–67; Kerr *Contract* 5.

104 Christie *Contract* (1991) 76–70; *S v Henckert* 1981 3 SA 445 (A). Op hierdie algemene reël bestaan verskeie uitsonderings.

105 Die begrippe *Vereinbarung* en *Gesamtakt* word ontwikkel as oorkoepelende begrippe vir alle meersydige regshandelinge wat nie ooreenkomste is nie – Walz 1931 *AöR* 161. Hierdie begrippe is vreemd aan die Suid-Afrikaanse regswetenskap en sal dus nie gebruik word nie.

106 Bloembergen en Kleyn *Contractenrecht* hfst 1 par 12; Rutten *Overeenkomsten* 10 12; Noldus *Ongeldigheid van besluiten in de naamloze vennootskap* (1969) 25–33; Walz 1931 *AöR* 167–168 222–223; Wiechers *Administratiefreg* 97–98 vn 2. Die volgende redes word verder aangevoer waarom 'n besluit nie 'n ooreenkoms is nie: (1) Die regsgevolge kan uitsluitlik derdes raak. (2) Minderhede en afwesiges word deur 'n besluit gebind en gevolglik ontbreek wilsooreenstemming.

107 Ruppert *Der öffentlich-rechtliche Vertrag* 4; Rutten *Overeenkomsten* 9; Wiarda *Overeenkomsten* 6–7 13; Baechi 1934 *ZöffR* 77. Wiarda gee die volgende vbe uit die

vervolg op volgende bladsy

4 6 Die regsgevolge moet primêr gerig wees op die reëling van die individuele verhouding tussen die betrokkenes en nie uitsluitlik derdes raak nie

Uiteenlopende standpunte word oor hierdie vereiste gehuldig. Die een standpunt vereis bloot dat die regsgevolge die partye tot die ooreenkoms moet raak.[108] Ander skrywers is meer presies en vereis dat die ooreenkoms die subjektiewe regte en verpligtinge tussen die partye moet reël.[109] Laasgenoemde standpunt is te eng want nie alle regsgevolge van die erkende ooreenkomste in die privaatreg kan as die reëling van subjektiewe regte beskou word nie.[110]

'n Verdere standpunt is dat die regsgevolge die individuele verhouding tussen die partye moet reël deur die individuele verhouding tot stand te bring, te wysig of te beëindig.[111] As uitgangspunt kan hierdie stelling as geldig beskou word vir die privaatreg onderworpe daaraan dat daar wel uitsonderings kan wees. Hierdie stelling hou verband met die beginsel van privaatoutonomie in die privaatreg.[112] Regsubjekte mag binne die grense neergelê deur die positiewe reg self hulle eie individuele regsverhoudings reël.[113] Ooreenkomste kan indirek regsgevolge vir derdes hê al reël hul uitsluitlik andersins die individuele verhoudings tussen die partye direk.[114] 'n Ooreenkoms kan ook die individuele verhoudings van derdes reël naas die primêre reëling van die individuele verhoudings tussen die partye.[115] 'n Ooreenkoms kan selfs uitsluitlik regsgevolge vir iemand hê wat nie direk betrokke is by sluiting van die ooreenkoms nie en een van die partye.[116] Daar is twee voorbeelde hiervan: Eerstens kom 'n ooreenkoms, wat gesluit word

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Nederlandse reg: begenadiging deur die koning wat gewoonlik slegs op versoek verleen word; die man se toestemming tot regshandelinge van sy vrou; en die ouers se toestemming aan hulle kinders wat gewoonlik op hulle versoek geskied.

108 Bloembergen en Kleyn *Contractenrecht* hfst 1 par 12; Vegting *Administratiefrecht* 211; Rutten *Overeenkomsten* 11; Hartkamp *Overeenkomsten* 13; Suijling *Inleiding* 364–365; Flume *Allgemeiner Teil* 7–9; Büchner *Die Bestandskraft* 94. Sien ook *Peri-Urban Areas Health Board v Estate Breet supra* 454; *Transvaalse Raad vir die Ontwikkeling van Buite-Stedelike Gebiede v Steyn Uitzicht Beleggings (Edms) Bpk supra* 358.

109 Walz 1931 *AöR* 189; Baechi 1934 *ZöffR* 62–64; Layer *Zur Lehre vom öffentlich-rechtlichen Vertrag, eine Studie aus dem österreichischen Verwaltungsrecht* (1916) 15–16; Van der Linde *Overeenkomsten* 225; Apelt *Der verwaltungsrechtliche Vertrag* 54; Speiser *Über öffentlich rechtliche Verträge im Verwaltungsrecht* (proefskrif Basel 1922) 33; Reusch *Der Vertrag* 9. Ander se omskrywing gaan wyer. Sien Wiarda *Publiekrechtelike overeenkomsten* 70 (hy sluit ook statusooreenkomste in); Paton *Jurisprudence* 433–434 (hy sluit ook ander regte naas subjektiewe regte in).

110 Bv die regsgevolge van huweliksluiting; sien vn 9 *supra*.

111 Forsthoff *Lehrbuch* 274; Von Tuhr *Der Allgemeine Teil* 146 167 227; Wiarda *Overeenkomsten* 16; Van der Linde *Overeenkomsten* 224; Noldus *Besluiten* 25; Rutten *Overeenkomsten* 11; Gitzinger *Verwaltungsakt auf Unterwerfung* 40; Fortshoff *Lehrbuch* 275; Wiechers *Administratiefreg* 129.

112 Flume *Allgemeiner Teil* 7–12; Christie *Contract* (1991) 310–312 (kontrakte).

113 Flume *Allgemeiner Teil* 1.

114 Larenz *Allgemeiner Teil* 287.

115 Von Tuhr *Der Allgemeine Teil* 147 227 237 vir vbe uit die Duitse reg. Die beding ten behoewe van 'n derde in die trustreg is 'n vb hiervan in ons reg – Christie *Contract* (1991) 320–321.

116 Salzwedel *Die Grenzen* 78 gaan te ver waar hy meen dat 'n ooreenkoms self uitsluitlik die individuele verhouding tussen derdes kan reël omdat die beginsel van privaatoutonomie heeltemal misken word.

deur 'n verteenwoordiger, tot stand tussen die prinsipaal en die ander party.[117] Tweedens kan 'n derde geldig die verskuldigde prestasie aan die skuldeiser lewer al weet die skuldenaar nie eers daarvan nie en selfs al is dit teen sy sin.[118]

Daar bestaan heelwat twis in veral Frankryk oor die vraag of 'n regshandeling naas die reëling van individuele regsverhoudings tussen die partye ook algemene verhoudings kan reël. Sommige Franse publiekregtelike teoretici wend sowel 'n formele as 'n materiële toets aan by die klassifisering van handelinge van die administrasie.[119] By die formele toets word na die handeling self gekyk terwyl daar by die materiële toets na die aard van die regsgevolge gekyk word. Laasgenoemde word as die deurslaggewende toets beskou. Hulle onderskei materieel gesproke tussen die volgende administratiewe handelinge:[120]

(a) Regulerende of reëlende handelinge (soos wetgewing) waardeur algemene regsverhoudings geskep word.

(b) Subjektiewe handelinge waardeur individuele regsverhoudings geskep word (kontrakte val hieronder).

(c) Bepalende of determinerende handelinge waardeur die objektiewe reg werking verkry sonder dat die betrokkenes self die gevolge bepaal (soos administratiewe beskikkings).

'n Ooreenkoms behoort tot die tweede groep al kan dit formeel gesproke by die derde groep ingedeel word omdat die materiële toets deurslaggewend is.[121] 'n Soortgelyke opvatting kom ook in ander lande voor.[122]

Hierdie beskouing bots met die erkenning van sekere privaatregtelike handelinge as ooreenkomste.[123] 'n Analise van die derde groep toon dat dit uit twee onderskeibare groepe bestaan:

(a) Die gevalle waar slegs 'n individuele verhouding tot stand kom wat geheel en al deur die reg beheers word.

(b) Die gevalle waar 'n individuele verhouding tot stand kom en 'n party in 'n bestaande algemene verhouding geplaas word.[124]

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117 De Wet en Van Wyk *Kontraktereg* 96.

118 *Idem* 260.

119 Lüthje *Die Theorie des Contrat administratif im französischen Verwaltungsrecht* (1964) 22–23.

120 *Idem* 22–23; Vegting *Administratiefrecht* 214–215; Baechi 1934 *ZöffR* 67–68; Wiechers *Administratiefreg* 97 vn 2.

121 Lüthje *Die Theorie* 23.

122 Duitsers wat sodanige standpunt huldig, is Burckhard *Der Vertrag* 42–44; Apelt *Der verwaltungsrechtliche Vertrag* 95–96 105–107; Stern "Zur Problematik des energiewirtschaftlichen Kozessionsvertrags" 1959 *AöR* 276; Rüfner *Formen öffentlicher Verwaltung im Bereich der Wirtschaft* (1967) 337. Sien ook die Switsers Imboden 1958 2 *ZSR* 38–39 en Baechi 1934 *ZöffR* 67–68. Die standpunt kom ook in Engeland voor: *Read v Croydon Corporation supra* 648; *Pfizer Co v Ministry of Health supra*; Guest *Anson's law of contract* (1984) 6. Die Nederlander Wiarda *Publiekrechtelike overeenkomsten* 71 beskou wel die geval waar die regsgevolge uitsluitlik deur die reg gereël word as 'n ooreenkoms, maar is nie heeltemal oortuig daarvan dat dit wenslik is nie. Sien ook die Suid-Afrikaner Labuschagne *Staatskontrakte* 7.

123 Baechi 1934 *ZöffR* 79 meen dat dit ook die geval in Duitsland is.

124 Lüthje *Die Theorie* 23; Wiechers *Administratiefreg* 97–98 vn 2; Stelkens ea *VwVfG* 1031.

ide groepe kan as statusooreenkomste beskou word.[125] Daar bestaan voorelde van beide groepe in die privaatreg wat as regshandelinge en selfs as reenkomste erken word. Voorbeelde van die eerste groep is die saaklike en ılddelgende ooreenkoms wat wel as ooreenkomste beskou word;[126] voorelde van die tweede groep is volmagverlening en die oprigting van 'n gemeentelike regspersoon. Volmagverlening is 'n regshandeling waardeur 'n individuele verhouding tussen die volmaggewer en gevolmagtigde ontstaan maar ook gevolmagtigde in 'n algemene verhouding plaas deurdat hy nou die bevoegdd het om namens die volmaggewer regshandelinge aan te gaan.[127] Die oprigg van 'n gemeenregtelike regspersoon geskied deur ooreenkoms en het naas skep van individuele verhoudings tussen die lede onderling en tussen die lede die regspersoon, ook die skep van 'n regspersoon tot gevolg waardeur die we regsubjek in 'n aantal algemene verhoudings geplaas word.[128]

Uit die voorgaande is dit duidelik dat 'n ooreenkoms gewoonlik die reëling n 'n individuele verhouding tussen die partye tot die ooreenkoms tot gevolg . Hierop bestaan uitsonderings:

Die ooreenkoms kan in die geval van verteenwoordiging en prestasie die lividuele verhouding tussen die prinsipaal of die party wie se skuld gedelg ord en die ander party reël.[129]

Die ooreenkoms kan naas die individuele verhoudings tussen die partye self k die individuele verhouding tussen een party en 'n derde reël.

Die ooreenkoms kan ook naas die individuele verhouding tussen die partye party binne 'n bestaande algemene regsverhouding plaas.

Verdere vraag is of 'n ooreenkoms uitsluitlik die skep, verandering of beëinging van algemene verhoudings tot gevolg kan hê. Hieroor bestaan veral in itsland 'n meningsverskil.[130] Dit is uit 'n doelmatigheidsoogpunt gesien beter die regsbegrip *ooreenkoms* nie uit te brei om ook uitsluitlik sodanige gevolge kan hê nie, omdat dit die onderskeid tussen wetgewing waardeur algemene

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5 Vegting *Administratiefrecht* 214; Wiarda *Overeenkomsten* 26. So ook Labuschagne *Staatskontrakte* 91; Wiechers *Administratiefreg* 167.

6 Sien die teks tussen vn 6 en 8 *supra*.

7 De Wet *Agency* par 101; Larenz *Allgemeiner Teil* 563; Bloembergen en Kleyn *Contractenrecht* hfst 9 par 30; Van der Grinten *Asser's handleiding tot het beoefening het Nederlands burgerlijk recht. Vertegenwoordiging en rechtspersoon* (1985) 16.

8 Caney en Brooks "Associations" in 1 (1993) *LAWSA* par 455. Tav die oprigting van regspersone in die Duitse en Nederlandse reg sien Wiarda *Overeenkomsten* 20–21; Vegting *Administratiefrecht* 212–213 403; Hartkamp *Overeenkomsten* 13–14; Von Tuhr *Der Allgemeine Teil* 237.

9 Hierdie is streng gesproke nie 'n uitsondering nie omdat die verteenwoordiger in die plek van die prinsipaal handel.

0 Die volgende skrywers is van mening dat 'n ooreenkoms nie uitsluitlik die reëling van 'n algemene verhouding tot gevolg kan hê nie: Speiser *Über öffentlich rechtliche Verträge* 24–25; Walz 1931 *AöR* 219–220; Von Tuhr *Der Allgemeine Teil* 146 227 237; Sachs "Die

Beide groepe kan as statusooreenkomste beskou word.[125] Daar bestaan voorbeelde van beide groepe in die privaatreg wat as regshandelinge en selfs as ooreenkomste erken word. Voorbeelde van die eerste groep is die saaklike en skulddelgende ooreenkoms wat wel as ooreenkomste beskou word;[126] voorbeelde van die tweede groep is volmagverlening en die oprigting van 'n gemeenregtelike regspersoon. Volmagverlening is 'n regshandeling waardeur 'n individuele verhouding tussen die volmaggewer en gevolmagtigde ontstaan maar ook die gevolmagtigde in 'n algemene verhouding plaas deurdat hy nou die bevoegdheid het om namens die volmaggewer regshandelinge aan te gaan.[127] Die oprigting van 'n gemeenregtelike regspersoon geskied deur ooreenkoms en het naas die skep van individuele verhoudings tussen die lede onderling en tussen die lede en die regspersoon, ook die skep van 'n regspersoon tot gevolg waardeur die nuwe regsubjek in 'n aantal algemene verhoudings geplaas word.[128]

Uit die voorgaande is dit duidelik dat 'n ooreenkoms gewoonlik die reëling van 'n individuele verhouding tussen die partye tot die ooreenkoms tot gevolg het. Hierop bestaan uitsonderings:

(a) Die ooreenkoms kan in die geval van verteenwoordiging en prestasie die individuele verhouding tussen die prinsipaal of die party wie se skuld gedelg word en die ander party reël.[129]

(b) Die ooreenkoms kan naas die individuele verhoudings tussen die partye self ook die individuele verhouding tussen een party en 'n derde reël.

(c) Die ooreenkoms kan ook naas die individuele verhouding tussen die partye 'n party binne 'n bestaande algemene regsverhouding plaas.

'n Verdere vraag is of 'n ooreenkoms uitsluitlik die skep, verandering of beëindiging van algemene verhoudings tot gevolg kan hê. Hieroor bestaan veral in Duitsland 'n meningsverskil.[130] Dit is uit 'n doelmatigheidsoogpunt gesien beter om die regsbegrip *ooreenkoms* nie uit te brei om ook uitsluitlik sodanige gevolge te kan hê nie, omdat dit die onderskeid tussen wetgewing waardeur algemene

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125 Vegting *Administratiefrecht* 214; Wiarda *Overeenkomsten* 26. So ook Labuschagne *Staatskontrakte* 91; Wiechers *Administratiefreg* 167.

126 Sien die teks tussen vn 6 en 8 *supra*.

127 De Wet *Agency* par 101; Larenz *Allgemeiner Teil* 563; Bloembergen en Kleyn *Contractenrecht* hfst 9 par 30; Van der Grinten *Asser's handleiding tot het beoefening het Nederlands burgerlijk recht. Vertegenwoordiging en rechtspersoon* (1985) 16.

128 Caney en Brooks "Associations" in 1 (1993) *LAWSA* par 455. Tav die oprigting van regspersone in die Duitse en Nederlandse reg sien Wiarda *Overeenkomsten* 20–21; Vegting *Administratiefrecht* 212–213 403; Hartkamp *Overeenkomsten* 13–14; Von Tuhr *Der Allgemeine Teil* 237.

129 Hierdie is streng gesproke nie 'n uitsondering nie omdat die verteenwoordiger in die plek van die prinsipaal handel.

130 Die volgende skrywers is van mening dat 'n ooreenkoms nie uitsluitlik die reëling van 'n algemene verhouding tot gevolg kan hê nie: Speiser *Über öffentlich rechtliche Verträge* 24–25; Walz 1931 *AöR* 219–220; Von Tuhr *Der Allgemeine Teil* 146 227 237; Sachs "Die normsetzende Vereinbarung im Verwaltungsrecht" 1983 *VerwArch* 26; Gitzinger *Verwaltungsakt auf Unterwerfung* 40–41; Forsthoff *Lehrbuch* 275; Flume *Allgemeiner Teil* 5; Rebhan *Öffentlichrechtliche Verträge im Bereich des Erschliessungs-, Bauplanungs- und Bauordnungsrechts* (proefskrif Frankfurt 1971) 215; Martens "Normenvollzug durch Verwaltungsakt und Verwaltungsvertrag" 1964 *AöR* 430. Sien egter Nawiasky *Allgemeine Rechtslehre* 218–219; Jedlička *Der öffentlich-rechtliche Vertrag* 38–40; Salzwedel *Die Grenzen* 57–61; Koeman (red) *Praktijkboek administratiefrecht* par 2.2.

regsverhoudings gewoonlik geskep word en regsfeite waardeur individuele regsverhoudings geskep word, sal uitwis.[131]

Die Duitsers gebruik die begrip *Vereinbarung* vir hierdie soort ooreenkomste asook ooreenkomste wat naas die skep van individuele verhoudings ook die skep, wysiging en opheffing van objektiewe regsreëls tot gevolg het.[132]

4 7 Begripsomskrywing

Die regsbegrip *ooreenkoms* kan kortliks omskryf word as 'n meersydige regshandeling waarvan die onderskeidende kenmerke die wilsooreenstemming of skynbare wilsooreenstemming tussen minstens twee regsubjekte is, welke wilsooreenstemming primêr of skynbaar gerig is op die intreding van regsgevolge vir die partye tot die ooreenkoms. Die begrip kan verder betrekking hê op die regsgevolge van 'n ooreenkoms (die regsverhouding dus) en kan ook ten aansien van nietige ooreenkomste gebruik word.

The fact that one can conceive of bizarre hypothetical situations where it might be iniquitous to hold a mere owner of property liable for damage caused by such property where, for example, his property has been stolen by a thief unknown to such person, does not, in my view entitle a Court in an appropriate case to disregard the clear and unambiguous provisions of the statute or 'to invent fancied ambiguities' (per Zulman J in *Telkom (SA) Ltd v Duncan* 1995 3 SA 941 (W) 944).

131 Wiechers *Administratiefreg* 64 65 72; Forsthoff *Lehrbuch* 275; Kelsen "Zur Lehre vom öffentlichen Rechtsgeschäft" 1913 *AöR* 53, 1919 *ZöffR* 166. Die onderskeid tussen 'n wet en 'n regshandeling is nie absoluut nie want 'n wet kan ook individuele verhoudings reël en 'n regshandeling kan ook, naas die reëling van individuele verhoudings, 'n party in 'n bestaande algemene verhouding plaas.

132 Sachs 1983 *VerwArch* 26; Speiser *Über öffentlich rechtliche Verträge* 24; Henrichs "Richterliche Vertragshilfe bei öffentlich-rechtlichen Verträgen" 1953 *DVBI* 233; Tober *Die "clausula rebus sic stantibus" bei verwaltungsrechtlichen Verträgen* (proefskrif München 1970) 10; Redeker "Die Regelung des öffentlich-rechtlichen Vertrages im Musterentwurf" 1966 *DöV* 544 vn 13; Maurer "Die Verwaltungsvertrag – Probleme und Möglichkeiten" 1989 *DVBI* 807; Vogel *Vertrag* 1; Gahlen *Die öffentlich-rechtliche Vereinbarung als Rechtsform übergemeintlicher Zusamnenarbeit* (proefskrif Münster 1965) 44; Schick *Vergleiche und sonstige Vereinbarungen zwischen Staat und Bürger im Steuerrecht* (1967) 10. Dié benaming word ook gebruik vir 'n ooreenkoms wat nietig is omdat die partye nie selfstandige regspersone is nie – Beinhardt *Der öffentlich-rechtliche Vertrag als Regelungsbefugnis der öffentlichen Verwaltung im deutschen, französischen und spanischen Recht* (proefskrif München 1960) 59.

A German perspective on the constitutional enforceability of children's and labour rights in the interim bill of rights with special reference to *Drittwirkung*[*]

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OPSOMMING

'n Duitse perspektief op die grondwetlike afdwingbaarheid van kinder- en arbeidsregte in die tussentydse handves van menseregte met besondere verwysing na *Drittwirkung*

Artikels 27 en 30 van die handves van menseregte in die tussentydse Suid-Afrikaanse Grondwet (200 van 1993) beskerm onderskeidelik kinderregte en arbeidsregte. Terwyl kinderregte by uitstek 'n aanspraak teen die staat daarstel, is arbeidsregte primêr teen werkgewers in die private sfeer gerig. Hierdie verskil het belangrike gevolge vir die grondwetlike afdwingbaarheid van die betrokke regte asook vir die kwessie van horisontale werking van die handves van menseregte. Dié gevolge word ondersoek met besondere verwysing na die beginsel van *Drittwirkung* in die Duitse reg. Sekere kenmerke van grondwetlik beskermde regte word geïdentifiseer en bogenoemde verskille aan die hand daarvan onder die loep geneem. Die implikasies van horisontale toepassing van 'n handves van menseregte by sosio-ekonomiese regte word ontleed en daar word gewys op die probleme wat (veral in die Suid-Afrikaanse konteks) met die afdwingbaarheid van hierdie kategorie regte gepaard gaan.

1 INTRODUCTION

Sections 27 and 30 of the interim bill of rights[1] protect labour rights and children's rights, respectively. Whereas children's rights (especially those contained in section 30(1)(c)), presuppose a material claim against the state, labour rights are aimed primarily at private employers. This difference has consequences for the constitutional enforceability of the rights in question, as well as the extent of

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1 Ch 3 of the Constitution of the Republic of South Africa Act 200 of 1993.

the horizontal effect (*Drittwirkung*) of constitutional rights. The following article is an attempt to analyse some of these consequences.

This is done by means of a comparative analysis based on German constitutional law. The German Federal Constitution of 1949 does not explicitly guarantee any social and economic rights. Although the constitutions of the German federated states contain many social and economic rights in the form of constitutional commands or directive principles, the Federal Constitution – which is the superior constitution – does not contain any specific social and economic rights. It only entails a general directive principle, the so-called social state principle (in articles 20 and 28), which obliges the legislator to create a just social order. Since the social state principle is a constitutional command, the obligation implied by it does not correlate with any constitutional "subjective" rights. It lies within the discretion of the legislator to formulate concrete individual socio-economic rights.

But in spite of the absence of socio-economic rights in the Federal Constitution, the complexities surrounding social and economic rights, as well as *Drittwirkung*, have received intensive attention in literature and jurisprudence. Consequently, German constitutional law will serve as the background against which the enforceability of the rights in sections 27 and 30 will be evaluated.

The first section of this article is devoted to identifying certain characteristics of constitutional rights. This will serve as the background against which the complexities surrounding socio-economic rights – understood as material claims against the state – are analysed, and implications for the rights in section 30 are highlighted. Thereafter the differences between labour rights (aimed at private employers) and the consequences of these differences for the horizontal effect of constitutional rights, as well as the consequences for the enforceability of the labour rights in section 27, will be identified.

For the purposes of this article, the term "fundamental right" is regarded as a synonym for a constitutional (subjective) right. In German constitutional law, constitutional socio-economic rights are described as independent constitutional claims to performance (*Leistungsrechte*).[2] The focus will be on subsection (1)(c), (d) and (e) of section 30 only.

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2 For the German debate on the enforceability of *Leistungsrechte* see generally Alexy *Theory der Grundrechte* (1985); Badura "Staatsaufgaben und Teilhabenrechte als Gegenstand der Verfassungspolitik" 1991 *Politik und Zeitgeschichte*; Böckenförde *et al* (eds) *Soziale Grundrechte* 5. *Rechtspolitischer Kongreß der SPD* (1981) (hereinafter *Soziale Grundrechte*); "Grundrechte als Grundsatznormen" 1990 *Der Staat*; Bleckmann *Staatsrecht* II (1989); Brunner "Die Problematik der sozialen Grundrechte" 1971 *Recht und Staat*; Feddersen "Die Verfassungsgebung in den neuen Ländern" 1992 *Die Öffentliche Verwaltung*; Häberle and Martins "Grundrechte im Leistungstaat" 1973 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehre*; Isensee and Kirchhof (eds) *Handbuch des Staatsrechts* IV V VI (1987–1989); Lücke "Soziale Grundrechte als Staatszielbestimmungen und Gesetzgebungsaufträge" 1982 *Archiv des Öffentlichen Rechts*; Maunz and Dürig *et al Grundgesetz Kommentar* (1992); Müller *Soziale Grundrechte in der Verfassung* (1981); Murswiek in Isensee and Kirchhof (eds) *Handbuch des Staatsrechts* IV; Polakiewicz "Soziale Grundrechte und Staatszielbestimmungen in den Verfassungsordnungen Italiens, Portugals und Spaniens" 1994 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 340; Rath *Die Garantie des Rechts auf Arbeit* (1974); Schwabe *Probleme der Grundrechtsdogmatik* (1977); Siebeck *Die Sozialstaatsklausel des Grundgesetzes in Literatur und Rechtsprechung* (1974); Starck

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2 THE NATURE OF A CONSTITUTIONAL "SUBJECTIVE" RIGHT IN GERMAN LAW

The following exposition focuses only on those characteristics which are relevant for the consequent evaluation of constitutional socio-economic rights, namely their clear normative content and enforceability.

2 1 Normative content derivable from the Constitution

Alexy[3] describes a constitutional (subjective) right as a legal relationship between a legal subject, an addressate, and a legal object, in accordance with which the legal subject has a right against an addressate to something (the legal object).

He describes a legal object as an action by the addressate.[4] The right to life, for example, which is guaranteed in article 2 of the German Federal Constitution, implies a right to life of individuals *vis-à-vis* the state. The individual has the right not to be put to death by the state, as well as the right to be protected by the state from the attacks of others. The fact that the state must refrain from actions which could be instrumental in the death of the individual, indicates a negative action. The protection which the state must offer to the individual presupposes positive state action.[5]

It is important that the action by the addressate (whether positive or negative) should be clearly defined. If it is not, the legal object is unclear, with the result that the content of the right is obscure.[6] This means that there is no yardstick for ascertaining whether the limitations placed on the right are legally permissible. This, in turn, leads to legal uncertainty.[7] In other words, the essential content of constitutional (subjective) rights cannot be established merely with reference to the Constitution itself, but must be shaped by legislation. This is problematic since, in terms of German law, it is contrary to the character of constitutional (subjective) rights to make their content dependent on a previous legislative action.[8]

Bundesverfassungsgericht und Grundgesetz II (1976); Stern *Handbuch des Staatsrechts* III/I (1988); Tomandl *Der Einbau sozialer Grundrechte in das positive Recht* (1967); Von Mutius "Grundrechte als Teilhaberechte – zu den verfassungsrechtlichen Aspekten des Numerus Clausus" 1973 *Verwaltungsarchiv*; Wiegand "Sozialstaatsklausel und soziale Teilhaberechte" 1974 *Deutsches Verwaltungsblatt*; Wildhaber *Der Staat als Aufgabe* (1972).

3 Alexy *supra* 2 172–173.

4 *Ibid.* Compare to Hommes *De samengestelde Grondbegrippen der Rechtswetenschap* (1976) 114. The latter argues that in Roman-Dutch law only items with an economic value may constitute the object of a "subjective" right, eg property, copyright and so on. He is of the opinion that rights having a bearing on personality, including freedom and the right to life, are not subject to legal objectification, since they have no economic value and are inalienable. He describes rights which have a bearing on personality as subjective legal interests. See also Venter *Die publiekregtelike verhouding* (1985) 71. Alexy, on the other hand, objectifies the actions with regard to a right connected with personality or freedom, rather than the object as such. Cf also Van Niekerk "Categories of fundamental rights and constitutional reform in South Africa" 1990 *SA Public Law* 87–97; "The stronger position argument and public law rights of the state: a methodological problem" 1992 *SA Public Law* 264–273.

5 Alexy *supra* fn 2 173.

6 *Idem* 313.

7 *Ibid.*

8 Muller *supra* fn 2 181.

This, however, does not detract from the fact that legislation is often needed to give a more concrete shape to constitutional rights. Häberle[9] points out that constitutional rights are given relevance within a certain reality by means of legislation. This applies to all constitutional rights, although not necessarily to the same extent. Freedom of conscience and religion, for example, is a right that can be realised privately to a large extent. It is not heavily dependent on legislation for its effective realisation. Such concretisation (*Prägung*) becomes particularly important in cases where the realisation of a constitutional right is linked with the legal interests of others.[10] A good example is the right to property. In terms of article 14(1) of the German Federal Constitution, the content and limits of the right to property have to be defined by the legislature. In some cases it merely has to establish the limits of property, such as immovable property, since difficulties may arise in the identification of its natural borders.[11] Accordingly legislation is needed to regulate registration of land, for example. In other cases, for instance, claims and intellectual property, the effective realisation of the rights depends on legislation. Otherwise these rights would only exist on an abstract level where they are of no real use ("(nicht) eigentumsfähig") to the owner.[12]

However, the important point is that the legislation mainly concerns the *effective realisation* of the constitutional rights in question and not their basic *normative content*. The latter can be derived from the Constitution as such, since these rights possess a basic core content formed by historic and non-legislative influences (*Vorprägung*).[13] It cannot be said that the legislature has a free hand in designing the content of the rights.[14] It will become clear that this has important implications for the enforceability of constitutional rights.

2 2 Enforceability

Constitutional (subjective) rights go hand in hand with the ability to enforce them before a court.[15] Article 93(4) of the German Federal Constitution expressly asserts that constitutional rights are directly enforceable before a court of law. The violation of these rights may be addressed by means of normal court procedures and, where necessary, by means of a constitutional objection.[16] Constitutional rights should, however, be enforced with due regard to the principle of the separation of powers. This principle is inherent to the constitutional state (*Rechtsstaat*) and implies, amongst other things, that decisions affecting budget politics rest with the legislature (parliament) and not with the court. The enforcement of constitutional rights may therefore not result in the court usurping the function of parliament.[17] This element of the separation of powers is

9 *Die Wesensgehaltgarantie des Art 19 Abs 2 Grundgesetzes* (1983) 184.
10 *Idem* 183.
11 Leisner in *Handbuch des Staatsrechts* V *supra* fn 2 1048–1049.
12 *Ibid.*
13 Lerche in *Handbuch des Staatsrechts* V *supra* fn 2 764; also Leisner *ibid.*
14 Leisner *supra* fn 11 1046.
15 Alexy *supra* fn 2 209.
16 A 93(4) of the Constitution reads: "[Das Bundesverfassungsgericht entscheidet] über Verfassungsbeschwerden, die von jedermann mit der Behauptung erhoben werden könne, durch die öffentliche Gewalt in einem seiner Grundrechte . . . verletzt zu sein." See also Böckenförde *supra* fn 2 14; Stern *supra* fn 2 978.
17 Alexy *supra* fn 2 462; Müller *supra* fn 2 5.

particularly relevant to socio-economic rights, since their enforcement implies financial decisions which could have a heavy impact on the state budget.

In order to function as constitutional (subjective) rights, therefore, social and economic rights should have a clear legal subject, legal object and addressate, which are determinable on the basis of the Constitution itself *and* which can be rendered legally enforceable, with due regard to the separation of powers. The question whether independent socio-economic claims satisfy the requirements of the definition will now be addressed.

3 INDEPENDENT CONSTITUTIONAL CLAIMS TO SOCIO-ECONOMIC PERFORMANCE (*LEISTUNGSRECHTE*)

Constitutional claims to socio-economic performance relate to social and economic rights which have been expressly formulated as (subjective) constitutional rights. In other words, the Constitution would clearly stipulate that each individual, for example, has a right to work, housing, health and education. The formulation implies that the state must furnish each person with a job opportunity, a house, an opportunity to be educated and medical services. If this does not happen, the individual has the right to challenge the state's performance in a court of law.[18]

3 1 Recognition in positive law

No independent rights to socio-economic performance exist in German law. Although the constitutions of several of the German federated states do, in effect, contain formulated rights to work, education and housing, these are not regarded as rights to performance but as constitutional commands or directive principles.[19]

3 2 The implications of independent constitutional claims to socio-economic performance

3 2 1 Legal uncertainty

The legal objects of social and economic rights usually consist in a positive action or actions on the part of the state. This implies that the state may carry out one (or more) of a variety of possible actions in order to realise the right. The question therefore is what state action(s) is (are) the most desirable. The right to work, for example, may theoretically run the whole gamut from a utopian right to a self-chosen employment opportunity, to the right to unemployment insurance.[20] The same applies to other claims to socio-economic performance. In the concept of a right to housing, it is neither qualitatively nor quantitatively clear exactly what kind of dwellings should be provided by the state.[21] Even the simplest social or economic right, for example the right to a minimum subsistence level (*Existenzminimum*) is not easily defined.[22]

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18 Alexy *supra* fn 2 402; Müller *supra* 2 172; Bleckmann *supra* fn 2 206; Ramm in *Soziale Grundrechte supra* fn 2 33.

19 Ramm *ibid*; cf Alexy *supra* fn 2 402; Müller *supra* fn 2 172; Bleckmann *supra* fn 2 206.

20 Tomandl *supra* fn 2 8–9.

21 Alexy *supra* fn 2 421 462.

22 Brunner *supra* fn 2 11. Alexy *supra* fn 2 461 states that the legal subject of the rights is also not clear. Eg, are only the unemployed entitled to employment opportunity? Are only those who fall below a certain income level entitled to housing, or does everyone qualify?

It is therefore not clear which of the state performances constitutes the legal object, nor who the legal subjects of the right are. Are all individuals such legal subjects, or for example, only those below a certain income level? Thus the normative core of these rights cannot be elucidated merely on the basis of the Constitution itself, but must be defined by legislation in the first place.[23]

This is in conflict with the nature of constitutional (subjective) rights in German law. Moreover, it also carries certain implications for article 19(2) of the Federal Constitution, which stipulates that the *essence* of a constitutional right may not be violated under any circumstances, and is aimed at protecting constitutional rights against excessive curtailment by the legislature.[24] If, however, constitutional rights do not have a fixed normative substantive core, the court has no yardstick whereby to determine whether the essential content of the right is being violated by legislation or not. This does seem to be the case with social and economic rights – it would be exceedingly difficult for a court to ascertain whether their essential content is being undermined by legislation, which gives rise to large-scale legal uncertainty.

This problem does not usually arise with regard to civil and political rights. They are traditionally regarded as negative rights, and, as indicated, their legal objects are, in general, easier to determine since the state must refrain from all acts which would violate these rights.[25] Even in cases where civil and political rights, such as the right to a fair trial, require positive state action, the German legal system provides clarity about their minimum content (legal subject, legal object and addressate). Müller[26] points out that a wealth of political and historical knowledge, experience and significance lies behind civil and political rights, and this makes it possible to determine at least their normative core.

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23 Alexy *supra* fn 2 462 points out that problems with the precise formulation of rights are not unusual. Before social or economic rights may be described as indefinable, it must be shown that it is impossible to furnish them with an abstract normative content. Böckenförde *Soziale Grundrechte* 12 explains the difference between (negative) civil and political rights and (positive) social and economic rights by saying that the content of a civil and political right (ie the legal object) already exists to a certain degree and only needs to be protected. In the case of social and economic rights, the content (legal object) must be provided and protected.

24 Häberle *supra* fn 2 291 372 332; Alexy *supra* fn 2 270. Cf BVerfGE 45, 184; BVerfGE 34, 238 (245); BVerfGE 33, 303 (333); BVerfGE 22, 189 (219–220). When applying this principle, an intensive and differentiated balancing of objective community interests and subjective individual interests takes place. The question whether the subjective or objective interests carry the most weight depends on the nature of the right and whether it is strongly linked with the social interests of others. If that is indeed the case, the individual freedom will be subjected to greater limitation. However, a 19(2) always serves as an "emergency brake" which controls the decision of the court, whether the judges refer to it explicitly or obliquely, by saying eg that the right may not "run dry" or that its substance may not be violated – something of individual freedom always has to remain. Even if a 19(2) were to be seen merely as a reaffirmation of the proportionality principle, it is important since it explicitly draws attention to the limits for state intervention. The strict and formal distinction made by Woolman "Riding the push-me pull-you: Constructing a test that reconciles the conflicting interests which animate the limitation clause" 1994 *SAJHR* 72 is not correct.

25 Alexy *supra* fn 2 209.

26 *Supra* fn 2 183.

3 2 2 The undermining of the principle of the separation of powers

Rights to socio-economic performance are usually cost-intensive, and their enforcement therefore involves economic-political decisions. In compliance with the principle of the separation of powers, however, such decisions rest with the legislature (parliament).[27] If an individual indeed tries to enforce a right to socio-economic performance before a constitutional court, it would be the court that should ultimately make the decision. This would lead to social politics being removed from the sphere of parliamentary competence and placed in that of the constitutional court. Such a shifting of authority would be in conflict with the principle of the separation of powers.[28]

Moreover, the state has limited financial means at its disposal.[29] In order to render social and economic rights enforceable as constitutional (subjective) rights, budget politics would have to be laid down in the constitution to a large extent, which would result in a further undermining of the separation of powers.[30] The determining and control of the execution of the budget is also a political function which rests exclusively with the legislature. The judge is not qualified to co-ordinate the diversity of political factors which influence social priorities and the means to their realisation.[31]

3 2 3 The undermining of the character of a constitutional right

It is sometimes argued that the above problem may be addressed by expressly laying down that independent constitutional rights to socio-economic performance exist only within the compass of legislation, and with due consideration being given to available financial means.[32] The legislature therefore has the opportunity to describe the content of the right from a closer perspective, without shifting budget politics to the domain of the constitutional court.[33]

The problem with this particular approach is that the rights to socio-economic performance lose their constitutional character and are not accessible to judicial control. The legislature is responsible for their content, which would also have to be continually adjusted to suit the financial requirements of the times and the availability of state means.[34] If a lack of state means should lead to the legislature's being unable to give any content, at a given time, to the right to housing, for example, then article 19(2) would be undermined.

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27 Alexy *supra* fn 2 462; Müller *supra* fn 2 5: The judge stands outside the political process and does not have adequate, established and recognised legal criteria according to which state performance can be measured.

28 Müller *supra* fn 2 181.

29 Wildhaber *supra* fn 2 365; Alexy *supra* fn 2 463–464: The means brought into play for this purpose are those which the state takes away from others in some or other form, eg taxation. This redistribution is permissible only if the purpose for which it is applied is reconcilable with the constitutional civil and political rights of the citizens. This means that the state's capacity to perform desired actions depends not only on the amount of available means, but also on the purpose for which the state means is applied.

30 Alexy *supra* fn 2 462; see also Von Mutius *supra* fn 2 190.

31 Müller *supra* fn 2 193.

32 See Basson *Die ontwikkeling van ekonomiese regte met 'n arbeidsregtelike perspektief* (1990) 126–131; Haysom "Constitutionalism, majoritarianism, democracy and socio-economic rights 1992 *SAJHR* 461.

33 Brunner *supra* fn 2 16–17.

34 *Ibid*; see also Häberle *supra* fn 2 91, who is in favour of "grundrechtliche Leistungsansprüche unter Maßgabevorbehalt".

The individual would not be able to approach the constitutional court on the ground that the essential content of his constitutional right has been impaired. The question whether the state, with due regard to all its obligations, is in a financial position to guarantee housing, is a political question which is not accessible to legal adjudication.[35] The rights to socio-economic performance would therefore lose their constitutional quality. They would be formulated in the guise of constitutional (subjective) rights, but would not be accessible to constitutional control – and therefore cannot be enforced in the sense in which a constitutional right should be enforceable.

It must be emphasised again that, even should individuals be able to approach a constitutional court, the latter would in any case be unable to test whether article 19(2) has been complied with. As explained above, the court does not have a yardstick to establish whether the essential content of the right has been violated or not.

It would therefore appear that rights to socio-economic performance do not meet the requirements for constitutional rights. One lands repeatedly in the same cul-de-sac, namely the vagueness of the contents of the rights, which results in their being legally unenforceable.

The problem could be overcome if social and economic rights could be reduced to their simplest components. The right to basic nutrition[36] may serve as an example. International organisations such as the World Health Organisation (WHO) have in the course of time developed standards according to which the essence of this basic right may be established.[37] This, however, still leaves the problem unsolved of who, exactly, is entitled to this right. For example, does it devolve only to those who fall in a specific income group and/or to children and the aged? Or may every individual lay claim to it? Legislation would therefore still be necessary to define the legal subject – who also constitutes a part of the normative core. One could try to circumvent the problem by expressly limiting the constitutional right, to apply only to children,[38] with the idea that this might be considered a sensible fixing of priorities by starting with the youth. However, the question remains whether the recognition of a variety of extremely simple claims to socio-economic performance would really provide any protection worth mentioning to socio-economic interests.

3 2 4 The undermining of constitutional stability

The only way in which rights to socio-economic performance could possibly be entrenched as independent constitutional rights, without undermining either their constitutional character or the principle of separation of powers, would be by continually adjusting the constitution in such a manner that it includes only those rights which can be enforced at a given time.[39]

The constant adjustment of the constitution would undermine one of its primary characteristics, namely stability. The constitution is the cornerstone of the

35 Brunner *supra* fn 2 16–17.
36 S 30(c) of the interim Constitution.
37 For a discussion of the implications of these guidelines for the enforceability of children's rights in the interim bill of rights, see De Wet *Constitutional enforceability* ch 5.
38 S 30(c) of the interim Constitution.
39 Tomandl *supra* fn 2 35.

legal order, and should therefore contain provisions which can adjust to the requirements of the times without having to be constantly amended. If constitutional stability were to be forfeited, the whole meaning of the constitution would become suspect.[40]

It would appear, therefore, that it is not possible to overcome the problems posed by independent constitutional (subjective) rights to socio-economic performance. The question is what this would imply for the children's rights in section 30 of the interim bill of rights – especially since section 7 of the South African Constitution of 1993 also guarantees the enforceability of the fundamental rights protected in the Constitution. This means that the requirement that constitutional rights should possess a legal subject, a legal object and an addressate, which can be established from the Constitution itself, and that their enforcement should not undermine the separation of powers, would also apply to fundamental rights in the South African context.

4 IMPLICATIONS FOR THE CHILDREN'S RIGHTS (SECTION 30) IN THE INTERIM BILL OF RIGHTS

4 1 Introduction

Section 30 provides, *inter alia*:

> "(1) Every child shall have the right–
>
> (c) to security, basic nutrition and basic health and social services
>
> (d) not to be subject to neglect or abuse; and
>
> (e) not to be subject to 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.
>
> (3) For the purposes of this section a child shall mean a person under the age of 18 years . . ."

In order fully to comprehend the nature of these rights, one has to keep the limitation clause in section 33 of the Constitution in mind. In terms of section 33(1)(a)(i), all limitations of fundamental rights has to be "reasonable". Furthermore, in terms of section 33(1)(aa), certain rights, including those protected by section 30(1)(d) and (e), may only be limited when the limitation is "reasonable and necessary". It is unclear why this distinction has been made, especially if one considers that necessity is normally a component of the proportionality principle and therefore inherent to the limitation of all constitutional rights in a constitutional state (*Rechtsstaat*). However, in order to give meaning to this explicit distinction in the transitional Constitution, one could argue that "necessary limitations" would be subjected to stricter judicial control than merely "reasonable limitations". The legislature will consequently have less discretion to limit these rights.[41]

Section 33(1)(b) provides, further, that no limitation may negate the essential content of the right in question. This clause was taken over from the German

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40 *Ibid*; see Lücke *supra* fn 2 51: The credibility of the constitution, which creates a "stable order" ("dauerhafte Ordnung") would suffer considerable damage were the constitution to be continually amended.

41 Woolman *supra* fn 24 67; Cachalia *et al Fundamental rights in the new constitution* (1994) 111.

Federal Constitution and means that the constitutional rights have to possess a normative content which is identifiable without the aid of legislation. Otherwise no yardstick exists by which limitations can be measured.

4 2 Security, basic nutrition, basic health and social services

Section 30(1)(c) entails positive claims against the state. It is not explicitly qualified by a clause proclaiming that the rights are enforceable "where reasonably possible". In other words, the claims are not explicitly reduced to constitutional commands or directive principles. The question is whether they are indeed enforceable.[42]

According to certain South African legal writers, such rights are enforceable. The financial impact that will follow after enforcement by the courts should not undermine the separation of powers, since the rights would exist only when children have no other access to the services in question.[43] In other words, although the courts will be confronted with financial decisions, it will only be to a limited extent, which should not pose a threat to the separation of powers or to budgetary politics. The courts would therefore be able to test whether certain basic services are available to children. In this way the Constitution compels the state to meet basic minimum requirements where children are concerned, regardless of the financial means that the state would otherwise have made available.[44]

However, before one can come to this conclusion, there has to be general agreement on the content of the "basic services" – the core content of security, basic nutrition, basic health and social services has to be identified. None of the legal writers supporting the enforceability of the rights in question has attempted to do so. Since this is indeed unexplored territory in South Africa and since section 35(1) of the Constitution obliges the courts to have regard to public international law, where applicable, existing international guidelines in these areas may shed light on the matter. It is important to focus on those guidelines which are applicable to developing countries, since the level of basic services provided by industrialised countries would be out of reach for a developing country like South Africa. Although the Convention of the Rights of the Child of 1989 is too vague to be of any real assistance, the WHO (World Health Organisation) and UNICEF (United Nations Children Fund) have developed certain indicators which could serve as a starting point.

Some of these indicators are very technical and altogether foreign to the legal mind. However, if a sincere attempt is to be made to define economic and social rights more clearly, one will have to take these indicators into account.

4 2 1 Basic nutrition

The guidelines supplied by the WHO concern basic nutrients to be taken daily in order to avoid malnutrition. They include carbohydrates, protein, vitamins A, D and B_{12}, thiamine, riboflavine, niacin, iron, calcium, ascorbic and folic acid.[45]

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42 In terms of the limitation clause, the right may be limited to a "reasonable" extent. But since this is a general limitation applying to almost all fundamental rights, it does not necessarily imply that the rights in s 30(1)(c) are unenforceable.

43 Cachalia *supra* fn 41 102; see Basson *South Africa's interim Constitution* (1994) 46.

44 Cachalia *supra* fn 41 102.

45 WHO *Handbook on human nutritional requirements* (1974) 66.

The intake depends on the age, sex and body weight of the children. A girl of twelve years who weighs 38kg would generally need, for example, 2350 calories, 29 gm protein, 575 mg vitamin A, 2.5 mg vitamin D, 0.9 mg thiamine and 5–10 mg iron, daily.

The way in which these nutrients are taken, depends on the typical and available products in a certain region; the amounts may also be adapted in accordance with local conditions. But in spite of such fluctuations, the important point is that at least some clear international indicators exist which may serve as a starting point in defining the core content of basic nutrition.

4 2 2 Basic health services

Although the WHO does not define the term "basic health services", existing WHO guidelines on primary health care may serve as a frame of reference to define basic health services. The guidelines regarded as the most important by the WHO[46] as well as the United Nations Committee on Economic, Social and Cultural Rights,[47] include (1) access to clean drinking water; (2) access to adequate excreta disposal facilities; (3) immunisation against diphtheria, pertussis, tetanus, measles, poliomyelitis and tuberculosis; (4) access to trained personnel for treatment of common diseases and injuries, with regular supply of essential drugs, within one hour's walk or travel; (5) access to trained personnel during pregnancy, delivery; and (6) post-natal infant care.

4 2 3 Basic social services

The international guidelines for social services are rather vague. Until now, UNICEF has been the only international organisation that has suggested certain indicators. The priorities identified by UNICEF include (1) nutrition; (2) development of activities for women; (3) pre-school and day care centres; (4) support of the development of children between 0–6 years; (5) clean water and sanitary facilities; and (6) family planning.[48]

Emphasis is placed on guidelines 2 and 3 in conjunction with guideline 4. According to UNICEF, these three priorities should form a basic core which could be developed later. They should also be enacted in legislation which involves the community and establishes self-help services. In this way costs are kept low and sources of income (especially for women) are developed.[49]

4 2 4 Basic security

None of the international organisations contains any indication about what the basic security of children means. The guidelines of the ILO on social security exclusively concern workers: for example, they deal with workmen's compensation and unemployment benefits and do not provide indicators for child security. However, in the light of the guidelines suggested above, one could argue that basic security would at least include maintenance and care (either within a family context or in a state institution).

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46 WHO *Declaration of alma-ata* (1978).
47 E/C 12/1991/1.
48 UNICEF *Urban basic services: reaching children and women of the urban poor* (E/ICEF/L 1440) (1982).
49 *Ibid.*

4 2 5 Implications

To summarise, one could say that, with the help of certain international indicators, it may indeed be possible to identify a core content for the rights guaranteed in section 30(1)(c) without resorting to legislation. However, it is by no means clear that this core content will not burden the courts with financial decisions which it is not equipped to deal with.

One could indeed argue that the rights to basic nutrition and security (in the sense of maintenance) would only have a minor financial impact, since they would be claimed only by a minority that lives in extreme poverty. But the matter becomes more complicated when dealing with medical and social services. In South African society, many parents who may still be able to feed and clothe their children, would not be able to pay for day care centres or medical bills – even those resulting from primary medical care. The number of children completely dependent on the state as well as the consequent financial impact would be distinctly larger than in the case of the right to basic nutrition. Although some of the services (such as immunisation services) already exist and equal access to them can be guaranteed, it is unclear to what extent courts could demand the expansion of such facilities.[50]

It should also be kept in mind that children live in a family and community context. Therefore, although the principles of primary health care are – in terms of section 30 of the transitional Constitution – applicable only to children, their access to clean drinking water and excretion removal facilities, for example, would depend on the access which the community as a whole has to these facilities. Only if access can be guaranteed for the whole community – which presupposes a necessary but very expensive process in developing countries – would the rights of the children be enforceable.

It is consequently uncertain whether the courts will run the risk of designing a core content of the above-mentioned rights based on international indicators.[51] It is more probable that they will hide behind the legislature with the argument that the latter is responsible for giving effect to the rights and that these fundamental rights are limited by the availability of state funds. If this were to be the case, it would mean that a so-called fundamental or constitutional right would not be accessible to judicial control and would be reduced to a directive principle.

4 3 Neglect, abuse and exploitation

The rights contained in section 30(1)(d) and (e) should be directly enforceable in so far as they refer to children who are in state care. However, one could also argue that the rights presuppose a constitutional command to adopt legislation and measures for the protection of children in private care.[52] If this were not the case, the rights would have a very limited meaning, since most children are

50 If certain rural areas do not have these facilities, it could be argued that such a lack constitutes a violation of the equality principle and that the facilities must be expanded. However, the legislature would still have a considerable discretion concerning the size, number and exact location of such facilities.

51 If courts were willing to derive a right to day care centres from the right to basic social services, it would probably only apply to children who are completely destitute. Those who could be taken care of by the extended family, eg, would not qualify.

52 Cachalia *supra* fn 41 104.

ought up by families and most abuse and exploitation take place within a ivate context. Since the rights in section 30(1)(d) and (e) belong to the cate- ry of right which may only be limited when "necessary", it is unlikely that ey were intended to have a limited effect only.

This leads to the question whether children (via their guardians) would indeed ve the right to demand state protection against private abuse or exploitation. r example, would section 30(1)(d) give an abused child the right to demand to placed in a state institution? This could be possible if it is kept in mind that ction 30(1)(c) guarantees a right to security (for example, maintenance and re). Thus if the subsections are read together, it would seem that section (1)(d) and (e) could also guarantee positive claims against the state – in spite its negative wording.

The references to the impact of constitutional rights on the relations between dividuals lead to the question of the extent of the horizontal effect of constitu- nal rights. Although this question also relates to section 30 of the interim nstitution, it will be shown that it is of particular relevance to labour or rkers' rights.

THE IMPLICATION OF A HORIZONTAL ACTION (*DRITTWIRKUNG*) FOR SOCIAL AND ECONOMIC RIGHTS

om the above exposition it would appear that the German debate about social d economic rights in the form of constitutional (subjective) rights is limited ainly to those aimed at substantive performance by the state and its implica- ns for legal security and the separation of powers. No distinction is made tween social and economic rights which are directed at performance to be ndered by the state and those which are directed at regulating relations be- een private individuals. Therefore, the *function* of the different norms and the ssible results of their application have received very little attention in German w up to the present.

Social and economic rights which are aimed exclusively at regulating private ations are the so-called workers' rights. Although the German Federal Consti- ion does not contain any workers' rights, the constitutions of the federated tes do. The workers' rights which are contained in these constitutions are: the ght to freedom of association; to strike; to a fair wage; to safe working condi- ns; to equal remuneration for work of equal value; to reasonable hours of rk, and to adequate leave.[53]

However, these provisions do not create enforceable constitutional rights, but nstitutional commands. As early as 1981, Müller[54] pointed out that these rights re aimed mainly at private employers and not purely at the state. He described em as indirect constitutional commands, since the state legislature had to omulgate specific legislation which had, for example, to guarantee fair wages d reasonable hours of work for (private) employees. The state is therefore only

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53 See eg a 167–169 of the Bavarian Constitution.
54 *Supra* fn 2 172.

The question is whether these constitutional commands may be made directly enforceable by recognising their horizontal effect (*Drittwirkung*). To date the matter has received very little attention in German law. The references to a horizontal action of social and economic rights are normally limited to cases in which the question arises whether claims to substantive performance can be realised by making them directly applicable to third parties. The logical answer is that a direct horizontal action offers no solution because the same problems exist in respect of legal certainty (vague object, subject and/or addressate).[55] Virtually no mention is made of social or economic rights directed at the regulation of private relations and which can in fact be enforced if direct horizontal effect is given to them.

5 1 The recognition of the horizontal effect of constitutional rights in positive law

In German law, constitutional rights operate primarily between individuals and the state. However, the constitutional court explicitly ruled that constitutional rights envisage an objective value system which would apply to the entire legal system. Consequently all norms of private law, criminal law, commercial law and law of procedure must reflect the values underlying constitutional rights, and legislation in conflict with this is null and void.[56]

Nevertheless constitutional rights in general enjoy no direct validity between individuals or groups. Civil relations are materially and formally regulated by private law. The only explicit exceptions are the right to freedom of association, the rules governing the formation of labour unions and employers' organisations and the right to strike. In terms of article 9(3) of the Federal Constitution these rights are directly operative between individuals – this is in fact the only constitutional right which explicitly has a direct horizontal effect, and it is pre-eminently an example of an instance in which the aim of a constitutional right would be totally undermined if it could not be made directly applicable to civil relations.[57]

Article 9(3) should therefore serve as a point of departure for a debate about the desirability of the recognition of direct horizontal effect of the remaining workers' rights – especially since the other workers' rights mentioned here, namely those to fair wages, secure working conditions, equal pay for work of equal value, reasonable hours of work and adequate leave, are only entrenched as legislative directives in the federated state constitutions.[58]

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55 Tomandl *Der Einbu sozialer Grundrechte in das positive Recht* (1976) 8–9; Polakiewicz *supra* fn 2 3877.

56 BVerfGE 2, 1 (12); BVerfGE 6, 32 (40). For cases in which a direct horizontal action were derived from constitutional rights, see BVerfGE 34, 269 (280) and BVerfGE 71, 183 (201). The right to physical integrity in a 2 of the Constitution obliges the state to protect its citizens against physical and mental injury, whether caused by the state or by third parties. German courts have ruled that if the right to life and physical integrity is undermined, the aggrieved party will have a right against the state, as well as against concerned third parties for personal damages.

57 A 9(3) of the Federal Constitution provides, *inter alia*, that agreements which limit or impede the law are null and void.

58 Müller *supra* fn 2 172–173.

However, to date, German legal authors have not developed the matter further.[59] They simply acknowledge that direct horizontal action becomes more important as social and economic forces in civil relations increase, since in such cases unilateral power relations come into the picture which bear many resemblances to state supremacy.[60]

In the 1950s Nipperdey[61] did make an effort to pursue the debate. However, he limited his arguments to equal wages for men and women and pleaded that the quality principle should be directly applicable to private wages. He maintained that the meaning of the equality principle is undermined if only the civil service is obliged to introduce wage equality.

Although the constitutional court has not had to rule in this connection to date, the federal labour court (of which Nipperdey was the president) implicitly supported this viewpoint. The court has up to now explicitly left open the question of the direct horizontal action of the equality principle in respect of equal wages. Nevertheless the court did concede that it "could have" direct horizontal action and that the matter should be developed further.[62]

Unfortunately, the question has not been raised again. In this connection it is illuminating to examine developments in southern European law. The approaches to direct horizontal operation of constitutional rights in southern European countries such as Spain,[63] Italy[64] and Portugal,[65] as well as to the enforceability of social and economic rights in general, are very largely based on the German concept. The fact that Italy, for example, has recognised the direct horizontal operation of the right to a fair wage can therefore also prove to be a valuable guideline to German law in future.

The Italian Constitution guarantees a wage right "which is commensurate with the scope and quality of labour and which enables the worker and his family to lead a free and dignified life". According to Italian literature and jurisprudence, this presumes a directly enforceable right which has direct horizontal operation. This is related to the fact that in Italy (in contrast to other western European countries) no legislation exists regulating minimum wages.[66] In other words, the court had the necessary discretion to apply the constitutional right directly to private relations.

The Italian financial court declared null and void labour agreements which do not meet the requirements of fair wages and a fair wage was fixed by the judge. The crucially important criteria are whether the wage guarantees a decent living and whether it is commensurate with the scope and quality of the work. The question whether a wage ensures a decent standard of living for the employee and his family, is objectively determined according to general circumstances and does not imply an obligation to consider the circumstances of a specific family.

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59 Polakiewicz *supra* fn 2 387.
60 Zippelius in *Evangelisches Staatslexikon* I (1987) 1229; see also BAG (Bundes Arbeitsgericht) AP No 4.
61 Nipperdey *Grundrechte und Privatrecht* (1962) 25; see also Stern 1988 *supra* fn 2 76.
62 BAG AP No 4 s 3; see also BAG AP No 16 s 3.
63 Cf STC 31/1984, 83/1984 and 86/1985 in Polakiewicz *supra* fn 2 358.
64 C.Cost sent No 455/1990 in Polakiewicz *supra* fn 2 361.
65 AcTC (Plenum) 39/84 in Polakiewicz *supra* fn 2 358.
66 Polakiewicz *supra* fn 2 389–390.

The principle that the payment must accord with the quality and scope of the work, has not yet been further concretised by the courts. The civil courts were, however, reticent about exactly what constitutes a fair wage, and usually determined it in accordance with collective agreements and the concrete circumstances of the case, including the nature, duration and intensity of the labour.[67]

The Italian courts therefore recognised the principle that direct horizontal operation of constitutional rights is necessary if the right is directed at the regulation of one-sided power relations.[68] Consequently, the right was made directly enforceable: a core content was identifiable and since no substantive performance by the state was at stake, the separation of powers was not undermined. Unfortunately, this discussion is still in its infancy in Italy and other southern European countries and the courts and legal authors have to date paid very little attention to it. This is particularly regrettable because it is unclear how far such direct horizontal operation should extend. Should it, for example, apply only to workers' rights or also to other social and economic rights which may be made enforceable in this way?

Most social and economic rights such as the right to education, social security, health services and housing are directed primarily at substantive performance by the state, and do not lend themselves to direct enforcement against third parties. However, it would appear that the right to housing does have an element which can have direct legal force against third parties. For example, the Portuguese constitutional court ruled that the right to housing did have direct horizontal operation, which means, *inter alia*, that a person has a right against arbitrary eviction.[69]

Since most tenants sign a lease with private owners, the interdict will have real meaning only if it is made directly applicable to third parties. This facet of a right to housing may therefore be singled out, together with workers' rights, as rights with direct horizontal operation.[70]

5 2 The disadvantages of excessive recognition of direct horizontal operation of constitutional rights

The recognition of direct horizontal operation of workers' rights and a right against arbitrary evictions does not imply that all constitutional rights operate in the horizontal sphere. If that were to be the case, all private relations would be regulated directly by the constitution, which would severely restrict the function of private law as well as private autonomy.[71]

One should not forget that the very existence of private law is a manifestation of freedom. If direct horizontal effect were attributed to all constitutional rights, this function would be severely limited. Down the centuries, private law has

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67 (112) Cass No 4147/1990 in Polakiewicz *supra* fn 2 390. See also C.Cost sent No 43/1980: The constitutional court has repeatedly confirmed that the right to a fair wage does not justify a claim to automatic adjustment of wages in accordance with the cost of living.

68 Polakiewicz *supra* fn 2 387.

69 AcTC 1 (Secção) 101/92 in Polakiewicz *supra* fn 2 385.

70 See De Wet *Constitutional enforceability* ch 4 for a discussion on the enforceability of constitutional commands.

71 Zippelius *supra* fn 60 1228–1229; Stern *supra* fn 2 1591.

developed certain mechanisms to limit the abuse of power in private relations. The fact that these are inadequate does not justify denying their existence, or disregarding them by the recognition of the direct horizontal operation of constitutional rights.[72] The existing (inadequate) protection should rather be extended by means of civil legislation. Although this also presupposes state intervention in private relations, it occurs through civil law itself and not via its elimination by interposing constitutional rights.[73]

Furthermore, constitutional rights cannot operate with the same intensity in private law as in public law. The effect of constitutional rights on the horizontal plane is relative, since the rights are enforced between parties who all have claims to the same rights. In the vertical relationship, this effect is stronger, because only individuals may claim the right and not the state. This implies that constitutional rights have to be contextualised before they can operate within private law.[74]

This contextualisation may be illustrated by means of the distinction between civil and non-civil private law. Civil private law concerns state law (legislation as well as common law), whereas non-civil private law refers to the law of private institutions such as churches and sports associations. If constitutional rights were applicable not only to state law, but also to non-state law, it would mean that the internal regulations of private organisations would also have to conform to the constitution.[75] This could imply a major limitation of private autonomy, since every individual private sphere – including those which should be protected from state intervention – would be made subject to state control. The constitutional protection of religious freedom, for example, should not prevent a newspaper or magazine which adheres to a particular philosophy, from expecting its journalists to support this view in their articles – such decisions belong to the internal policy of the newspaper and fall under non-civil private law.[76] However, if the editor were to forbid his journalists to marry people who

72 Stern *supra* fn 2 1594.

73 *Idem* 1593–1594.

74 Nipperdey *supra* fn 61 27; see also Rosenzweig "Bedeutung der Grundrechte in österreich" 1978 *Europaische Grundrechte Zeitschrift* 473; Alexy *supra* fn 2 492.

75 Van der Vyver *General principles of the declaration of fundamental rights* (unpublished) (1994) 21.

76 Also see Zippelius *supra* fn 60 1229; Dürich "Der Grundrechtssatz von der Menschenwürde" (1956) *Die Öffentliche Verwaltung* 123. For a similar point of view adopted by the Spanish constitutional court, see STC 129/1989 in Polakiewicz *supra* fn 2 387–388: The court recognised the direct horizontal operation of the right to education as a negatively enforceable right. The plaintiff felt that, in terms of the right to education (s 27(1)), he was entitled to work night shifts instead of day shifts so that he could pursue his studies during the day. With reference to a direct horizontal action, the constitutional court strictly distinguished between the negative and positive elements of the right to education. It would, eg, be irreconcilable with the right to education if the employer forbade the employee's studies. However, the court felt that no claim to a specific division of individual shifts could be inferred. The aspect of the right to education which is aimed at positive performance is applicable only to the state. The court emphasised that constitutional rights cannot be regarded as unlimited "exception clauses" which totally change the content of labour relations and which justify the non-fulfilment of contractual obligations. Although the individual has no rights in regard to the specific allocation of shifts, one could argue that the constitutional right to education should compel the employer to accommodate the employee's request, if possible. In this way, recognition would be given to the spirit and aims of right to education. However, the court made no mention of the existence of such an obligation.

do not share the philosophy of the newspaper, he would no longer be moving within the sphere of non-civil private law. He would be operating in an area governed by civil (state) private law which should be more receptive to constitutional values.

These factors lead to the conclusion that great care should be taken if direct horizontal operation of constitutional rights is recognised. The nature and purpose of the various constitutional rights will be decisive in determining whether they are suitable for such operation or not.[77] Direct horizontal operation would come into contention primarily in civil private law, in cases where a unilateral power relation exists which manifests parallels with state supremacy, and where legislation which concretises the rights in question is lacking. In other words, it would primarily enter into play with workers' rights that are constitutionally guaranteed but not clearly defined by legislation. Consequently it is time to draw certain conclusions for the rights contained in section 27 of the interim bill of rights, as well as the rights contained in section 30(1)(d) and (e).

6 IMPLICATIONS FOR THE LABOUR RIGHTS IN SECTION 27 OF THE INTERIM BILL OF RIGHTS

Section 27 of the interim Constitution provides:

> "(1) Every person shall have the right to fair labour practices.
>
> (2) Workers shall have the right to form and join trade unions, and employees shall have the right to form and join employers' organisations.
>
> (3) Workers and employers shall have the right to organise and bargain collectively.
>
> (4) Workers shall have the right to strike for the purpose of collective bargaining.
>
> (5) Employers' recourse to the lock-out for the purpose of collective bargaining shall not be impaired, subject to section 33(1)."

The workers' rights protected in section 27 of the Constitution are primarily aimed at workers employed by private employers. They do not presuppose substantive performance by the state. Consequently, the extent to which the horizontal operation of the constitutional rights in the interim bill of rights is recognised, has to be established.

It seems that the interim Constitution, like the German Constitution, recognises indirect horizontal operation only.[78] In terms of section 7(1) and (2), all state organs and all law are bound by the Constitution. The law referred to includes all forms of state law: in other words, common law, legislation and customary law. This becomes clear when section 7(2) is read together with section 33(2) which provides that "no law, whether a rule of the common law, customary law or legislation, shall limit any right entrenched in this Chapter".[79]

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77 Nipperdey *supra* fn 61 26–27; Alexy *supra* fn 2 492; Stern *supra* fn 2 1558.

78 Van der Vyver *supra* fn 75 22.

79 *Ibid.* He argues that this assumption is supported by s 33(4), which states that the Constitution does not preclude measures designed to prohibit unfair discrimination by bodies and persons other than those bound in terms of s 7(1). This provision is aimed at measures to control private discrimination within non-civil private law. If the Constitution were applicable to non-civil law in any case, s 33(4) would have been superfluous. For a discussion of the effects of s 33(4) and its implications for non-civil private law, see De Wet *Constitutional enforceability* ch 5.

Consequently, section 27 will serve as a yardstick by which all existing labour legislation (with the exception of the exemptions mentioned in section 35(1)(a)), future labour legislation and common law labour relations will be measured. Section 27 therefore has indirect horizontal operation and the courts will be able to decide whether any termination of employment in accordance with common law constitutes an unfair labour practice.[80]

One would like to suggest that the courts also acknowledge the direct horizontal operation of the rights contained in section 27, since they are mainly aimed at private relations where power relations, similar to those between the state and citizen, are in issue.[81] Direct horizontal operation would be especially relevant where labour relations are governed by common law. In applying the general principles of common law the court has a wider discretion to infer rights and obligations directly from the Constitution, than in cases where rights and obligations have been concretised by legislation. This was also indicated by the Italian decision quoted above where it was mentioned that Italy, unlike other western European countries, does not have a codified labour law.

Finally, it has to be pointed out that the transitional Constitution only contains a limited number of labour rights. The right to a fair wage, equal remuneration, safe working conditions and fair holidays are not guaranteed. This is unfortunate, since these rights could play an important role in curbing excessive power in private relations.

7 IMPLICATIONS FOR CHILDREN'S RIGHTS AGAINST NEGLECT, ABUSE AND EXPLOITATION IN TERMS OF SECTION 30(1)(d) AND (e)

It has already been indicated that the extent of the horizontal operation of constitutional rights arises in section 30(1)(d) and (e) as well. The rights against neglect, abuse and exploitation are probably intended to protect children in state as well as private care. The rights are aimed against protection of abuse of power and do not envisage substantive performance by the state. It is therefore possible that the courts may recognise direct horizontal operation and will infer certain obligations for all those responsible for the welfare of children, directly from the Constitution.

8 CONCLUSION

In order to qualify as a constitutional human right, a right must possess a core normative content that can be ascertained without the help of legislation. The right must also be directly enforceable without undermining the separation of powers by, for example, excessively straining the budget. Although most social and economic rights do not meet these requirements, it is conceivable that workers' rights could. They have already been enforced by the labour courts for some time, and, as indicated in the Italian decision quoted above, it should be possible for the courts to identify their core normative content where this is not done by legislation – in other words, where the common law still applies. However, since the rights are aimed mainly at regulating private relations

80 Cachalia *et al supra* fn 40 90–91.

81 This is also suggested by Basson *supra* fn 43 42.

(between employer and employee) their direct enforcement is dependent on attributing a direct horizontal operation to them.

It remains to be seen whether the children's rights in the South African transitional Constitution are indeed enforceable. Even though they have been scaled down to their simplest components, many questions remain regarding their core content and financial viability. Rights to basic medical and social services for children may seem enforceable at first glance – especially if one considers that certain international guidelines regarding their content already exist – but their enforcement could burden the courts with heavy financial decisions. Although one would wish the courts to enforce these rights, they might be confronted with decisions which they are not equipped to deal with. It will not be an easy task to develop a substantial core content for these rights without seriously impairing the separation of powers. It is hoped that the courts will be willing to take up this challenge and not to hide behind the legislature with the argument that it is the task of the latter to give effect to social and economic rights. If this were to happen, potentially enforceable rights will be reduced to directive principles.

However, the rights against neglect, abuse and exploitation could be directly enforced if the courts were willing to attribute direct horizontal operation to them. These rights are – like the labour rights – aimed primarily at private relations (for example, between adult and child). The rights do not presuppose substantive performance on the part of the state but imply a curbing of a power relationship which, in certain ways, resembles the supremacy of the state over the individual. Thus although there may be many other differences in constitutional enforceability between labour rights and children's rights, the private nature of both categories and their objective of protection against abuse, neglect and exploitation, make them receptive for direct horizontal operation, especially in areas governed by common law, where the court still has the necessary discretion to infer rights and obligations for private individuals directly from the Constitution.

The law recognises that there exists in our society a class of priest or spiritual adviser, who for some may be a minister of religion, to others a rabbi, to yet others a moulana, or a leader in a traditional religion, and that these counsellors perform a socially valuable function in comforting and guiding their congregants, and attempting to conciliate and mediate their disputes. These Courts, for all their coldness, recognise that people have spiritual needs and desires, and that it is socially valuable they should be able to confide their anxieties and sorrows to their spiritual advisers. The law recognises that, within the confidentiality of such communications, congregants should feel reasonably free to communicate what is troubling them, and that the spiritual adviser may have an interest in receiving even communications which are defamatory of others (per Cameron J in *O v O* 1995 4 SA 482 (W) 492).

Vroue in die arbeidsmark – 'n Unieke posisie wat betref diskriminasie?

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SUMMARY

Women in the labour market – A unique position in regard to discrimination?

As the vital role of women in the economy becomes more apparent, so does the need to combat sex discrimination in the labour market. Two key issues in this regard are pregnancy and sexual harassment. The Constitution contains an equality clause. The enforcement thereof generates the need to distinguish between two concepts: discrimination and differentiation. Equality usually depends upon objectivity as a criterion – but in the case of sex discrimination care must be taken not to equate so-called objectivity with the test of the reasonable man. In the case of sexual harassment the situation must be viewed according to the perspective of a reasonable member of the group to which the victim belongs. An equilibrium must be maintained between an objective contemplation of the behaviour of the perpetrator and a subjective investigation into the manner in which such behaviour is viewed by the victim. In regard to pregnancy it is important to understand that the pregnant woman cannot be compared to a man, as only women can get pregnant. The Labour Relations Act 66 of 1995 added the concept of the "automatically unfair dismissal" to our law of unfair dismissal in this regard. The definition of the "unfair labour practice" has been removed to schedule 7 of the Labour Relations Act which deals with "Transitional Arrangements". Stipulations in regard to the protection of the foetus may be seen as discrimination against a female worker as they infringe her freedom of choice.

1 INLEIDING

Vroue speel 'n belangrike rol in die moderne ekonomie. Ten spyte hiervan is daar nog verskeie wetgewende bepalings ingevolge waarvan teen vroulike werkers gediskrimineer word. Daar is ook verskeie bepalings op die wetboek wat vroue klaarblyklik bevoordeel maar wat daartoe lei dat indirek teen vroue in die arbeidsmark gediskrimineer word. Dit is egter nie net sulke duidelik waarneembare gevalle van diskriminasie wat kommerwekkend is nie maar veral ook die groot aantal arbeidspraktyke wat algemeen deur werkgewers beoefen word wat die vrou aan die kortste ent laat trek.

In hierdie artikel word beoog om sekere van hierdie praktyke te ondersoek. Daar word spesifiek gekonsentreer op die posisie van die vrou wat betref swangerskap en seksuele teistering. So 'n ondersoek is belangrik veral in die lig van veranderinge op konstitusionele gebied en die inwerkingtreding van die nuwe Wet op Arbeidsverhoudinge 66 van 1995. Aangesien die oes aan Suid-Afrikaanse regspraak op die terrein van geslagsgelykheid tot onlangs nog redelik skraal was, word die probleem hoofsaaklik vanuit 'n regsvergelykende oogpunt benader deur na internasionale wetgewing en presedente te kyk.

Die doel van die artikel is nie om die geheel van Suid-Afrikaanse wetgewing te ondersoek wat op die onderwerp betrekking het nie maar bloot om sekere riglyne neer te lê wat gebruik kan word wanneer met geslagsdiskriminasie in die praktyk te doen gekry word.

2 DIE BEGRIP DISKRIMINASIE

Artikel 8(2) van die Grondwet van die Republiek van Suid-Afrika 200 van 1993 bepaal uitdruklik dat daar teen niemand onbillik gediskrimineer mag word nie. Die insluiting van die woord onbillik is belangrik aangesien daar twee betekenisnuanses aan die woord kleef – 'n negatiewe en 'n heilsame betekenis. Laasgenoemde maak voorsiening vir die daarstelling van geregverdigde differensiasie.[1] Artikel 8(1) mag nie so uitgelê word dat individue nie in sekere omstandighede verskillend behandel mag word nie.

Dit is belangrik om te bepaal wat die begrip diskriminasie presies behels. Drie betekenisse van die woord kan kortliks aangetoon word. Eerstens, 'n neutrale betekenis van die handhawing van 'n verskil of 'n onderskeid. Tweedens, 'n negatiewe betekenis van 'n onbillike onderskeid in die juridiese, sosiale of ekonomiese behandeling van persone. Derdens, omgekeerde diskriminasie of regstellende optrede.[2]

Die vraag wat ontstaan, is of vroue klem moet lê op die ooreenkomste wat hulle met mans het of op die verskille tussen die geslagte. Dit is belangrik om vas te stel of gelykheid noodwendig identiese behandeling veronderstel.

Moet 'n vrou nie soms juis bo 'n man bevoordeel word om só gelyk behandel te word nie? Naas die oproep om gelykheid is daar tog ook die oproep op die reg om anders te wees. Laasgenoemde vereis verskillende behandelings vanweë verskillende omstandighede. Van hierdie omstandighede is die versorging van 'n kind die algemeenste. Daar is al opgemerk dat

> "many feminists argue that women are not simply men without penises, just as men are not simply women who cannot have babies. They want equality with men, but not necessarily according to the norms that men have created for society as a whole. Thus they do not wish for equality if that means that they must be female men. True equality connotes a joint input into determining the generalised norms, as well as acknowledging the right of women and men each to speak in their own voices".[3]

Gelykheid moet dus gemeet word aan objektiewe standaarde wat nie net die waardes van een geslag in ag neem nie. "Geslagblindheid" (dit wil sê 'n verontagsaming van geslag) het egter nie noodwendig gelykheid tot gevolg nie. Daar word in die algemeen aanvaar dat mense wat gelyk is, gelyk behandel moet word. Hierdie "formule" behels twee komponente, naamlik (a) 'n vasstelling dat twee persone gelyk is en (b) 'n morele oordeel dat hulle gelyk behandel behoort te word. Persone wat gelyk is, kan in die eerste plek twee persone behels wat in alle opsigte gelyk is, en in die tweede plek, mense wat slegs in sekere opsigte

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1 Cheadle ea *Current labour law* (1994) 103; sien *Association of Professional Teachers v Minister of Education* 1995 *ILJ* 1048 1079D ev vir 'n breë oorsig van die uitleg van a 8 ivm diskriminasie in die arbeidsmark.

2 Sien Schmidt (red) *Discrimination in employment* (1978); Cameron ea *The new Labour Relations Act* (1989) 161.

3 Sachs *The future constitutional position of white South Africans* (1990) 33.

gelyk is. Vanweë hul aard kan mense nooit in alle opsigte gelyk wees nie. Dit het tot gevolg dat daar ook nie altyd absolute gelyke behandeling kan en hoef te wees nie. Verskillende behandelings kan slegs gelyk wees met verwysing na die een of ander (objektiewe) morele reël.

3 FAKTORE WAT TOT GESLAGSDISKRIMINASIE BYDRA

Statutêre beperkinge op die vrou in die arbeidsmark kan in die algemeen in twee kategorieë verdeel word, naamlik (a) statutêre maatreëls wat uitdruklik op diskriminasie in diensvoorwaardes betrekking het, en (b) statutêre maatreëls wat daarop gemik is om vroue teen uitbuiting te beskerm maar wat tog 'n diskriminerende uitwerking het.[4]

Kulturele faktore in die tradisionele arbeidspraktyk wat mans se voorregte beskerm, asook die gesindhede en waardestelsels van die gemeenskap wat teen die deelname van vroue aan die arbeidsmark gekant is, dra daartoe by dat teen vroue gediskrimineer word.[5] Townshend-Smith[6] verwoord hierdie kulturele faktore soos volg:

> "There is no doubt that young women are socialised into thinking that certain jobs are inappropriate ... The ideology of domesticity is that paid work must not interfere with childrearing. Employers assume that all women will conform to this stereotype which is regarded as freely chosen."

In Suid-Afrika is dit moontlik dat die heersende ideologie nie soseer skepties staan teenoor die vermoë van vroue om hul loopbane te balanseer met hul huislike verpligtinge nie, maar eerder of hulle enigsins moet probeer om dit te doen.[7]

4 DIE BREË INTERNASIONALE POSISIE

4 1 Internasionale menseregte-instrumente

Die Internasionale Arbeidsorganisasie het sedert sy totstandkoming in 1919 die beginsel van gelykheid vir vrouewerkers gehandhaaf. Die Declaration of Philadelphia van 1944 het hierdie beginsel herbevestig deur te verklaar dat alle mense, ongeag geslag, die reg het om hul materiële welstand en geestelike ontwikkeling na te streef in toestande van vryheid en waardigheid, ekonomiese sekuriteit en gelyke geleenthede.

In 1967 word in die VVO se Verklaring van die Regte van Vroue gesê dat

> "discrimination against women, denying or limiting as it does their equality or rights with men, is fundamentally unjust and constitutes an offense against human dignity".[8]

In 1975 is die Declaration of Equality of Opportunity and Treatment for Women Workers aangeneem. Dit vereis onder andere die volgende:

- Die uitskakeling van alle vorme van diskriminasie op grond van geslag.

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4 Wentzel *Statutêre beperkinge op die posisie van die vrou in die arbeidsmark, 1910–1988* (1989).

5 Verslag van die Kommissie van Ondersoek na Arbeidswetgewing Deel 5 (1981) 93.

6 *Sex discrimination in employment: law, practice and policy* (1989) 18–19.

7 Datnow ea "Perceptions of, and attitudes towards, the employment and advancement of women in the legal and advertising professions in the Cape Peninsula" 1990 *SAJLR* 45.

8 A 1.

- Die afskaffing van diskriminasie op grond van huwelikstaat of gesinsverantwoordelikhede.
- Waarborge vir die reg op gelyke besoldiging vir gelyke werk.
- Die uitskakeling van diskriminasie teen vroue op grond van swangerskap of bevalling.
- Die beskerming van vroue teen werksrisiko's met spesiale verwysing na hul maatskaplike funksie van reproduksie.

In 1979 is die Konvensie met Betrekking tot Alle Vorme van Diskriminasie teen Vroue deur die VVO aangeneem. Dit is insiggewend om daarop te let dat in ag geneem word

> "the great contribution of women to the welfare of the family and to the development of society, so far not fully recognised, the social significance of maternity and the role of both parents in the family and in the upbringing of children".

Daar is 'n bewustheid vir die feit dat

> "the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole".

4 2 Regspraak

Om die effek van hierdie bepalings ten volle te verstaan, is dit nodig om na te gaan hoe die internasionale howe hierdie en ander soortgelyke bepalings uitgelê het.

'n Persoon diskrimineer direk teen 'n vrou indien hy haar minder gunstig behandel op grond van haar geslag as wat hy 'n man sou behandel. In hierdie sin het diskriminasie dus twee elemente:[9]

(a) Die vrou moet eerstens bewys dat sy minder gunstig behandel is as 'n vergelykbare man.

(b) Die vrou moet verder bewys dat die rede vir die minder gunstige behandeling haar geslag is.

In *Peake v Automotive Products Ltd*[10] het 'n werkgewer sy vroulike werkers toegelaat om die fabriek vyf minute voor die mans te verlaat sodat hul nie in die spitstyd rondgestamp sal word in die proses om 'n bus te haal nie. Hierdie vergunning word in die hof as geslagsdiskriminasie bestempel aangesien hier sprake is van verskillende behandeling vir die verskillende geslagte. Lord Denning bevind met verwysing na die Sex Discrimination Act dat

> "although the Act applies equally to men as to women, I must say it would be very wrong to my mind if this statute were thought to obliterate the differences between men and women or to do away with the chivalry and courtesy which we expect mankind to give womankind. The natural differences of sex must be regarded even in the interpretation of an Act of Parliament".[11]

Die hof van appèl het geen waardering gehad vir hierdie ironie nie en bevind dat

> "a statute introduced to make unlawful gender-based classifications, which had often been rationalised by reference to chivalry or the alleged need to protect frail women, was being frustrated by judicial reliance on precisely those factors of chivalry and paternalism".

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9 Pannick *Sex discrimination law* (1988) 25.
10 [1977] ICR 480.
11 968 973.

Die hof bevind dat 'n ander behandeling vir elke geslag egter nie diskriminasie is nie indien dit gebaseer is op "the interests of safety" of "sensible administrative arrangements" of wanneer die stelreël *de minimis non curat lex* toepassing vind.

Dit wil voorkom of die hof hier objektief na die vroulike werkers as *persone* gaan kyk het. Daar is nie sprake van subjektiewe hoedanighede wat aan een klas persone toegeskryf word, en dan as basis vir spesiale behandeling gebruik word nie. Indien subjektiewe hoedanighede wel in ag geneem sou word, moet 'n mens op die gegewe feite ook 'n toegewing maak vir mans wat (moontlik vanweë ouderdom of siekte) "swakker" as die ander is.

In *Jeremiah v MOD*[12] word met verwysing na *Peake* beslis dat veiligheid en goeie administrasie nie genoegsame rede vir 'n diskriminerende praktyk is nie. Dit gaan hier oor dit wat regverdigbaar is in 'n oop en demokratiese samelewing. Artikel 33 van die Grondwet bepaal dan ook dat enige beperking op die fundamentele regte van 'n persoon regverdigbaar moet wees in 'n oop en demokratiese samelewing gebaseer op vryheid en gelykheid.

5 SPESIALE GEVALLE VAN DISKRIMINASIE

Daar kan nou oorgegaan word tot 'n ondersoek van sekere praktyke wat reeds in die regspraak en wetgewing van die internasionale gemeenskap uitgekristalliseer het as moontlike gebiede waar geslagsdiskriminasie aan die orde van die dag is.

5 1 Seksuele teistering

'n Interessante vraagstuk wat al dikwels die aandag van die internasionale gemeenskap geniet het, is die kwessie van seksuele teistering as geslagsdiskriminasie.[13] In die VSA is by monde van die Equal Employment Opportunity Commission riglyne neergelê om die omstandighede waarin seksuele teistering in onregmatige diskriminasie ontwikkel, te verduidelik.[14]

Seksuele teistering kom hiervolgens neer op diskriminasie indien

- onderwerping aan sodanige optrede uitdruklik of by implikasie 'n voorwaarde van 'n individu se diens gemaak word;
- onderwerping aan of die verwerping van sodanige optrede gebruik word as die basis waarop besluite aangaande diensvoorwaardes geneem word; en
- sodanige optrede ten doel het of die effek het dat dit onredelik inmeng met 'n individu se werkverrigting, of 'n vyandige of intimiderende werksomgewing skep.

Toepassing van die beginsel van gelyke behandeling van mans en vroue beteken onder andere dat beide geslagte blootgestel word aan dieselfde werksomstandighede. Om 'n vroulike werknemer te onderwerp aan seksuele teistering het die gevolg dat daar nie aan haar dieselfde werksomstandighede as aan haar manlike kollegas verskaf word nie.[15]

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12 1979 IRLR 436.

13 'n Kommissie van die Europese Gemeenskap het bevind dat seksuele teistering wel direkte diskriminasie, gebaseer op geslag, kan daarstel. Sien Rubenstein *The dignity of women at work, a report on the problem of sexual harassment in the member states of the European Communities* (1988); "Sexual harassment: European Commission recommendation and Code of Practice" 1992 *Industrial LJ* 70–74.

14 Ellis *European Community sex equality law* (1991) 148.

15 Ellis 149.

In die Canadian Labour Code word seksuele teistering beskryf as

> "any conduct, comment or gesture of a sexual nature that (a) is likely to cause offense or humiliation to an employee; or (b) might, on reasonable grounds, be perceived by that employee as placing a sexual condition on employment or any opportunity in training or promotion".[16]

Daar word algemeen erken dat mans en vroue in fundamentele opsigte ooreenstem. Daar word dus uitgegaan van die veronderstelling dat 'n verskil in geslag nie outomaties verskillende behandelings verskoon nie. Dit is belangrik om in gedagte te hou dat optrede soos seksuele teistering inbreuk maak op vroue se reg op menswaardigheid.[17] Dit was ook die bevinding in die Kanadese saak *Janzen & Govereau v Platy Enterprises Ltd*:[18]

> "Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being."

Verskeie vereistes het reeds in die Amerikaanse reg uitgekristalliseer wat betref die bewys van diskriminasie in geval van seksuele teistering,[19] naamlik:

- Die vrou moet bewys dat sy aan 'n beskermde klas behoort.
- Onwelkome seksuele teistering moet bewys word.
- Die teistering moet op haar geslag gebaseer wees.
- Die teistering moet 'n effek op haar diensvoorwaardes hê.
- Haar werkgewer moet verantwoordelik wees.

'n Verdere vereiste wat moontlik hierby gevoeg kan word, is dat die vrou moet bewys dat die omstandighede waarin sy werk, nie neerkom op gelyke behandeling van die geslagte nie (sogenaamde "environmental harassment").

In *Strathclyde Regional Council v Porcelli*[20] het twee manlike tegnici 'n vroulike kollega seksueel geteister. Die doel was om druk op haar te plaas om vir 'n oorplasing te vra. Namens die werkgewer is geargumenteer dat die optrede nie op die geslag van die applikant gegrond was nie aangesien 'n man wat net so min geliefd was as die applikant, dieselfde tipe behandeling sou ontvang het. Die hof beslis egter dat waar die behandeling 'n beduidende seksuele element bevat waarvoor 'n man nie vatbaar sou gewees het nie, dit op die geslag van die vrou gebaseer is.

'n Mens moet versigtig wees om nie in elke situasie waar daar wrywing tussen manlike en vroulike werknemers en/of werkgewers is, seksuele teistering in te lees nie. Dit is belangrik om te onthou dat 'n mens steeds te doen het met twee persone wat toevallig die subjektiewe kenmerk vertoon dat hulle nie aan dieselfde geslag behoort nie.

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16 Part III Division V 9.

17 Die Ontario Human Rights Code bevestig in a 5(2) dat elke persoon die reg op vryheid van teistering het. A 7(2) maak dit spesifiek op seksuele teistering van toepassing.

18 Ontario Women's Directorate *Employer's guide – a time for action on sexual harassment in the workplace* (1993) 13.

19 Dancaster "Sexual harassment in America and South Africa: nature, relief and employer liability" 1991 *SAJLR* 13.

20 IRLR 134.

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'n Mens moet versigtig wees om nie in elke situasie waar daar wrywing tus n manlike en vroulike werknemers en/of werkgewers is, seksuele teistering in e lees nie. Dit is belangrik om te onthou dat 'n mens steeds te doen het met tw e persone wat toevallig die subjektiewe kenmerk vertoon dat hulle nie aan e selfde geslag behoort nie.

'n Probleem waaraan aandag gegee moet word, is die volgende: welke toets moet deur die howe gebruik word om te bepaal of seksuele teistering neerkom op diskriminasie deur die werkgewer, al dan nie? Diskriminasie vind plaas as die vrou se geslag meer aandag trek as haar werk. Daar kan dus gevra word of die vrou se diensvoorwaardes afhang van normaal-aanvaarde faktore (soos die termyn wat sy reeds by die betrokke firma werk of haar kwalifikasies) en of dit bloot afhang van haar geslag. Is die vrou se aanvaarding (al dan nie) van die werkgewer se seksuele optrede teenoor haar die oorredende faktor of nie?

In die Kanadese saak *Stadnyk v Canada Employment and Immigration Commission*[21] word die "redelike vrou" as maatstaf gebruik. 'n Ander formulering sou die "redelike slagoffer" wees. As maatstaf is dit beter as die "redelike persoon"-beginsel wat die ervaring van vroue ignoreer. Die redelike persoon-beginsel is gebaseer op ingeburgerde manlike standaarde wat nie die verskillende perspektiewe van mans en vroue in ag neem nie. Die teisteraar se optrede moet dus beoordeel word in die lig van die perspektief van 'n redelike lid van die groep waaraan die slagoffer behoort.

Die aangeleentheid kan egter nie geheel en al eensydig behandel word nie. In *Waroway v Joan and Brian's Upholstering and Interior Decorating Ltd*[22] word bepaal dat die werkgewer net aanspreeklik kan wees indien hy geweet het of redelikerwys moes geweet het dat sy gedrag onwelkom sou wees. Hier word die aangeleentheid beoordeel uit die gesigspunt van die werkgewer. Hoe die werknemer die situasie ervaar het, word buite rekening gelaat.

Dit is belangrik om te bepaal of die howe 'n subjektiewe dan wel objektiewe benadering moet gebruik. 'n Subjektiewe benadering sou impliseer dat die hele aangeleentheid vanuit die oogpunt van die werknemer benader word. Daar word gekyk na die gevolge van die optrede wat moontlik as diskriminerend ervaar kan word en die effek wat dit op die betrokke werknemer het. Dit kan dus gebeur dat optrede wat volgens die werkgewer redelik is, aanstoot gee aan 'n sensitiewe werknemer. In so 'n geval sou die optrede dus op seksuele teistering neerkom terwyl dit ten opsigte van ander vroulike werknemers nie dieselfde effek sou hê nie.

In 1991 is daar in Brittanje 'n *Code of Practice* aanvaar wat poog om 'n eenvoudige definisie van seksuele teistering daar te stel:

> "Sexual harassment means unwanted conduct of a sexual nature, or other conduct based on sex affecting the dignity of women and men at work. This can include unwelcome physical, verbal or non-verbal conduct."[23]

Die *code* lê duidelik klem op die subjektiewe karakter van seksuele teistering. Deur woorde soos "unwanted" en "unwelcome" te gebruik, word aangetoon dat elke individu self moet besluit watter optrede vir hom of haar aanvaarbaar is en wat hy of sy as aanstootlik beskou. Aandag word gegee aan die reaksie van die ontvanger eerder as die bedoeling van die dader.

Alhoewel die howe veronderstel is om objektief te wees, is dit belangrik om in te sien dat op die terrein van veral die arbeidsreg, billikheid nie losgemaak kan word van die omstandighede van die bepaalde geval nie:

> "Fairness is the righteousness of the particular case; it can therefore only become relevant in specific situations . . ."[24]

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21 Canadian Human Rights Commission *Annual report* (1993) 83.
22 Ontario Women's Directorate 13.
23 Rubenstein 71.
24 *UAMAWU v Fodens* (1983) 4 *ILJ* 212 (IC) 225.

Dit is belangrik om ten minste begrip te hê vir die ongeregtigheid, vooroordeel, nadeel of gevaar in die betrokke omstandighede. Handelinge wat op 'n onbillike wyse inbreuk maak op die arbeidsverhouding tussen die werkgewer en die betrokke werknemer, of dit benadeel, sal 'n onbillike arbeidspraktyk daarstel. Hier kan dit dalk nodig wees om 'n tweeledige toets aan te lê: (a) sou 'n redelike slagoffer in die posisie van die klaagster die werkgewer se optrede as benadelend ervaar het, en (b) het die werkgewer geweet, of moes hy redelikerwys geweet het, dat sy gedrag as benadelend ervaar sal word? Hierby kan gevoeg word die vraag of daar in die lig van al die omstandighede van diskriminasie sprake is.

Tot dusver is daar slegs na "onregmatige" seksuele teistering gekyk; daar word egter soms ook van die *quid pro quo*-eis as aksiegrond gebruik gemaak. Dit is gebaseer op die argument dat dit nie die seksuele teistering *per se* is wat onregmatig is nie maar eerder die diens-geassosieerde gevolge wat daaruit voortvloei. Die howe wat hierdie benadering gebruik, fokus op die *nexus* tussen die beweerde dreigemente (van byvoorbeeld ontslag) en ekonomiese benadeling. 'n "Clear and temporal link" word vereis.[25]

In Suid-Afrika is daar min hofsake oor die vraag of seksuele teistering diskriminasie daarstel. In *J v M* bevind die nywerheidshof dat

> "sexual harassment . . . will violate the right to integrity of body and personality which belongs to every person and which is protected in our legal system both criminally and civilly."[26]

Die volgende faktore word onder andere deur die hof in ag geneem om te bepaal of die betrokke seksuele teistering op geslagsdiskriminasie neerkom:

- Die verweerder het hom herhaaldelik aan sodanige optrede skuldig gemaak.[27]
- Die bestuurder het by verskeie geleenthede die verweerder se optrede met hom bespreek.[28]
- Die verweerder het volhard in sy gedrag alhoewel hy deur werknemers daarop gewys is dat sy optrede onwelkom is.[29]
- Die vroue wat hy geteister het, is almal persone onder sy beheer.[30]

5 2 Swangerskap

'n Verdere aspek wat van groot belang is, is dié van die swangerskap van 'n vroulike werknemer. Artikel 17(b) van die Wet op Basiese Diensvoorwaardes[31] bepaal onder andere dat 'n werkgewer nie mag vereis of toelaat dat 'n vroulike werknemer gedurende die tydperk wat vier weke voor die verwagte datum van haar bevalling begin, en agt weke na die datum van haar bevalling eindig, werk nie.[32]

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25 Vgl *Horne v Duke Homes Inc* 755 F 2d 599 604 (7th Cir 1985): "Clear and close, temporal nexus between plaintiff's rejection of her superior's sexual demands and her discharge."
26 (1989) 10 *ILJ* 755 757I–J.
27 759E.
28 759G.
29 759I.
30 760B.
31 3 van 1983.
32 In die Groenskrif: Beleidsvoorstelle vir 'n nuwe Wet op Diensstandaarde (Algemene Kennisgewing 156 van 1996 *SK* 1996-02-23) word aanbeveel dat wetgewing vir twee aangeleenthede voorsiening moet maak, nl (1) 'n periode waartydens werk verbied word en (2) 'n langer periode van verlof waartydens sekuriteit van diens gewaarborg word.

Kamerman[33] is van mening dat swangerskapregulasies soos hierdie aanvanklik ontwerp is om die gesondheid van die swanger vrou, nuwe moeders en hul babas te beskerm. Dit is slegs meer onlangs dat daar vanweë beleidsoorwegings kommer ontstaan het oor die ekonomiese bydrae wat die vrou tot die gesin maak. Hierdie breër benadering het die gevolg gehad dat die voortbring van kinders hergedefinieer is as 'n bydrae tot die voortbestaan en welsyn van die gemeenskap. Swangerskap word dus nou gesien as 'n sosiale risiko en nie bloot 'n aangeleentheid van persoonlike keuse nie.[34] Deur swangerskap te sien as 'n sosiale verpligting word 'n klimaat geskep waarin die gemeenskap meer besorg is oor die beskerming van vroue teen afdanking en die verlies aan inkomste tydens die periode van kraamverlof. Dit onderstreep die behoefte aan spesifieke en effektiewe beskerming van die funksie van die werkende vrou.

Bepalings soos artikel 17(b) word dikwels gebruik om die afdanking van die betrokke vrou te regverdig.[35] 'n Gegriefde werknemer moet in so 'n geval bewys dat sy minder gunstig behandel is bloot op grond van haar geslag.[36] Word hierdie toets gebruik, is die logiese probleem dat die posisie van die vrou nie vergelyk kan word met dié van 'n man in 'n soortgelyke posisie nie. Wat hierdie aspek betref, is die volgende bevinding in *Reamy v Kanda Jean Products Ltd*[37] van groot belang:

> "It is impossible for a man to become pregnant (at all events in the present state of scientific knowledge!). His situation therefore cannot be compared with that of a woman. The concept of discrimination involves by definition an act or treatment which in the case of a woman is less favourable than that which may be accorded to a man . . . [W]e can only make comparison of the cases of persons of different sex where the relevant circumstances in the one case are the same or not materially different than those in the other. In so far as the applicant complains that she is the victim of discrimination by comparison with the case of any other (hypothetical) man, the respective circumstances in each case are materially different for obvious reasons . . ."

Die gevolgtrekking wat noodwendig hieruit volg, is dat as 'n vergelyking nie moontlik is nie daar geen manier is waarop diskriminasie bewys kan word nie. Dit laat die benadeelde vrou remedieloos.

5 2 1 Die howe se benadering(s)

In 1978 is die Pregnancy Discrimination Act in die VSA gepromulgeer. Daarin word duidelik gestel dat diensvoorwaardes gebaseer op swangerskap en verwante toestande in die vervolg as geslagsdiskriminasie beskou sal word. Swanger werknemers moet dus op dieselfde wyse as ander werknemers behandel word wat betref aangeleenthede soos lone en ander diensvoorwaardes.

Dat swanger werknemers soms gedwing kan word om vir 'n bepaalde tyd nie te werk nie, word egter nie hierdeur uitgesluit nie. Aldus is onder andere in *California Federal Savings v Guerra*[38] beslis dat

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33 *Maternity and parental benefits and leaves: an international review* (1980) 13.
34 Matthias "Neglected terrain: maternity legislation and the protection of the dual role of worker and parent in South Africa" 1994 *ILJ* 23.
35 In *Randall v Progress Knitting Textiles* 1992 *ILJ* 200 (IC) is beslis dat sodanige beëindiging van diens "be exercised in a fair manner and all the circumstances have to be taken into account".
36 Pannick 147.
37 1978 IRLR 427 428.
38 107 SC 683 (1987).

> "the Pregnancy Disability Act amendment might be read as only precluding fringe benefit discrimination against pregnant workers – but not discriminatory treatment which favours pregnant employees".

Die openbare belang in die fisiese welstand van die swanger vrou geniet voorrang bo die individuele begeertes van die werknemer.

In *Dekker v Stichting Vormingscentrum Voor Jonge Volwassen*[39] het 'n mens te doen met die geval waar 'n swanger vrou werk geweier is. 'n Saak van moontlike geslagsdiskriminasie is in die hof geargumenteer. Daar word bevind dat dit belangrik is om vas te stel of die rede waarom sy nie in diens geneem is nie, een is wat sonder onderskeid op beide geslagte van toepassing is (byvoorbeeld haar kwalifikasies) en of dit eksklusiewe toepassing op een geslag vind (naamlik swangerskap). Die hof bevind dan ook dat

> "only women can be refused employment on grounds of pregnancy and such a refusal therefore constitutes direct discrimination on grounds of sex. A refusal of employment on account of the financial consequences of absence due to pregnancy must be regarded as based, essentially, on the fact of the pregnancy. Such discrimination cannot be justified on grounds relating to the financial loss which an employer who appointed a pregnant woman would suffer for the duration of her maternity leave".

Dit is dus noodsaaklik om die kousale verband tussen die weiering van indiensname en die rede daarvoor vas te stel. Daar kan gevra word of die besluit anders sou gewees het as dit nie was vir die geslag van die aansoeker nie.

In die *Aldi*-saak[40] was die afdanking van 'n vrou weens lang afwesighede van die werk as gevolg van 'n siekte wat deur 'n vroeëre swangerskap veroorsaak is in geskil. Word *Dekker* se beginsel toegepas, het 'n mens hier met geslagsdiskriminasie te doen. In die *Aldi*-saak word egter bevind dat waar 'n mens te make het met 'n siekte wat eers na die kraamverlof ontstaan, daar geen rede is waarom dit anders behandel moet word as enige ander siekte nie. Die enigste vraag is dan of die vrou afgedank is weens afwesigheid op dieselfde grondslag as 'n man.[41]

'n Analise van direkte diskriminasie dui daarop dat dit uit twee komponente bestaan:

(a) Die kousaliteitselement – die optrede waaroor gekla word, moet op die geslag van die klaagster gegrond wees;

(b) Ongunstige behandeling – die optrede moet meer nadeel vir die klaagster inhou as optrede wat deur 'n lid van die teenoorgestelde geslag ondervind sou word.

In *Dekker* het die hof meer aandag gegee aan die kousaliteitselement terwyl die teenoorgestelde weer waar is van die uitspraak in *Aldi*.

5 2 2 Paradigmas waarbinne swangerskap beoordeel kan word

Wat die aangeleentheid van swangerskap betref, is daar diegene wat argumenteer dat dit 'n unieke toestand eiesoortig aan vroue is. Manlike norme en waardes kan

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39 Case 177/88 [1990] ECR I–3941 3973.

40 *Handels-OG Kontorfunktionaerernes Farbund Danmark (acting for Hertz) v Dansk Arejdsgierforerung (acting for Aldi Marked K/S)* Case 179/88 [1990] ECR I–3979.

41 Dit sou dus oa veronderstel dat die reëls van natuurlike geregtigheid nagekom moet word indien afdanking noodsaaklik bevind word. Die moontlikheid van alternatiewe take wat aan die vrou opgelê kan word, moet in ag geneem word om die redelikheid van die besluit te verseker.

e as 'n standaard gebruik word nie. As kritiek teen hierdie benadering word weer dat spesiale behandeling van vroue die proses van geslagsgelykheid sal rtraag. Deur vroue anders as mans te behandel, word beklemtoon dat vroue nie lyk aan mans is nie.

Daar is andere wat meen dat swangerskap voldoende geakkommodeer kan ord onder die beginsel van gelyke behandeling deur die ontwikkeling van utrale beleidsoorwegings wat die fisiese effek van swangerskap in ag neem as ongeskiktheid eerder as die swangerskap self. Teen hierdie benadering word eer as kritiek genoem dat die behoeftes van die baba in ag geneem moet word. Baba het die behoefte om by sy moeder te wees vir 'n langer periode as wat ur normale ongeskiktheid toegelaat word. 'n Vraag wat in verband hiermee n ontstaan, is of die werkgewer enigsins 'n verpligting teenoor die ongebore nd het.[42] Normaalweg sou daar negatief hierop geantwoord word. Daar bestaan el 'n dienskontrak tussen die werkgewer en die moeder maar daar is tog geen danige verhouding met die ongebore kind nie. Die posisie van die ongebore nd is egter so onlosmaaklik verbonde aan dié van die swanger vrou dat 'n derskeid nie moontlik is nie.

Opsommenderwys kan die nadeel wat moontlik deur 'n vrou gely word wanr sy swanger word, op een van die volgende maniere benader word:

Eerstens is daar standpunte wat beweer dat die afdanking van 'n swanger vrou e as direkte diskriminasie beskou kan word nie omdat die vrou se situasie rgelyk moet word met dié van 'n man en mans nie swanger kan word nie. So standpunt sou in stryd wees met die bedoeling van die gelykheidsbeginsel.[43] elykheid kan nie afhanklik gemaak word van blote vergelyking nie, aangesien nstandighede dalk van so 'n aard kan wees dat selfs sogenaamde "gelyke" handelings nie vergelyk kan word nie.

Tweedens is daar standpunte waarvolgens dit wel op direkte diskriminasie kan erkom indien die swanger vrou kan aandui dat 'n man in soortgelyke omandighede meer gunstig behandel sou word. Die vraag wat weer eens hier tstaan, is of swangerskap as soortgelyk aan enige ander siekte of ongeskiktid beskou moet word. Volgens artikel 13(1) van die Wet op Basiese Diensorwaardes kwalifiseer 'n werknemer slegs vir siekteverlof indien hy weens geskiktheid van die werk afwesig is. Artikel 13(6)(c) bepaal dat "ongeskiktid" die onvermoë om te werk weens enige siekte of besering beteken, behalwe siekte of besering wat deur die werknemer se eie wangedrag veroorsaak is. ierdie artikel sou gebruik kon word om swangerskap sowel in as uit te sluit. 'n egripsbepaling deur die wetgewer is nodig.

Dit is belangrik om te onthou dat in die meerderheid van gevalle die werkwer nie die vrou afgedank het omdat sy swanger is nie, maar weens die volge van die swangerskap. Die werklike rede vir die afdanking is dus die feit t die werkgewer nie wil hê dat sy werknemers van die werkplek afwesig moet ees vir 'n substansiële tydperk nie.[44]

nie as 'n standaard gebruik word nie. As kritiek teen hierdie benadering word beweer dat spesiale behandeling van vroue die proses van geslagsgelykheid sal vertraag. Deur vroue anders as mans te behandel, word beklemtoon dat vroue nie gelyk aan mans is nie.

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Tweedens is daar standpunte waarvolgens dit wel op direkte diskriminasie kan neerkom indien die swanger vrou kan aandui dat 'n man in soortgelyke omstandighede meer gunstig behandel sou word. Die vraag wat weer eens hier ontstaan, is of swangerskap as soortgelyk aan enige ander siekte of ongeskiktheid beskou moet word. Volgens artikel 13(1) van die Wet op Basiese Diensvoorwaardes kwalifiseer 'n werknemer slegs vir siekteverlof indien hy weens ongeskiktheid van die werk afwesig is. Artikel 13(6)(c) bepaal dat "ongeskiktheid" die onvermoë om te werk weens enige siekte of besering beteken, behalwe 'n siekte of besering wat deur die werknemer se eie wangedrag veroorsaak is. Hierdie artikel sou gebruik kon word om swangerskap sowel in as uit te sluit. 'n Begripsbepaling deur die wetgewer is nodig.

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42 Sien die gedeelte oor fetale beskerming *infra*.

43 *Turley v Allders Department Stores Ltd* 1980 IRLR 4.

44 Sien oa *Hayes v Malleable Working Men's Club and Institute; Maughan v North East London Magistrates Court Committee* 1985 IRLR 367; *Webb v Emo Air Cargo (UK) Ltd* 1990 ICR 442.

Artikel 185 Wet 66 van 1995 bepaal dat elke werknemer die reg het om nie onbillik ontslaan te word nie. Volgens artikel 186 beteken ontslag onder andere dat 'n werkgewer weier om 'n werknemer toe te laat om werk te hervat nadat sy kraamverlof geneem het of vir 'n sekere tydperk van die werk afwesig was met die geboorte van haar kind.

Ontslag is outomaties onbillik indien die rede vir die ontslag die werknemer se swangerskap is, of haar voorgenome swangerskap of enige rede wat met haar swangerskap verband hou. Ontslag, gebaseer op diskriminasie van enige aard word ook as 'n outomatiese onbillike ontslag beskou. Dit sluit onder andere ontslag op grond van geslag, huwelikstaat of gesinsverantwoordelikheid in.[45]

Die wet erken drie gronde waarop diensbeëindiging wel regtens geregverdig is. Hulle is die gedrag van die werknemer, die geskiktheid of bekwaamheid van die werknemer en die bedryfsvereistes van die werkgewer se besigheid.[46]

Wat betref die beginsels wat hier toegepas moet word, kan leiding gevind word in die benadering wat die howe gevolg het voordat die nuwe Wet op Arbeidsverhoudinge op die wetboek gekom het. In *National Union of Mineworkers v Rustenburg Base Metals Refiners*[47] is 'n werknemer afgedank – nie vanweë sy fisiese onvermoë om die nodige werk te verrig nie, maar as 'n operatiewe vereiste omdat sy oormatige afwesigheid dit vir hom feitlik onmoontlik gemaak het om sy kontraktuele vereistes na te kom. Die nywerheidshof moes vasstel of dit billik en regverdig was om hom in die betrokke omstandighede af te dank deur onder andere in ag te neem (a) die aard van die siekte; (b) die tydperk wat die afwesigheid moontlik mag duur; en (c) die behoefte van die werkgewer om die werk afgehandel te kry waarvoor daar met die werknemer gekontrakteer is.

Die besluit om 'n swanger vrou af te dank, kan soms geregverdig word op die basis van operatiewe vereistes ("business necessity").[48] Dit beteken dat 'n onderskeid gebaseer op die inherente vereistes van die werk nie neerkom op diskriminasie nie. Die toets wat normaalweg hier gebruik word, is of

> "the company would have been prejudiced had it found itself in circumstances where a senior employee was on leave for a period of three months, and whether such a period of leave would have affected the operations at the plant in a negative way".[49]

Die "business necessity"-toets behels die volgende:[50]

(a) Daar moet vasgestel word of daar 'n oorkoepelende wettige besigheidsdoel is; en (b) of die praktyk noodsaaklik is vir (c) die veilige en effektiewe funksionering van die besigheid. (d) Die besigheidsdoel moet meer noodsaaklik en gebiedend wees as die nadelige gevolge wat dit veroorsaak. (e) Daar mag nie 'n aanvaarbare alternatief vir die onderskeidende praktyk wees nie.

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45 A 187(1)(e) en (f) Wet 66 van 1995.
46 A 188 Wet 66 van 1995.
47 1993 *ILJ* 1094 (IC).
48 A 15(a) van die Canadian Human Rights Act. Ook die Suid-Afrikaanse arbeidswetgewing maak nou hiervoor voorsiening in a 188(10)(a)(ii) Wet 66 van 1995.
49 *Progress Knitting Textiles supra* 202J–203A.
50 Sien *Robinson v Lorillard Corporation* 404 US 1006 (1971) waar dit op 'n geval van rassediskriminasie toegepas is.

5 2 3 Gevolgtrekking

Dit behoort nou duidelik te wees dat die reg op gelykheid nie absoluut is nie en dat daar uitsonderings op die algemene reël gemaak kan word sonder om een groep in die samelewing onbillik te benadeel. Die volgende kan as moontlike uitsonderings aangemerk word:

- Waar weens die aard van werksaktiwiteite geslag 'n bepalende faktor is in die aktiwiteite wat aan 'n werker toegesê kan word.
- Wetgewing wat vroue beskerm. Die Europese howe neem dikwels die spesiale verhouding tussen 'n moeder en haar baba, asook die vrou se biologiese toestand, in ag.

Teen-diskriminasie-wetgewing kan vroue beskerm teen geslagsdiskriminasie. Die Grondwet verbied reeds diskriminasie op grond van geslag uitdruklik. Dit stel ook maatstawwe daar vir die beskerming en die vooruitgang van die belange van persone wat deur onbillike diskriminasie benadeel is.

Dit is in belang van die gemeenskap dat die vaardighede van die vrouewerker vir die arbeidsmark beskikbaar moet bly en dat sy nie afgedank moet word vanweë swangerskap nie. Die arbeid wat beskikbaar is, moet effektief gebruik word. Daar rus egter geen verpligting op 'n werkgewer om die posisie van 'n werknemer wat siek is, onbepaald oop te hou nie. Hierdie beginsel behoort ook ten opsigte van swangerskap aanwending te vind.

Alternatiewe metodes moet ondersoek word om die vrou te akkommodeer sonder dat sy noodwendig afgedank word.[51] Die volgende kan as voorbeelde genoem word: alternatiewe werk in die firma tot en met (en soms selfs na) die bevalling; verminderde werksure (haar vergoeding kan *pro rata* daarby aangepas word); en die aanstel van 'n assistent vir die swanger vrou.

Een van die uitdagings van die uitwissing van diskriminasie teen die vrou is die invoer van bepalings wat vroue sal toelaat om hul loopbane voort te sit nieteenstaande die groter las wat betref die gesinsverantwoordelikheid wat hulle dra.[52]

Dit is moontlik om vroue tydens swangerskap te beskerm deur wetgewing daar te stel wat uitdruklik bepaal dat spesiale maatreëls wat ten doel het om swangerskap te beskerm, nie as diskriminasie beskou sal word nie.[53] Dit maak voorsiening dat vroue in sekere omstandighede anders behandel mag word. Daar moet egter verseker word dat swangerskap en die beskerming daarvan nie gebruik word om onbillike diskriminasie te verdoesel nie. Dit kan gedoen word deur in die handves van menseregte 'n bepaling in te sluit dat waar die diskriminasie geskied op grond van swangerskap of die geboorte van 'n kind, dit geag sal word op grond van geslag te wees.[54] Daar word reeds bepaal dat daar nie op grond van geslag gediskrimineer mag word nie. Hierdeur word verseker dat die gelykheidsbeginsel makliker in geval van swangerskap toepassing sal vind.

5 2 4 Fetale beskerming

'n Aangeleentheid wat binne die kader van geslagsdiskriminasie tuisgebring kan word, maar wat effens afwyk van die standaardraamwerk het met fetale

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51 Natuurlik onderworpe aan die oorwegings soos hierbo bespreek.
52 Sien in hierdie verband die voorstelle vervat in die Groenskrif.
53 *Davis v Clean CC* 1992 *ILJ* 1230 (IC).
54 Vgl a 4(2) van die Konvensie mbt die Eliminasie van Alle Vorme van Diskriminasie teen Vroue en a 15(6) van die Canadian Human Rights Act 1976–77.

beskerming te doen. Daar word geredeneer dat waar 'n swanger vrou werk geweier word omdat dit haar fetus sou benadeel, dit slegs gedoen word omdat sy 'n *vrou* is.

Die legaliteit van beleidsrigtings wat streef na fetusbeskerming in die werksplek is 'n aangeleentheid wat nog nie gefinaliseer is nie. Aanvanklik is daar in die VSA[55] bevind dat beleid wat vroue beskerm deur hulle uit te sluit van sekere werk, op Victoriaanse paternalisme neerkom. In meer onlangse sake is sodanige optrede as regmatig aanvaar.

Title VII van die Civil Rights Act van 1965 verbied diskriminasie in die arbeidsreg op grond van ras, kleur, geloof, geslag of nasionale oorsprong. Die bedoeling van die Amerikaanse Kongres met dié bepalings is deur die Supreme Court uitgelê as die verwydering van

> "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification". [56]

Hierdie beginselverklaring suggereer dat in sekere situasies, natuurlike, beredeneerde of noodsaaklike grense – gebaseer op andersins ontoelaatbare klassifikasies – op arbeid toegelaat kan word. Hier sou dus gepraat kon word van geregverdigde diskriminasie.

Die beskerming van die fetus impliseer 'n unieke versameling van belange op die gebied van geslagsdiskriminasie. 'n Vrou het die reg op vryheid van keuse – sy het die reg om te besluit watter soort werk sy wil doen en wat die beste vir haar is. Fetusbeskermingsregulasies kan tot gevolg hê dat 'n vrou die reg ontsê word om self oor haar liggaam en reproduksie te besluit. Werkgewers het daarenteen die reg om hul besighede te bestuur soos hulle dit goedvind. Verder kan 'n werkgewer argumenteer dat hy nie deel wil hê aan die benadeling van ongeborenes nie. 'n Unieke reg kom verder hier na vore wat nie elders wat betref geslagsdiskriminasie aangetref word nie – die reg van die fetus op lewe en fisiese en psigiese integriteit. Die gemeenskap het 'n belang daarin dat daar 'n balans gevind word tussen al die belange.

Die huidige regsposisie in die VSA ten opsigte van hierdie aangeleentheid is baie onbevredigend. In *Johnson Controls*[57] bevind die hof dat

> "decisions about the welfare of future children, must be left to the parents who conceive, bear, support and raise them rather than to the employers who hire those parents".

Daar word geredeneer dat regulasies wat poog om die fetus te beskerm, op diskriminerende beleid neerkom. Die hof gaan kyk bloot of die beperking op die vrou se regte 'n "business necessity" was. Dit word dus behandel soos enige ander aangeleentheid rakende swangerskap. Die firma se besorgdheid oor vroulike steriliteit (en daarmee saam die belange van toekomstige generasies) is nie noodsaaklik vir die effektiewe funksionering van die besigheid nie.

Alhoewel daar nie in alle opsigte met die hof se beslissing saamgestem word nie, is dit regtegnies korrek. Nadat daar deeglik besin is oor die gelykheidsbeginsel

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55 Wat *Title VII* (van die Civil Rights Act van 1965)-beslissings betref (sien *infra*); vgl a 3(2) van die Canadian Human Rights Act.

56 *Weeks v Southern Bell Tel & Tel Co* 408 F 2d 288, 1 FEP Cases 656, 661 (5th Cir 1969).

57 *International Union v Johnson Controls, Inc SCt* 1196 (1991) 1207.

ervat in *Title VII*, kom die hof tot die korrekte gevolgtrekking dat daardie egulasies nie beskerming aan fetusse verleen nie. Hierdie aangeleentheid strek gter wyer as bloot die gelykheidsbeginsel. Gemeenskaps- en fetale belange noet hiermee saamgelees word. Weer eens is die werking van die beperkings-lousule in die Grondwet belangrik. Enige beperking wat op die vrou se vryheid an keuse geplaas word, moet redelik en regverdigbaar in 'n oop en demokratie-e samelewing wees.

Daar kan algemeen aanvaar word dat die gemeenskap 'n belang het in die eskerming van fetusse. Daarom behoort enige redelike beperkings op die regte an vroue wat redelikerwys poog om die fetus te beskerm, regverdigbaar te wees n 'n demokratiese samelewing. Soos reeds hierbo gesê is, moet die betrokke epalings nie slegs redelik in die omstandighede wees nie maar die oogmerk vaarmee die bepalings daargestel is, moet ook geoorloofd wees. Indirekte iskriminasie kan dus nie goedgepraat word onder die voorwendsel van fetale eskerming nie. Indien wetgewing aanvaar sou word wat bepaal dat daar nie op rond van swangerskap deur werkgewers teen werknemers gediskrimineer mag vord nie, behoort die term "swangerskap" wyd geïnterpreteer te word om ook lle aangeleenthede wat met die swangerskap verband hou, in te sluit.[58]

Werkgewers wat werklik bekommerd is oor die gesondheid en veiligheid van wanger vroue en hul fetusse, sal buite die huidige wetgewing moet gaan soek na plossings vir die probleem. Daar kan moontlik gepoog word om werksplekke koon te hou van alle stowwe wat moontlik benadelende gevolge kan hê.[59]

Om indirekte diskriminasie te voorkom, sou dit verstandig wees om 'n alge-nene beperking op alle werknemers (beide manlik en vroulik) te plaas waar die evaar van steriliteit en benadeling van die fetus bestaan.

SLOTSOM

Suid-Afrika se Grondwet vereis dat daar nie teen 'n persoon gediskrimineer mag vord op grond van sy geslag nie. "Geslag" moet wyd geïnterpreteer word om lle subjektiewe attribute of hoedanighede wat aan 'n bepaalde geslag kleef, in te luit. 'n Gesonde onderskeid tussen *diskriminasie* en *differensiasie* is nodig om e verseker dat praktyke wat bydra om die vrou te bevoordeel nie as onregmatige iskriminasie uitgemaak word nie.

Swangerskap en seksuele teistering is maar twee van die vele gevalle waar eslagsdiskriminasie aan die orde van die dag is. Die beginsels wat hier aangedui s, kan egter ook met vrug op ander gevalle toegepas word.

vervat in *Title VII*, kom die hof tot die korrekte gevolgtrekking dat daardie regulasies nie beskerming aan fetusse verleen nie. Hierdie aangeleentheid strek egter wyer as bloot die gelykheidsbeginsel. Gemeenskaps- en fetale belange moet hiermee saamgelees word. Weer eens is die werking van die beperkingsklousule in die Grondwet belangrik. Enige beperking wat op die vrou se vryheid van keuse geplaas word, moet redelik en regverdigbaar in 'n oop en demokratiese samelewing wees.

Daar kan algemeen aanvaar word dat die gemeenskap 'n belang het in die beskerming van fetusse. Daarom behoort enige redelike beperkings op die regte van vroue wat redelikerwys poog om die fetus te beskerm, regverdigbaar te wees in 'n demokratiese samelewing. Soos reeds hierbo gesê is, moet die betrokke bepalings nie slegs redelik in die omstandighede wees nie maar die oogmerk waarmee die bepalings daargestel is, moet ook geoorloofd wees. Indirekte diskriminasie kan dus nie goedgepraat word onder die voorwendsel van fetale beskerming nie. Indien wetgewing aanvaar sou word wat bepaal dat daar nie op grond van swangerskap deur werkgewers teen werknemers gediskrimineer mag word nie, behoort die term "swangerskap" wyd geïnterpreteer te word om ook alle aangeleenthede wat met die swangerskap verband hou, in te sluit.[58]

Werkgewers wat werklik bekommerd is oor die gesondheid en veiligheid van swanger vroue en hul fetusse, sal buite die huidige wetgewing moet gaan soek na oplossings vir die probleem. Daar kan moontlik gepoog word om werksplekke skoon te hou van alle stowwe wat moontlik benadelende gevolge kan hê.[59]

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58 Soos wat inderdaad in a 187(1)(e) Wet 66 van 1995 die geval is.

59 Sien volledigheidshalwe Weil "Protecting employees' fetuses from workplace hazards: *Johnson Controls* narrows the options" 1993 *Berkley J of Employment and Labour L* 142–178.

A critical analysis of section 21 of the Insolvency Act 24 of 1936*

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OPSOMMING

'n Kritiese ontleding van artikel 21 van die Insolvensiewet 24 van 1936

Dit is 'n basiese uitgangspunt van die Insolvensiewet 24 van 1936 dat al die bates van die insolvent deel van sy insolvente boedel uitmaak. In die praktyk kan die kurator egter probleme ondervind met die insameling van eiendom vir die insolvente boedel wanneer daardie eiendom deur die insolvent vervreem is by wyse van 'n gesimuleerde kontrak. Die versoeking om bates buite die bereik van krediteure te plaas, kan veral groot wees waar gades buite gemeenskap van goed getroud is of waar twee persone as man en vrou saamwoon.

Artikel 21 van die Insolvensiewet is veronderstel om die kurator se bewyslas aangaande sodanige gesimuleerde kontrakte te verlig en om die bewyslas na die solvente gade te verskuif dat die betrokke eiendom aan hom of haar behoort. Artikel 21 blyk egter 'n drastiese en onbillike stuk wetgewing te wees. Probleme met betrekking tot die uitleg van die artikel het gelei tot hewige akademiese debat en die oorweging daarvan deur die howe. Die probleem is vererger deur artikel 22 van die Wet op Huweliksgoedere 88 van 1984 wat skenkings tussen gades wettig.

In hierdie artikel word die praktiese toepassing van artikel 21 eers kortliks bespreek; daarna volg 'n kritiese analise van die uitwerking wat artikel 22 van die Huweliksgoederewet op artikel 21 van die Insolvensiewet het, asook 'n bespreking van die uitleg van artikel 21(5). Met betrekking tot laasgenoemde word daar spesifiek gekyk na die wyse waarop die solvente gade se bates op die kurator van die insolvent oorgaan, asook na die botsing van belange tussen die krediteure van die solvente en insolvente gades wat veroorsaak is deur hierdie subartikel. Die moontlikheid van 'n botsing tussen artikel 21 en die nuwe Grondwet word laastens kortliks behandel. Die gevolgtrekking waartoe gekom word, is dat artikel 21 eerder uit die wetboek geskrap moet word.

1 INTRODUCTION

Prior to the amendment of the Insolvency Act 32 of 1916 by the Amendment Act of 1926,[1] debtors frequently attempted to avoid payment of their debts by

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* This article is based partly on the author's LLM thesis *A critical analysis of section 21 of the Insolvency Act 24 of 1936* (UP 1995). It should be pointed out that since the completion of this article the South African Law Commission has recommended the deletion of s 21 from future insolvency legislation on the ground that it is potentially unconstitutional – see the Draft Insolvency Bill and Explanatory Memorandum of the South African Law Commission (*infra* fn 5).

1 29 of 1926.

transferring their assets to a spouse, thereby defrauding their creditors while simultaneously benefiting themselves. Particularly in marriages entered into by antenuptial contract, or in cases where two people were merely living together as man and wife, it could be tempting to place estate assets beyond the reach of creditors by means of simulated transactions. Upon sequestration, the trustee then carried the onus of proving that such transfers were simulated transactions. This was a heavy burden which rested on the trustee by virtue of the fact that proprietary rights of assets between spouses are normally matters falling within their particular knowledge.[2] The trustee could experience great difficulty in distinguishing which spouse owned what, sometimes making it impossible for the trustee to separate the property of one spouse from that of the other. In *Maudsley's Trustees v Maudsley*[3] Greenberg JP succinctly referred to such deviant behaviour as follows:

> "One knows that before the amendment of the law in 1926, it was common practice for traders (and perhaps others) to seek to avoid payment of their debts by putting property in their wives' names; on insolvency the burden rested on the trustee to attack the wife's title."

This practice was halted by the enactment of section 21, which enactment simultaneously altered the common law. It was the purpose of section 21 to relieve the trustee of the onus to show that the property claimed by the solvent spouse was in fact her separate property. Section 21 placed this onus on the solvent spouse.[4]

Section 21, however, has not been received without criticism. While section 21 has been described as a drastic provision,[5] it is also an example of legislation which, in terms of the new Constitution of the Republic of South Africa,[6] may be regarded as discriminating on sexual grounds. Section 21 may also be in conflict with various other provisions of the Constitution. A further bone of contention relates to the nature of the vesting of the separate property of the solvent spouse in the trustee. Further, section 21 creates a conflict of interest between the separate creditors of the insolvent and solvent spouses. This conflict is founded on the premise that the interests of the insolvent estate and its creditors should take precedence over those of the solvent spouse and his or her creditors.

Within the context of this article, these points of criticism and questions relating to section 21 will be considered. At this point it may be appropriate to mention that the South African Law Commission has had as one of its projects the review of the law of insolvency in South Africa.[7] In my opinion, section 21 of the Insolvency Act[8] is one of the sections which perhaps best illustrate the

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2 Smith *The law of insolvency* (1988) 108.

3 1940 TPD 399 404.

4 De Wet and Van Wyk *De Wet en Yeats Die Suid-Afrikaanse kontraktereg en handelsreg* (1978) 455; Smith 108; Joubert "Skenkings tussen man en vrou, simulasie en artikel 21 van die Insolvensiewet 24 van 1936" 1992 *TSAR* 345; Joubert "Artikel 21 van die Insolvensiewet: Tyd vir 'n nuwe benadering?" 1992 *TSAR* 699; *Coetzer v Coetzer* 1975 3 SA 931 (E); *Snyman v Rheeder* 1989 4 SA 496 (T); *De Villiers v Delta Cables* 1992 1 SA 9 (A).

5 South African Law Commission Working Paper 41 Project 63 *Review of the law of insolvency* "Voidable dispositions and dispositions that may be set aside and the effect of sequestration on the spouse of the insolvent" (1991).

6 Act 200 of 1993 (see also the Constitution of the Republic of South Africa Bill, 1996).

7 *Supra* fn 5.

8 24 of 1936, hereinafter referred to as the Act.

need for this project. The following commentary by Voet in respect of a similar provision in our common law is clear evidence that our law of insolvency has become somewhat antiquated:

> "But today such presumptions of base gain fall away, since in case of doubt everyone is believed to be honest until the contrary has been proved. For that reason it is no longer necessary to presume that what a wife holds has come to her from the generosity of her husband, but rather is a donation to be proved, especially if the wife is a public trader."[9]

2 A BRIEF EXPLANATION OF THE PRACTICAL APPLICATION OF SECTION 21

2 1 Vesting of solvent spouse's property in the master or trustee

One of the results of the sequestration of the estate of one of two spouses is that all the property of the spouse whose estate has not been sequestrated vests in the master, and in the trustee, once he has been appointed, as if it were property of the sequestrated estate.[10] Section 21 of the Act applies only to spouses married out of community of property. In marriages in community of property there is only one estate, the joint estate, and section 21 will therefore not apply.[11]

"Spouse" in section 21 also includes a wife or husband by virtue of a marriage of any law or custom, as well as a woman living with a man as his wife or a man living with a woman as her husband, even though they are not married to each other.[12] In considering this section, the court in *Chaplin v Gregory (or Wyld)*[13] was prompted to say the following:

> "By introducing this subsection the Legislature quite obviously intended to bring into the net those persons who while not legally married were occupying the *de facto* position of husband and wife. The method by which this was done was, to say the least, a clumsy one."

After considering section 21(1) read together with section 21(13), the court found that it was not empowered to grant an order vesting in the trustee of an insolvent man the property of a woman with whom he has been living as her husband where such man in fact has a legal wife from whom he is either not living apart or is living apart, though not under an order of judicial separation.[14]

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9 24 1 16, Gane's translation as quoted in the South African Law Commission Working Paper 41 *supra* fn 5.

10 S 21(1) Act 24 of 1936. Unless otherwise stated, it will be assumed in this article for the sake of convenience that the husband is the insolvent and the wife the solvent spouse; see also Ailola "The rights of the separate creditors of a solvent spouse – understanding section 21 is the key" 1993 *J for Judicial Science* 143.

11 See *Badenhorst v Bekker* 1994 2 SA 155 (N); Nagel and Boraine "Badenhorst v Bekker NO en Andere (ongerapporteerde saaknr 3259/92 (N)): Gevolge van sekwestrasie van [illegible] uitgeslote bates" 1993 *De Jure* 457; Lee and

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12 S 21(13).

13 1950 3 SA 555 (C) 564.

14 566. It should be noted that it is no longer competent for a court to grant an order for judicial separation – s 14 of the Divorce Act 70 of 1979.

This prompted Smith[15] to comment that where a single man lives with a woman as her husband, although not married to her, and his estate is sequestrated, her estate automatically vests in his trustee. But if a legally married man chooses to live with another woman, her estate on insolvency does not vest in his trustee. This, Smith says, seems like placing a premium on adultery as contrasted with concubinage.

Thus one can find a myriad of further problems in the practical application of section 21. For example, in *Malcomess' Estate v De Kock*[16] it was pointed out that the vesting of the solvent spouse's estate in the insolvent's trustee does not stay civil proceedings against the solvent spouse. However, as long as the assets of the solvent spouse remain vested in the trustee, her estate cannot be surrendered. In *Ex parte Venter*,[17] for example, an order for the surrender of the applicant's estate was refused and a postponement granted to enable the applicant to have his assets released by the trustee in his wife's estate. Section 21(11) attempts to circumvent problems relating to the sequestration of the solvent spouse. It provides that where application is made to the court for the sequestration of the estate of the solvent spouse resulting from an act of insolvency committed by that spouse after the vesting of her property in the trustee, and the court is satisfied that the act of insolvency resulted from such vesting, the court may under certain circumstances postpone the hearing of the application or make such interim order as may seem just.

Further provisions in the Act attempt to limit the prejudice which the solvent spouse may suffer under certain circumstances. Thus where the solvent spouse is carrying on business as a trader apart from the insolvent spouse and the court is satisfied that she is willing and able to make arrangements whereby the interest of the insolvent estate in her property will be safeguarded without such vesting, the court, either when making the sequestration order or at some later stage, may exclude that property or any part of it from the operation of the order for a period it thinks fit. This is, however, subject to the immediate completion of such arrangements. The same applies if the court thinks that she is likely to suffer serious prejudice as a result of such vesting.[18] As indicated in *Van Schalkwyk v Die Meester*,[19] under these circumstances the interest of the insolvent estate must be safeguarded against the alienation of property by the solvent spouse, malicious damage to or destruction of the property, accidental damage to or destruction of the property, fraudulent abandonment of the property by the solvent spouse and theft of property by a third party. It was also held[20] that an order which confirms a provisional order for the exclusion of property of a solvent spouse from the operation of the sequestration order against the insolvent spouse's estate, subject to the furnishing of security *de restituendo*, is not permissible, because the court must, before it makes an order, be satisfied that the solvent spouse is willing and able to safeguard the interest of the insolvent estate.

Where the solvent spouse approaches the court to claim an asset, it must be done by way of notice of motion supported by an affidavit containing full

15 "Problem areas in insolvency law" 1989 *SA Merc LJ* 103.
16 1937 EDL 18.
17 1931 SWA 3.
18 S 21(10).
19 1975 2 SA 508 (N) 510.
20 511.

particulars of the asset claimed, the serious prejudice she will allegedly suffer as well as the arrangements she will make to safeguard the interests of the insolvent estate.[21] Section 21(10) makes provision for the solvent spouse to lay before the trustee, during the period fixed by the court, evidence in support of her claim to such property. This is done by means of an affidavit. The trustee must then notify her in writing whether or not he will release the relevant property.

The trustee must release any property of the solvent spouse which is proved[22]

(a) to have been her property immediately before her marriage to the insolvent or before the first day of October 1926; or

(b) to have been acquired by that spouse under a marriage settlement; or

(c) to have been acquired by that spouse during the marriage with the insolvent by a title valid as against creditors of the insolvent; or

(d) to be safeguarded in favour of the spouse in terms of certain insurance legislation;[23] or

(e) to have been acquired with any of the aforementioned property or with the income or proceeds thereof.

Although there is no indication in the Act as to the form which the application for the release of the aforementioned property must take, in practice it should occur by way of a sworn affidavit. The affidavit must contain complete information about the nature and origin of the solvent spouse's title to the property; supporting documents such as any antenuptial contract, vouchers, receipts, paid cheques or other relevant documents must be attached, as well as affidavits by parties able to confirm the solvent spouse's claim. The trustee must apply his mind to the matter when deciding whether the property in question belongs to the solvent spouse.[24]

In terms of the Matrimonial Property Act,[25] a party to an intended marriage under the accrual system may, for purposes of proving the nett value of his estate at the commencement of his marriage, declare that value either in his antenuptial contract, or in a statement which must be signed by the other party and attested by a notary public and filed with the antenuptial contract in the protocol of the notary who executed the antenuptial contract.[26] The inclusion of an asset in the antenuptial contract or separate statement does not serve as proof of any right of any person regarding that asset for the purpose of its release as contemplated by section 21(2).[27]

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21 *Ex Parte Vogt* 1936 SWA 39 41; In *Hawkins v Cohen NO* 1994 4 SA 23 (W) the court ruled that the Act does not specify when the solvent spouse is entitled to apply for the release of property which has vested in the trustee in terms of s 21(1). An application to the trustee under s 21(2) and his refusal to release are therefore not prerequisites for an application to court for the release of the property; see also Ailola 1993 *J for Judicial Science* 145.

22 S 21(2).

23 S 28 of the Insurance Act 27 of 1943 or by Insurance Ordinance 12 of 1927.

24 *De Villiers v Estate de Villiers* 1930 CPD 387 388.

25 88 of 1984.

26 S 6 of Act 88 of 1984.

27 S 21(2)(e) of Act 88 of 1984.

In this respect Smith[28] points out that the Matrimonial Property Act[29] refers to section 21(1) of the Insolvency Act[30] but should in fact refer to section 21(2), and further, that only the separate statement is referred to. A declaration in the antenuptial contract itself should obviously have been included by the legislature. In section 21(2)(e) of the Matrimonial Property Act, the legislature probably contemplated the protection of creditors of a prospective husband who possibly foresees the sequestration of his estate and then attempts to defraud his creditors by falsely declaring that assets which are actually his belong to his intended wife.

The trustee must release any property vesting in him if the solvent spouse proves that such property falls into one of the aforementioned categories.[31] In terms of the Act, the trustee's obligation to release such property is imperative and peremptory. A disgruntled creditor cannot intervene in the release by a trustee of the solvent spouse's separate property. In this context Berman AJ had the following to say in *Enyati Resources Ltd v Thorne*:[32]

> "I can neither recall nor find any authority on principle (nor have I been referred to any) which permits a disgruntled creditor to intervene in the release by a trustee to the solvent spouse of the insolvent of that spouse's separate property and to interdict the trustee from doing so, once he (the trustee) has bona fide come to a decision that the solvent spouse is entitled thereto. To my mind, no right to do so exists."

If the spouse fails to satisfy the trustee that she is entitled to the release of any such property, she may apply to court for an order either for the release of such property or for a declaration that she is entitled to the proceeds thereof if it is sold. If that property has been sold, she must apply before the proceeds are distributed and the court may make an order it thinks just.[33] Such proceedings may be initiated either by way of summons or by notice of motion with a supporting affidavit.[34] As a general rule, the court will allow such property to be released if it is satisfied that one of the grounds set out in section 21(2) exists.[35] If the trustee has released any property allegedly belonging to the solvent spouse, he is not debarred from proving that it belongs to the insolvent estate and from recovering such property.[36] The latter, however, applies only to cases where a trustee has released property in error. Where the court has therefore made an order regarding the ownership of the property, the matter is disposed of and the trustee will not be able to recover property released by the court under section 21(12).

2 2 Realisation of solvent spouse's property

If the solvent spouse is in the Republic and the trustee is able to ascertain her address, the trustee may not, except with leave of the court, realise property

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28 144.
29 88 of 1984 s 21(2)(e).
30 24 of 1936.
31 *Conrad v Conrad's Trustee* 1930 NLR 100 102.
32 1984 2 SA 551 (C) 558.
33 S 21(4); *Coetzer v Coetzer* 1975 3 SA 931 (E); *Foot v Vorster* 1983 3 SA 179 (O) 190.
34 *Rautenbach v Morris: In re Estate Rautenbach* 1961 3 SA 728 (E) 731.
35 *Constandinou v Lipkie* 1958 2 SA 122 (O).
36 S 21(12).

which ostensibly belongs to the solvent spouse until the expiry of six weeks' written notice to such spouse of his intention to do so. This notice must also be published in the *Government Gazette* and in a newspaper circulating in the district in which the solvent spouse resides or carries on business. All separate creditors for value of that spouse must be invited to prove their claims as provided for in section 21(5).[37] Unless the court has ordered the release of such property, the trustee must deal with that property as if it were an asset of the insolvent estate.

Any property of the solvent spouse which has been realised by the trustee bears a proportionate share of the costs of sequestration. The separate creditors for value of the solvent spouse, with claims which could have been proved against the estate of that spouse if it had been the estate under sequestration, are entitled to prove their claims against the estate of the insolvent spouse. This is done in the same manner and they have the same rights, remedies and obligations as if they were creditors of the insolvent estate.[38] However, they are not liable to make any contribution under section 106 and they may not vote at any creditors' meeting.[39] Such separate creditors who have proved their claims are entitled to share in the proceeds of the property realised in accordance with their legal priority *inter se* and in priority to the separate creditors of the insolvent estate. However, they may not share in the separate assets of the insolvent estate.[40]

If any property of the solvent spouse, other than property safeguarded by the Insurance Act,[41] has been released by the trustee or the court, the separate creditors of that spouse are entitled to share in the proceeds of any property of the solvent spouse which has been realised by the trustee, only after such released property and any property acquired by that spouse since the sequestration, has been excussed.[42] Before awarding a creditor a share in the proceeds of any property of the solvent spouse realised by the trustee, the trustee may require the creditor to lodge an affidavit setting out the result of the excussion and disclosing the balance of his claim which remains unpaid. This must be done within a period determined by the Master. The creditor may share in respect of that balance only, provided that he may also add to the amount of his proven claim any excussion costs which he was unable to recover from the proceeds of that property.[43] If any such creditor has failed either to lodge with the trustee the required affidavit, or to excuss any separate property of the solvent spouse still available for the satisfaction of his claim, he is debarred from sharing in the proceeds of any property of the solvent spouse which has been realised by the trustee, unless the court orders otherwise.[44]

3 THE EFFECT OF SECTION 22 OF THE MATRIMONIAL PROPERTY ACT 88 OF 1984

It is a basic premise of the Insolvency Act[45] that all the assets of the insolvent form part of his insolvent estate.[46] In practice, however, the trustee may experience

37 S 21(3).
38 S 21(5).
39 S 21(9).
40 S 21(5).
41 27 of 1943.
42 Insolvency Act s 21(6).
43 S 21(7).
44 S 21(8).
45 24 of 1936.
46 See s 20(1)(a); De la Rey *Mars The law of insolvency in South Africa* (1988) 174–176; Smith 81–82; Meskin *Insolvency law* (1990) 5–3.

difficulty in claiming for the insolvent estate property which the insolvent alienated by means of a simulated contract. The trustee would have to discharge the heavy onus of proving that the parties did not have the serious intention to enter into a contract and that such contract is therefore invalid. One of the most controversial aspects in this regard relates to donations between spouses.

Prior to the enactment of the Matrimonial Property Act 88 of 1984, in applications by a solvent spouse for the release of her separate property, litigation in terms of section 21(2)(c) of the Insolvency Act[47] was most common. In terms of this subsection, the trustee must release property of the solvent spouse which is proved to have been acquired by her during the marriage with the insolvent by a title valid as against creditors of the insolvent. The onus here was on the solvent spouse to show that the transaction whereby she acquired the property was not a simulated transaction or one intended to prejudice the rights of the creditors in the event of her husband's insolvency.[48] The solvent spouse had to show that the transaction was not a donation, a disposition without value or a transaction amounting to a collusive dealing. In *Kilburn v Estate Kilburn*[49] the court said:

> "[I]f property has been acquired by the spouse who is not insolvent by means of her own money or from a source other than her husband, then she holds it by a title valid as against the creditors of her insolvent husband. But if she obtains it from him during marriage as a donation or if the insolvent gives money to his wife to buy property and have it registered in her name, or if she buys property with money provided by the husband ostensibly for herself but in reality for her husband's estate, or even for the benefit of both the spouses, then it is his property and forms part of his estate; and the property, though registered in her name is not acquired by the non-insolvent spouse by a title valid as against the creditors of the insolvent."

A donation between spouses could therefore not create a valid title and the solvent spouse could not claim the release of property so obtained even where the donor actually intended entering into a contract of donation.

The enactment of section 22 of the Matrimonial Property Act[50] has, however, radically altered the above position. This section reads:

> "Subject to the provisions of the Insolvency Act . . . no transaction effected before or after the commencement of this Act is void or voidable merely because it amounts to a donation between spouses."

Section 21 of the Insolvency Act was intended to relieve the trustee of the onus of proving that transactions between spouses were simulated and to place the onus on the solvent spouse of showing that the property she was claiming was in fact her separate property.[51] The question which now arises, is precisely what effect section 22 of the Matrimonial Property Act has had on the provisions of section 21 of the Insolvency Act. *Snyman v Rheeder NO*[52] was the first case in

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47 24 of 1936.

48 *Coetzer v Coetzer* 1975 3 SA 931 (E); *Maudsley v Maudsley's Trustee* 1940 WLD 166 172; *Kilburn v Estate Kilburn* 1931 AD 501 507; *Snyman v Rheeder NO* 1989 4 SA 496 (T); *De Villiers NO v Delta Cables (Pty) Ltd* 1992 1 SA 9 (A); Joubert 1992 *TSAR* 345; Joubert 1992 *TSAR* 699.

49 *Supra* 507.

50 88 of 1984.

51 *Conrad v Conrad's Trustee* 1930 NLR 100 102.

52 1989 4 SA 496 (T).

which a degree of clarity was given in this respect. To appreciate the implications of this case it is necessary first to summarise the facts.

Mrs Snyman was married out of community of property. Prior to the sequestration of her husband's estate, she generated her own income by providing accommodation and care for her ill father, as well as from a small farming concern. This income, as well as an inheritance which she received from her father, was deposited in her husband's bank account. The total sum of this money amounted to approximately half the purchase price of a farm which her husband had purchased several years before his sequestration. Mrs Snyman and her spouse had apparently agreed to share equally in any profit generated by the resale of the farm. The farm was subsequently expropriated. The consideration received from the expropriation was used by Mr Snyman to purchase a game farm. The game farm was subsequently sold and Mr Snyman gave his wife a sum of money which amounted to less than half of the consideration received for the game farm. More than three years prior to the sequestration of her husband's estate, Mrs Snyman used these funds to purchase a residence. Using the house as security for a mortgage bond, Mrs Snyman later borrowed money for the purchase of a business. Approximately three months before her spouse's sequestration, Mrs Snyman purchased a plot of land from her husband for R25 000. The purchase price was financed by a portion of a loan of R35 000 secured by the registration of a bond over the land in question. With the balance of this loan Mrs Snyman purchased a pick-up truck from her spouse.

After the sequestration of her husband's estate, Mrs Snyman applied to court in terms of section 21(4) for the release of the aforementioned residence, business (shop), plot and truck. The trustee had dismissed her initial application in terms of section 21(2)(c) and now opposed the application before the court. One of the averments on behalf of Mrs Snyman was that section 22 of the Matrimonial Property Act radically altered section 21 of the Insolvency Act. This averment finds support in Smith[53] who confirms that no transaction effected before or after the commencement of section 22 of the Matrimonial Property Act is void or voidable merely because it amounts to a donation between spouses. Smith then reiterates that the purpose of section 21 was to relieve the trustee of the onus of proving that the transactions were simulated ones by placing the onus on the solvent spouse to show that it was in fact her separate property which she was claiming. Smith submits that this purpose has been defeated by section 22 of the Matrimonial Property Act, and says:

> "If the solvent spouse has acquired property from the insolvent by way of a donation, she acquires it with a title adverse to the insolvent's creditors. The onus is then on the trustee to prove that the disposition is one without value in terms of section 26 or a collusive dealing in terms of section 31 or a transaction in fraud of creditors under the common law."[54]

Smith is therefore of the opinion that the onus has reverted to the trustee, who now finds himself in the same position as a trustee prior to the promulgation of section 21 of the Insolvency Act. As will be seen below, however, this interpretation of the effect of section 22 of the Matrimonial Property Act on section 21 of the Insolvency Act is not shared by all. In the *Snyman* case, Kriegler J pointed

53 113.
54 *Ibid.*

out[55] that the prohibition of donations within the marriage previously prevented the solvent spouse from claiming the release of such donated property. He then said that section 22 of the Matrimonial Property Act has apparently abolished the prohibition of donations within the marriage. Kriegler J summarised the effect of section 22 of the Matrimonial Property Act on section 21 of the Insolvency Act as follows:

> "Artikel 21(2)(c) vereis steeds bewys van 'n regsgeldige titel. Die gesonde verstand verg nog steeds dat sodanige bewys wel deeglike bewys moet wees vanweë die aanspraakmaker se eksklusiewe kennis van die tersaaklike gegewens asook vanweë die verstaanbare versoeking tot verdoeseling. Maar 'n skenking kan nou sodanige titel verleen. Daar moet beklemtoon word dat die vereiste van goeie trou nog steeds bly staan. Dit moet 'n ware skenking wees. 'n Skyntransaksie sal nog steeds nie aan die solvente eggenoot 'n regsgeldige titel verleen nie."[56]

Precisely what Kriegler J meant by the words "deeglike bewys", is uncertain. Joubert[57] submits that the judge did not intend to create a heavier burden of proof for the solvent spouse, but that the trustee's onus of rebutting the solvent spouse's evidence should be easier to discharge because of the solvent (claimant) spouse's exclusive knowledge of the particular facts. Joubert[58] further submits that when claiming for the release of her property, the solvent spouse must bring facts before the court which *prima facie* prove the existence of the legal contract in terms of which the property was received. Thereafter the trustee will have to rebut such evidence by setting forth the facts on which the suspicion that the transaction was a simulated one is based. The solvent spouse may then offer an explanation to remove such suspicion on a balance of probabilities. The solvent spouse will have proved the legality of the contract only once she has removed the suspicion of simulation by providing an acceptable explanation. Joubert therefore says that it is much easier for the trustee to discharge the above onus of rebuttal than it would be for him to give positive proof of the simulation. Relying on this explanation, Joubert rejects Smith's submission that section 22 of the Matrimonial Property Act defeats the purpose of section 21 of the Insolvency Act. Section 22, he says, results only in donations within the marriage granting a valid title to the beneficiary. It does not alter the fact that section 21 absolves the trustee from providing positive proof of the simulated nature of the transaction.

In my opinion, "deeglike bewys" as used by Kriegler J means the application of the rules of evidence in their ordinary sense. In this respect the paramount rule regarding the onus of proof in civil proceedings should also apply to the insolvency proceedings in question. This rule dictates that the party making an allegation is burdened with the onus of proof. The adage *ei incumbit probatio qui dicit non qui negat* thus applies, namely that the claimant is not necessarily always burdened with the onus of proof but that the party making an allegation or averment (whether he be the claimant or the defendant) carries the onus of proof and not the party who denies the allegation.[59] Thus, whether the trustee be the "claimant" or the "defendant", it would appear that his burden has been increased considerably by the introduction of section 22 of the Matrimonial

55 504C.
56 505I–506A.
57 1992 *TSAR* 347.
58 *Idem* 348.
59 See Schmidt *Bewysreg* (1982) 35.

Property Act. The trustee must now, as was the case before the introduction of section 21 of the Insolvency Act, produce proof of matters which lie solely within the knowledge of the spouses. In my opinion, Smith's contention that section 22 of the Matrimonial Property Act defeats the purpose of section 21 of the Insolvency Act, therefore appears to be correct.

Be that as it may, the *Snyman* case's confirmation that a donation made with the serious intention of being bound thereby can provide a valid title, has provided legal clarity in this context. For the same reason one must welcome Kriegler J's remark that any simulated transaction, including a simulated donation, cannot provide the solvent spouse with a valid title.

To return to the facts of the case: Kriegler J regarded the provision of the finances by Mr Snyman for the purchase price of the residence as an obligation owing in terms of a partnership contract, a quasi-partnership contract or a donation. He found that it was not a simulated transaction.[60] Although no explanation was given for this finding, the judge was of the opinion that a valid title could be granted by means of any of the three forms of contract mentioned above.

With regard to the business which was purchased, the court found that for the purpose of claiming release of the property, the business and the residence were inextricably linked, since the business had been purchased with money borrowed and secured by a mortgage bond over the residence.[61] The purchase of the plot of land from her husband, however, was regarded as a simulated transaction, first of all because it was purchased only a few months prior to Mr Snyman's sequestration, and secondly, because it was sold to her for less than the market value. Contracts of purchase and sale are often identified as simulated contracts where property is sold below market price.[62] Contracting parties often create the impression of entering into a contract of purchase and sale while in actual fact their true intention is to make a donation.

Joubert[63] submits, however, that if the purchase of the plot had been a simulated transaction which camouflaged a donation between Mr and Mrs Snyman, the mere simulation of the contract would not have resulted in Mr Snyman's not receiving a valid title over the plot. Joubert states that under such circumstances, effect should have been given to the true intention to donate the plot, in which case the contract of donation (albeit hidden) would in fact have provided her with a valid title. Section 22 of the Matrimonial Property Act, he says, has obviated the need to circumvent the consequences of a donation within a marriage by feigning a contract of purchase and sale. It is, however, clear that in this context Joubert loses sight of Kriegler J's "vereiste van goeie trou" in the aforementioned quotation.

Joubert then says that he finds it difficult to see why, regarding the incident under discussion, Mr and Mrs Snyman could not have had the intention to be bound by the contract of purchase and sale. He says the evidence provides no indication that the parties could have intended that the purchase price should not

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60 506C.
61 508H.
62 Cf *McAdams v Fianders Trustee Bell NO* 1919 AD 207; *S v Dorfler* 1971 4 SA 374 (R); De Wet and Van Wyk 314.
63 1992 *TSAR* 349.

be paid or that registration of transfer in the name of Mrs Snyman should not take place. On the contrary, the circumstances under which the transaction occurred, he says, rather indicate that the parties were serious about entering into a contract of purchase and sale. In my opinion, however, this negates his argument that it could have been a contract of donation. If he relies on the argument that they had a serious intention to enter into a contract of purchase and sale, and if he wishes to reconcile this argument with his opinion that it was a simulated contract providing a valid title, he should rather have regarded the difference between the purchase price of the plot and its true market value as a donation, and the actual price paid as part of the contract of purchase and sale which the spouses faithfully intended entering into.

Joubert further says that in view of the advantages which the contract provided for the Snymans (essentially to help Mr Snyman obtain cash), it is unlikely that they could have intended entering into no contract or entering into a contract of another nature. Further, he says that the fact that Mrs Snyman borrowed money in her own name in order to finance the purchase price of the plot, is an indication that she accepted the full consequences of her obligation to pay the purchase price.

However, it would appear that the fact that she borrowed a larger sum of money than was necessary (using the property as security) is an indication that she was aware of the fact that she was purchasing below market price. Joubert further loses sight of the fact that the purchase of the plot was a *sine qua non* for obtaining the finances to pay the purchase price. By taking over the property (below market value) which formerly belonged to her spouse, she was diminishing his estate. This would be to the detriment of the *concursus creditorum* which would later come into existence. If she was intent on providing cash for her spouse, she could also have given him the excess portion of the loan which remained after the payment of the purchase price of the plot. In this context, the *bona fides* of the parties could certainly be questioned.

The court also found that Mrs Snyman's claim in respect of the pick-up truck which she purchased should fail since the purchase price was derived from the purchase and securing of the plot.[64] Joubert[65] disagrees with this ruling because the pick-up truck was purchased from a third party with finances which the spouse obtained in her own name. He argues that even if the purchase of the plot occurred by virtue of a simulated transaction, her right to the truck should not be affected by this.[66] However, he fails to take into account that the purchase of the plot and the borrowing of the money, secured by the mortgage bond over the plot, are inextricably linked. Without the existence of the contract of purchase and sale of the plot, the loan transaction and the subsequent purchase of the truck could never have come into operation. As stated above, the difference between the purchase price of the plot and the amount loaned (which difference financed the truck) should or would in any event have formed part of the estate of Mr Snyman, whether before or after sequestration, if the correct market value had been received for the plot.

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64 508I.

65 1992 *TSAR* 350.

66 Joubert errs when he says that the truck was purchased from a third party. He rectifies this error in a later article, but does not change his point of view about her right to the vehicle.

From the aforementioned one can conclude that section 22 of the Matrimonial Property Act has had a drastic effect on section 21 of the Insolvency Act. The effect has been drastic enough to bring this issue before the Supreme Court. Although some clarity has resulted from this litigation, it is my submission that this issue will again have to be considered by the courts if section 21 remains in force.

(*To be continued*)

AANTEKENINGE

HIV OF VIGS OP DOODSERTIFIKATE

1 Inleiding

Volgens die etiese reëls van die Suid-Afrikaanse Geneeskundige en Tandheelkundige Raad (SAGTR) het 'n geneesheer die etiese plig om vertroulikheid te handhaaf – selfs na die dood van sy pasiënt. Die bekendmaking van inligting aangaande 'n pasiënt

> "wat nie bekend gemaak behoort te word nie, behalwe met die uitdruklike toestemming van die pasiënt of . . . in die geval van 'n pasiënt wat oorlede is, met die skriftelike toestemming van die oorledene se naasbestaandes of die eksekuteur van die oorledene se boedel",

is 'n handeling ten opsigte waarvan die SAGTR tugstappe kragtens hoofstuk IV van die Wet op Geneeshere, Tandartse en Aanvullende Gesondheidsdiensberoepe 56 van 1974 mag doen (sien *Handleiding vir die handhawing van etiese norme* Bylae tot *SAMJ* Jan 1995 10 ev). Sommige geneeshere meen dat om HIV-infeksie of VIGS as oorsake van dood op doodsertifikate te meld, hierdie etiese plig ondermyn.

In *Jansen van Vuuren v Kruger* 1993 4 SA 842 (A) (wat gehandel het oor HIV-infeksie en vertroulikheid) beslis die appèlafdeling van die hooggeregshof dat 'n geneesheer se etiese en regsplig om die vertroulikheid van inligting oor sy pasiënt te handhaaf, nie absoluut geld nie. In hierdie geval het die hof oorweging geskenk aan privilegie as regverdigingsgrond vir optrede wat *prima facie* op 'n skending van die reg op privaatheid neerkom. Burchell *Principles of delict* (1993) 180 word met goedkeuring aangehaal:

> "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 kom na 'n versigtige afweeg van faktore soos die aard van VIGS, die SAGTR se etiese riglyne oor HIV en die behoefte om vertroulikheid te handhaaf – in sowel die openbare as die private belang – tot die gevolgtrekking dat die bekendmaking van HIV-infeksie in die bepaalde omstandighede nie deur privilegie geregverdig was nie. Die geneesheer was onder geen verpligting om die inligting te gee nie (aangesien sy optrede nie in ooreenstemming met die SAGTR-riglyne was nie) en die ontvangers van die inligting het geen reg gehad om dit te ontvang nie (aangesien hulle geen risiko van HIV-blootstelling geloop

het nie). Die hof beslis gevolglik dat daar geen sosiale of etiese plig, en by implikasie geen regsplig om in te lig, bestaan het nie. (Vir 'n bespreking van die saak, sien Van Wyk "VIGS, vertroulikheid en 'n plig om in te lig?" 1994 *THRHR* 141–147.)

'n Regsplig om inligting (wat andersins vertroulik is) te openbaar, sal op sigself die bekendmaking regverdig en as 'n geprivilegieerde (bevoorregte) geleentheid beskou word (Neethling, Potgieter en Visser *Deliktereg* (1996) 333 ev). Die vraag ontstaan nou of 'n geneesheer wel 'n regsplig het om HIV-infeksie of VIGS as oorsaak van dood op doodsertifikate te meld.

2 Toepaslike wetgewing

Doodsertifikate, of meer korrek "mediese sertifikate ten opsigte van dood" (sien hieronder) word gereël deur die Wet op die Registrasie van Geboortes en Sterftes 51 van 1992. Die Departement van Binnelandse Sake is verantwoordelik vir die administrasie van die wet. Die Minister van Binnelandse Sake is die verantwoordelike minister (a 1) en die Direkteur-Generaal van Binnelandse Sake is die bewaarder van alle dokumente en stukke met betrekking tot sterftes wat kragtens hierdie wet of enige ander wet verstrek moet word, en wat ingevolge wette wat herroep is, bewaar word (a 5(1)).

Die wet maak daarvoor voorsiening dat die minister regulasies kan uitvaardig "met betrekking tot enige aangeleentheid wat hy nodig ag om voor te skryf ten einde aan die oogmerke van hierdie Wet gevolg te gee" (a 32(1)). Dit is belangrik om daarop te let dat die minister gemagtig word om sy diskresie uit te oefen en om subjektief te besluit watter voorskrifte hy nodig ag. Die minister het dan ook regulasies ooreenkomstig artikel 32(1) uitgevaardig, naamlik die "Regulasies kragtens die wet op registrasie van geboortes en sterftes, 1992" wat op 9 September 1992 gepubliseer is (GK R 2139 *SK* 14182). Alhoewel regulasies normaalweg beskou word as ondergeskikte wetgewing, bepaal die wet spesifiek dat die wet "ook die regulasies beteken" (a 1). Die wet moet gevolglik saam met die regulasies gelees word.

2 1 Inwin van inligting

'n Voor-die-hand-liggende doelstelling van die wet is om te verseker dat die nodige inligting ingewin word sodat die bevolkingsregister volledig bygehou kan word.

2 1 1 Prosedure by dood weens natuurlike oorsake

Hoofstuk 3 van die wet (a 14–21) en regulasies 11 tot 18 reël die registrasie van sterftes. Die wet, en in 'n sekere mate ook die regulasies, maak 'n duidelike onderskeid tussen die prosedure wat gevolg moet word waar 'n sterfte aan natuurlike oorsake te wyte is en waar dit aan onnatuurlike oorsake te wyte is.

In geval van 'n sterfte weens natuurlike oorsake verplig artikel 14 'n persoon wat by die dood teenwoordig was, of wat daarvan te wete kom, om so gou doenlik kennis daarvan te gee. Kennis word gegee by wyse van 'n sertifikaat wat in artikel 15 vermeld word. Dit word gegee aan 'n persoon wat deur die direkteur-generaal ingevolge artikel 4 gemagtig is om sekere pligte te verrig. Regulasie 11 bepaal dat kennis van 'n sterfte ook mondeling of skriftelik gegee moet word aan so 'n gemagtigde persoon in die landdrosdistrik waar die sterfte plaasgevind het.

Indien die gemagtigde persoon oortuig is dat die dood die gevolg was van natuurlike oorsake, voltooi hy die voorgeskrewe sterfteregister en reik hy 'n begrafnisorder uit wat die begrafnis magtig (a 14(2)). Die vorm van die sterfteregister is uiteengesit in Aanhangsel 4 tot die regulasies (reg 11(2)). Op hierdie vorm word besonderhede aangaande die *oorsaak van dood* gevra. Indien redelike twyfel by die gemagtigde persoon ontstaan of die dood die gevolg van natuurlike oorsake was, moet ander prosedures gevolg word (a 14(3) en (4)) wat nie hier bespreek word nie.

Wanneer 'n geneesheer (en ook 'n "paslik gekwalifiseerde persoon" (a 1)) oortuig is dat die dood van 'n persoon wat hy voor sy afsterwe behandel het, die gevolg van natuurlike oorsake was, *moet* hy 'n voorgeskrewe sertifikaat uitreik wat die *oorsaak van dood* vermeld (a 15(1)). Indien hy 'n persoon nie voor sy dood behandel het nie maar die lyk nadoods ondersoek het en oortuig is dat die dood die gevolg van natuurlike oorsake was, *kan* hy 'n voorgeskrewe sertifikaat met daardie strekking uitreik (a 15(2)). "Voorgeskrewe" beteken dit wat kragtens die wet of by regulasie voorgeskryf word (a 1). Die vorm van die sertifikaat in verband met so 'n sterfte word in Aanhangsel 5 tot die regulasies voorgeskryf en uiteengesit. Hierdie sertifikaat staan bekend as die "Mediese Sertifikaat ten opsigte van Dood/Doodgeboorte". (Die tegnies korrekte benaming vir die sertifikaat wat die geneesheer uitreik, is gevolglik nie "doodsertifikaat" nie, maar "mediese sertifikaat ten opsigte van dood".)

Indien die geneesheer van mening is dat die dood die gevolg was van ander as natuurlike oorsake, moet ander prosedures gevolg word (a 15(3)) wat nie hier bespreek word nie.

Besonderhede wat uit bogenoemde dokumente verkry word, word in die bevolkingsregister opgeneem en daardie opname is die registrasie van die betrokke sterfte (a 5(2)). Na hierdie registrasie moet die direkteur-generaal 'n voorgeskrewe sterftesertifikaat uitreik (a 22). Dit geskied in die vorm van 'n rekenaaruitdruk of in 'n verkorte vorm soos voorgeskryf in Aanhangsels 9 en 10 tot die regulasies (sien reg 18). (Die verkorte vorm word uitgereik indien die oorledene geen identiteitsnommer gehad het nie.) Op beide vorms word die *oorsaak van dood* gemeld. Die direkteur-generaal kan op aansoek 'n sertifikaat uit die bevolkingsregister uitreik in die vorm wat hy goedvind, en so 'n sertifikaat sal in alle geregshowe *prima facie*-getuienis wees van die besonderhede wat daarin uiteengesit is (a 28).

2 1 2 Voorgeskrewe mediese sertifikaat

Die "mediese sertifikaat ten opsigte van dood/doodgeboorte" wat deur die geneesheer uitgereik word, vereis die volgende inligting in "Blok B" onder *oorsaak van dood*: finale siekte of toestand wat tot dood gelei het; bydraende oorsaak, indien enige, wat tot dood gelei het; en onderliggende oorsaak (siekte of besering wat gebeure geïnisieer het wat tot dood gelei het). Die geneesheer word op hierdie vorm gelas om "Blok B" in te vul in geval van dood weens natuurlike oorsake. Hierdie vorm is die enigste van die vorms wat in die regulasies voorgeskryf word waarop *gedetailleerde inligting oor die oorsake van dood* aangevra word.

Die geneesheer moet aan die einde van "Blok B" sertifiseer

> "dat die besonderhede hierbo verstrek na my beste wete en oortuiging waar en juis is en dat die sterfte/doodgeboorte uitsluitlik die gevolg was van natuurlike oorsake soos hierbo aangedui".

Die geneesheer sertifiseer *twee* aspekte: dat die inligting juis is *en* dat die sterfte uitsluitlik die gevolg was van natuurlike oorsake. Hy sertifiseer nie bloot dat die dood uitsluitlik die gevolg van natuurlike oorsake was nie. Verder sertifiseer hy beide stellings na sy beste wete en oortuiging ("to the best of my knowledge and belief") wat impliseer dat hy hom verstandelik moet inspan om waarheidsgetrou en toegewyd op te tree (sien *Beyers' Estate v Southern Life Association* 1938 CPD 8).

Toe die regulasies gemaak is, het die minister dit nodig geag "ten einde aan die oogmerke van hierdie Wet gevolg te gee" om die "voorgeskrewe sertifikaat wat die oorsaak van dood vermeld" (a 15(1)) só te formuleer dat dit inligting oor die finale, bydraende en onderliggende oorsake van dood vereis. Regulasie 12(1) bepaal dat die sertifikaat in die vorm moet wees en *wesenlik* die besonderhede moet bevat soos uiteengesit in Aanhangsel 5 tot die regulasies (my beklemtoning). "Wesenlik" ("substantially") beteken "in the main" en "in its principal essentials" (per Davis R in *Lawson and Kirk v SA Discount and Acceptance Corporation Pty Ltd* 1938 CPD 273 279). Dit is gevolglik nie korrek om hierdie inligting as oortollige inligting te beskou wat na die diskresie van die geneesheer uitgelaat mag word nie. Die geneesheer se statutêre plig is om die "oorsaak van dood" wesenlik te vermeld soos voorgeskryf deur die minister in die regulasies.

Die geneesheer moet "oortuig wees dat die dood van 'n persoon ... die gevolg van natuurlike oorsake was" of nie, *voordat* hy die mediese sertifikaat ten opsigte van dood voltooi. Die bykomende inligting wat die minister nodig ag, kan gevolglik ook nie beskou word as blote riglyne om die geneesheer te help om geen geval van dood oor te sien wat moontlik aan onnatuurlike oorsake te wyte kon wees nie.

2 1 3 Oorsake van dood

Die *conditio sine qua non*-teorie, ook bekend as die "but for"-toets, word in ons howe gebruik as die toets vir feitelike kousaliteit (Neethling ea *Deliktereg* 165 ev). Volgens hierdie toets moet 'n mens, ten einde vas te stel of X (HIV-infeksie) oorsaak van Y (die dood) was, die infeksie "wegdink", en dan kyk of die dood steeds intree of nie. Indien die dood ondenkbaar is sonder die HIV-infeksie was die infeksie die oorsaak van die dood. 'n Ander benadering wat in akademiese kringe gevolg word, beklemtoon die feitelike kousale verband tussen twee gebeure: Indien een feit uit 'n ander volg, bestaan die vereiste kousale verband. Of só 'n verband tussen die dood en HIV-infeksie bestaan, moet beslis word ooreenkomstig die kennis en ondervinding van die geneesheer. Dit is voldoende vir doeleindes van feitelike veroorsaking dat die toestand tot die dood bygedra het – dit is nie nodig dat HIV-infeksie die hoofoorsaak of die direkte oorsaak van die dood moet wees nie (*idem* 175).

Indien dit sou blyk dat HIV-infeksie die oorsaak van dood was (watter een van die twee toetse nou ook toegepas word) moet die geneesheer dit meld. Hy moet die inligting oor al die doodsoorsake waarheidsgetrou gee, soos hy dit uit sy ondervinding ken. Hy moet al die inligting wat in "Blok B" verlang word na die beste van sy wete en oortuiging gee. Dit sou gevolglik nie genoegsaam wees as die geneesheer net "natuurlike oorsake" as oorsaak van dood aandui nie. Dit is ook nie voldoende om byvoorbeeld net "longontsteking" as finale oorsaak van dood te meld indien die geneesheer weet dat die onderliggende of bydraende oorsaak van dood HIV-infeksie was nie.

2 1 4 Aanspreeklikheid weens nie-nakoming van voorskrifte

Uit bostaande blyk dit dat die geneesheer die sertifikaat waarheidsgetrou en so volledig moontlik moet invul. Hierdie gevolgtrekking spruit uit die feit dat die betrokke artikels en die regulasie geklee is in gebiedende terme, dat die "voorgeskrewe" mediese sertifikaat *wesenlik* die inligting moet bevat soos voorgeskryf in Aanhangsel 5 en dat die geneesheer die juistheid van die inligting na sy beste wete en oortuiging moet sertifiseer.

Daar word gevolglik in oorweging gegee dat die geneesheer 'n regsplig het om die voorskrifte na te kom en dat nie-nakoming van die voorskrifte op die verbreking van 'n regsplig sal neerkom.

Die geneesheer wat sy regsplig verbreek, kan deliktueel aanspreeklik gehou word. Die veroorsaking van nadeel by wyse van optrede wat bestaan uit die nienakoming van 'n statutêre voorskrif is *prima facie* onregmatig (Neethling ea *Deliktereg* 69). Indien derdes kan aantoon dat hulle skade gely het as gevolg van optrede in stryd met 'n statutêre plig (deurdat hulle bv op die verkeerde inligting op die mediese sertifikaat staatgemaak het) en dat die geneesheer opsetlik of nalatig die inligting weerhou het, kan die moontlikheid nie uitgesluit word dat ons howe die geneesheer vir skadevergoeding aanspreeklik sal hou nie. Verder kan die geneesheer se onbehoorlike of kwade motief in uitsonderlike gevalle ook 'n rol speel om die onregmatigheid van sy optrede te bepaal (*idem* 112-114). Ook die feit dat hy inderdaad geweet of subjektief voorsien het dat die benadeelde derdes ekonomiese skade gaan ly as gevolg van sy weerhouding van inligting, kan sy optrede onregmatig maak (*idem* 42).

Indien die geneesheer inligting weerhou, kan hy ook strafregtelik aanspreeklik wees. Die wet bepaal onder meer dat enige persoon wat sonder gegronde rede versuim om inligting te verstrek wat volgens die wet verstrek moet word, of wat 'n vals verklaring maak betreffende enige besonderhede wat volgens die wet bekend gemaak en geregistreer moet word, skuldig is aan 'n misdryf en by skuldigbevinding strafbaar is met 'n boete of met gevangenisstraf vir 'n tydperk van hoogstens vyf jaar of met sowel die boete as die gevangenisstraf (a 31). Die regulasies bevat soortgelyke bepalings (reg 21). Die feit dat hierdie strawwe (volgens die departement) nog nooit toegepas is op geneeshere wat inligting weerhou nie, doen nie afbreuk nie aan die algemene beginsel dat strafregtelike aanspreeklikheid aan die nie-nakoming van die voorskrifte kleef. So 'n weerhouding van inligting kan moontlik selfs op gemeenregtelike bedrog neerkom (sien *Rex v Heyne* 1956 3 SA 604 (A)).

2 2 Bekendmaking van inligting

Hierbo is in oorweging gegee dat die geneesheer 'n regsplig het om die inligting betreffende HIV-infeksie op die mediese sertifikaat ten opsigte van dood te vermeld. Die wet maak egter nie slegs voorsiening vir die inwin van belangrike inligting nie maar ook vir die beskikbaarstelling van sodanige inligting.

2 2 1 Verskaffing van inligting in openbare belang

'n Verdere doelstelling van die wet, saamgelees met die regulasies, is waarskynlik ook om data te bekom vir die gebruik van verskeie staatsdepartemente. Artikel 29(2)(a) magtig die direkteur-generaal om inligting wat ingevolge die wet met betrekking tot 'n persoon ingedien is, aan enige staatsdepartement, plaaslike owerheid of statutêre liggaam te verskaf vir enige van hul statutêre doeleindes. Daar is reeds gewys op die gevaar wat soortgelyke bepalings in

ander wette vir die privaatheid van individue inhou (bv deur Neethling, Potgieter en Visser *Neethling's law of personality* (1996) 295). Daar word egter in oorweging gegee dat, in die mate wat natuurlike persone ter sprake is, slegs lewende persone 'n reg op privaatheid het. Die probleem wat deur Neethling en ander aangeraak is, is derhalwe nie van toepassing op inligting wat op die mediese sertifikaat ten opsigte van dood verskyn nie.

Die Sentrale Statistiekdiens (SSD) en die Departement van Gesondheid maak byvoorbeeld gebruik van onpersoonlike of ongekoppelde data wat op mediese sertifikate ten opsigte van dood verskyn. Die SSD klassifiseer inligting oor siektes volgens die ICD-9 ("International Classification of Diseases") van 1975. Dié klassifikasie is in 1993 uitgebrei om ook VIGS in te sluit. ('n Gesamentlike komitee van die Departement van Gesondheid en die Departement van Binnelandse Sake het onlangs 'n konsep van 'n nuwe "Kennisgewing van Dood"-sertifikaat opgestel, wat selfs méér inligting oor die natuurlike oorsake van dood as die bestaande een verlang. Inligting oor "ander betekenisvolle toestande" word bv ook gevra. Die Departement van Gesondheid wil inligting oor onder meer die onderliggende oorsake van dood aanwend om te beplan vir die tipe gesondheidsorg wat in die toekoms verskaf moet word, om die gesondheidstand van die bevolking te beoordeel en om demografiese neigings te bepaal. Inligting oor bv die rookgewoonte, die gebruik van toksiese stowwe of HIV-infeksie as onderliggende doodsoorsake word as belangrik beskou. Indien hierdie konsep-sertifikaat aanvaar word, beplan die Departement van Gesondheid om riglyne hieroor aan geneeshere beskikbaar te stel en om studente op te lei ten einde hul samewerking te verseker.)

Die direkteur-generaal is verder by magte om inligting aan enige persoon te gee wat skriftelik daarom aansoek doen, mits so 'n persoon 'n volledige uiteensetting gee van die doeleindes waarvoor die inligting nodig is en die voorgeskrewe fooi betaal, en mits die direkteur-generaal oortuig is dat die verskaffing van die inligting in die openbare belang is (a 29(2)(b)).

Die openbare belang word gedien

> "deur die beskikbaarstelling van gemeenskapsrelevante inligting en kritiek oor alle aspekte van openbare politieke en sosiaal-ekonomiese aktiwiteite en meewerking tot vorming van die openbare mening" (Van der Walt "Die aanspreeklikheid van die pers op grond van laster" in Coetzee (red) *Gedenkbundel – HL Swanepoel* (1976) 68).

Die stelling is ook al gemaak dat daar 'n groot verskil is tussen "what is interesting to the public and what it is in the public interest to make known" (per Corbett HR in *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 2 SA 451 (A) 464C–D). Nie alle persone het gevolglik 'n genoegsame belang in die inligting op 'n mediese sertifikaat ten opsigte van dood nie. Openbare belang "connotes a common legitimate interest which is more than idle curiosity in the affairs of others" (per Hoexter AR in *Neethling v Du Preez* 1994 1 SA 708 (A) 780H).

In beginsel het 'n staatsorgaan (die Departement van Binnelandse Sake soos verteenwoordig deur sy direkteur-generaal) beheer oor data wat in die openbare belang beskikbaar gestel kan word. Indien die versekeringsbedryf byvoorbeeld kan aantoon dat inligting oor kanker of HIV-infeksie onder daardie deel van die bevolking wat versekering uitneem vir doeleindes van risiko-onderskrywing nodig is, sal dit waarskynlik in die openbare belang wees om hierdie inligting beskikbaar te stel.

2 2 2 Fundamentele reg op toegang tot inligting

Die tussentydse Grondwet van die Republiek van Suid-Afrika 200 van 1993 het op 27 April 1994 in werking getree as die hoogste reg van die land waaraan alle wetgewing getoets kan word. Die Grondwet brei die reg op toegang tot inligting, soos in die Wet op die Registrasie van Geboortes en Sterftes uiteengesit, nog verder uit. Die reg van toegang tot inligting word nou beskou as 'n fundamentele reg wat teen die staat en sy organe afgedwing kan word en word in die handves van fundamentele regte vervat. Artikel 23 bepaal dat elke persoon (en waar toepaslik sluit dit regspersone soos maatskappye in) die reg op toegang het tot alle inligting wat deur die staat of enige orgaan van die staat gehou word *in soverre sodanige inligting benodig word vir die uitoefening of beskerming van enige van sy of haar regte.* Dit beteken dat indien 'n derde (soos 'n versekeringsmaatskappy) kan aantoon dat inligting wat deur die Departement van Binnelandse Sake gehou word, benodig word om sy ekonomiese of besigheidsregte te beskerm, daardie derde in beginsel 'n reg op toegang tot sodanige inligting sal hê. In teenstelling hiermee magtig die wet onder bespreking bloot die direkteur-generaal om inligting beskikbaar te stel indien dit in die openbare belang is.

Die nuwe Grondwet (soos op 1996-05-08 deur die Grondwetlike Vergadering aanvaar en op 1996-10-11 gewysig) bevestig hierdie reg. Klousule 32(1) van die 1996-Grondwet (wat waarskynlik nie later nie as 1997-07-01 in werking sal tree) bepaal dat elkeen die reg op toegang het tot (a) enige inligting wat deur die staat gehou word, en (b) enige inligting wat deur 'n ander persoon gehou word en wat vir die uitoefening of beskerming van enige regte benodig word. Klousule 32(2) bepaal onder meer dat nasionale wetgewing verorden moet word om aan die reg op inligting gevolg te gee. Klousule 23(1) van die oorgangsbepalings (vervat in Bylae 6) bepaal dat die beoogde nasionale wetgewing binne drie jaar vanaf die datum waarop die nuwe Grondwet in werking getree het, verorden moet word. Totdat dit gebeur, word klousule 32(1) geag soos volg te lui:

> "Elke persoon het die reg op toegang tot alle inligting wat deur die staat of enige van sy organe ... gehou word vir sover daardie inligting benodig word vir die uitoefening of beskerming van enige van hulle (sic) regte."

Kortliks kom dit daarop neer dat nasionale wetgewing gevolg sal moet gee aan die horisontale toepassing van die reg (bv tussen individue onderling). In tussentyd sal die reg op toegang tot inligting net teenoor die staat en sy organe geld.

Geen reg geld egter absoluut nie. Die fundamentele reg op toegang tot inligting kompeteer byvoorbeeld met die fundamentele reg op privaatheid (lg reg is vervat in a 13 van die tussentydse Grondwet en in kl 14 van die nuwe Grondwet). Daar is hierbo in oorweging gegee dat slegs lewende persone (en in sekere toepaslike gevalle ook regspersone) die reghebbendes van die reg op privaatheid kan wees. Die gesinslede van die oorledene kan moontlik probeer steun op *hul* reg op privaatheid. Privaatheid het egter betrekking op die "persoonlikheid van die reghebbende, op sy persoonlike lewe en sy lewe in sy private huis" (Joubert *Grondslae van die persoonlikheidsreg* (1953) 135) en dit is

> "'n individuele lewenstoestand van afsondering van openbaarheid ... [wat] al daardie persoonlike feite [omsluit] wat die belanghebbende self bestem om van kennismaking deur buitestaanders uitgesluit te wees en ten opsigte waarvan hy 'n privaathoudingswil het".

(Neethling *Persoonlikheidsreg* (1985) 44; sien ook *National Media Ltd v Jooste* 1996 3 SA 262 (A) 271; vgl *Bernstein v Bester* 1996 2 SA 751 (CC) 789–790.) Privaatheid word geskend deur die bekendmaking van feite teen die wilsbestemming van die individu. Dit is egter twyfelagtig of *persoonlike feite* ook feite aangaande gesinslede sal insluit.

Die gesinslede se gevoel van piëteit teenoor die oorledene sou moontlik as 'n grondslag vir regsbeskerming geopper kon word. Ons howe het egter nog nie veel geleentheid gehad om die gevoelslewe as 'n onafhanklike en eiesoortige persoonlikheidsgoed te erken nie. Gesinslede sou moontlik sterker kan steun op hul subjektiewe reg op menswaardigheid of *dignitas* (wat in a 10 van die tussentydse Grondwet en kl 10 van die nuwe Grondwet as fundamentele reg erken word). Hierdie reg kan hul gevoelens van agting en liefde teenoor die oorledene insluit (Neethling ea *Neethling's law of personality* 219 ev). Of die fundamentele reg op toegang tot inligting sal moet swig voor die reg op menswaardigheid in die konteks van gekrenkte gevoelens, is egter onseker. Daar word in oorweging gegee dat derdes se reg op toegang tot inligting, wat nodig is vir die uitoefening of beskerming van hul regte, nie ligtelik opgehef moet word nie.

3 Die praktyk

In die praktyk word die reg, soos vervat in die Wet op die Registrasie van Geboortes en Sterftes, egter nie streng toegepas nie. Volgens 'n segsman van die Departement van Binnelandse Sake stel die departement hoofsaaklik belang in geboortes en sterftes ten einde 'n volledige bevolkingsregister te kan saamstel. Tweedens wil die departement weet of die oorsaak van dood natuurlik of onnatuurlik was. Verder word geneeshere teenswoordig 'n taamlik vrye hand gegee by die aangee van besonderhede oor die oorsaak van dood op die mediese sertifikaat ten opsigte van dood.

Die departement versamel inligting van 'n hoogs vertroulike aard maar die maatreëls wat daarop gerig is om die vertroulikheid van data te beskerm (bv die vereistes tov openbare belang en 'n opgaaf van redes soos vervat in a 29(2)(b)), word nie in die praktyk toegepas nie. Enige aansoeker wat die besonderhede van die oorledene op die vorm kan aandui en die voorgeskrewe R30 betaal, kan die volledige doodsertifikaat bekom. Artikel 29(1) verbied voorts (met enkele uitsonderings) die bekendmaking van enige inligting wat verkry is uit dokumente of stukke en wat iemand uit hoofde van sy werksaamhede bekom het, maar geen strawwe word vir die oortreding van hierdie bepaling voorgeskryf nie.

Verskeie skrywers het al daarop gewys dat maatreëls wat op databeskerming gerig is, byna geheel en al in Suid-Afrika ontbreek (Neethling ea *Neethling's law of personality* 296; Geldenhuys *Die regsbeskerming van inligting* (LLD-proefskrif Unisa 1993)). Totdat sulke maatreëls aanvaar word, moet algemene beginsels wat op ons gemenereg gebaseer is, toegepas word. Een so 'n beginsel is dat die departement die inligting mag gebruik of beskikbaar stel slegs vir doeleindes wat in die wet erken word. Indien bewys kan word dat die departement in die praktyk nie aan hierdie beginsel voldoen nie (en indien verder aan al die ander vereistes vir aanspreeklikheid voldoen word) behoort 'n interdik, die *actio iniuriarum* vir persoonlike genoegdoening en die *actio legis Aquiliae* vir die verhaal van skadevergoeding ter beskikking te wees van die benadeelde individu (bv 'n gesinslid van die oorledene wie se gevoelslewe geskend is).

4 Slotopmerkings

Die probleem wat geneeshere ondervind en wat hierbo uiteengesit is, word veroorsaak deur twee botsende belange: die belang in die beskerming van vertroulikheid en die belang in die inwin van en toegang tot belangrike inligting. Die behoefte aan die inwin van en die toegang tot inligting moet ontleed en opgeweeg word teen die behoefte aan die behoud van vertroulikheid. Waarskynlik behoort die hele situasie in heroorweging geneem te word deur 'n taakgroep waarop soveel moontlik belangegroepe verteenwoordig is, byvoorbeeld die mediese professie, die versekeringsbedryf en die betrokke staatsdepartemente. Indien voldoende konsensus bereik kan word, behoort dit redelik eenvoudig te wees om die nodige regswysigings aan te bring. Aangesien die Minister van Binnelandse Sake by magte is om die bestaande regulasies te wysig of nuwes te maak, hoef die parlement nie in dié verband genader te word nie.

'n Interessante verwikkeling is die verskyning op die Internet van die hersiene ontwerp van die "Open Democracy Bill" van 1995 wat deur die "Task Group on Open Democracy" in opdrag van adjunk-president Mbeki voorberei is (http://www.polity.org.za/govdocs/bills (1995)). Die doelstelling van die ontwerp (waarvan die status tans onseker is) is onder meer

> "to give the public a right of access to information held by governmental bodies, so far as that can be done without jeopardising good governance, personal privacy and commercial confidentiality ... and to protect individuals against abuse of information held by governmental or private bodies about themselves" (kl 2).

Klousule 3 bepaal dat hierdie wet op so 'n wyse geïnterpreteer en toegepas moet word dat die doelstellings vervat in klousule 2 maksimaal bevredig word en in die besonder dat die "maximum possible access to records of governmental bodies" verleen word.

Die ontwerp bevat 'n aantal interessante bepalings ten opsigte van oorledenes. Klousule 11(4)(iii) bepaal dat 'n aansoek om toegang tot 'n dokument wat persoonlike inligting oor 'n oorledene bevat, slegs deur die persoonlike verteenwoordiger van daardie individu gedoen mag word. (Ingevolge kl 1 beteken "persoonlike inligting" inligting oor 'n identifiseerbare individu.) Verder word in die vooruitsig gestel dat oorledenes ook 'n reg op privaatheid moet hê. Klousule 28(1) bepaal dat 'n regeringsorgaan 'n aansoek om toegang tot 'n dokument moet weier indien die blootlegging daarvan 'n inbreuk op die privaatheid van 'n identifiseerbare individu (anders as die aansoeker self) sal daarstel. So 'n identifiseerbare individu sluit 'n individu in wat minder as tien jaar voor die ontvangs van die aansoek gesterf het. Hierdie verbod op toegang tot inligting geld egter nie indien die inligting reeds "publicly available" is nie, die aansoeker self die oorledene se naasbestaande is, die aansoek gebring word met die toestemming van so 'n naasbestaande, of indien die openbare belang in inligting swaarder weeg as die belang in vertroulikheid "giving due weight to the importance of open, accountable and participatory administration" (kl 28(1), saamgelees met kl 41 en 42(1)(b)). Die Wet op die Registrasie van Geboortes en Sterftes word nie gelys as een van die wette wat herroep of gewysig word deur die wetsontwerp nie.

Met die eerste oogopslag lyk dit of hierdie ontwerp dalk sommige van die leemtes kan vul wat daar ten opsigte van databeskerming in Suid-Afrika bestaan. Verder ontstaan die gedagte ook dat dit dalk die beoogde nasionale wetgewing kan wees wat ingevolge klousule 32(2) van die nuwe Grondwet verorden moet word om aan die reg op inligting gevolg te gee. Of hierdie lywige dokument

egter wel aan die behoeftes voldoen en of dit versoenbaar is met die bepalings in die nuwe Grondwet, verdien 'n diepgaande ondersoek. Dit sal in elk geval interessant wees om te sien of die ontwerp daarin gaan slaag om die reg op privaatheid uit te brei na persone wat reeds oorlede is.

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THE ATTENUATED FORM OF INTENTION: A CONSTITUTIONALLY ACCEPTABLE ALTERNATIVE TO STRICT LIABILITY FOR THE MEDIA

It is somewhat surprising, given the rise in prominence of the right to freedom of expression, that the media's strict liability for defamation has not yet been tested against the provisions of the bill of rights. In the past, *Pakendorf v De Flamingh* 1982 3 SA 146 (A) was severely criticised by journalists, media lawyers and academics, even before the interim Constitution, and the Constitution has strengthened their case even further. This note assesses the extent to which constitutional developments could affect the rule relating to strict liability.

The elements of a defamation action are well-known: the wrongful and intentional publication of defamatory matter referring to the plaintiff. In proving their cases, plaintiffs are assisted by two rebuttable presumptions once the factual invasion of a personality interest (publication of defamatory material referring to the plaintiff) is proved: a presumption of wrongfulness and a presumption of intention (*Suid-Afrikaanse Uitsaaikorporasie v O'Malley* 1977 3 SA 394 (A); *May v Udwin* 1981 1 SA 1 (A); *Gardener v Whitaker* 1995 2 SA 672 (E)). The defendant bears the onus to rebut these presumptions, in the former instance on a balance of probabilities (*Neethling v Du Preez; Neethling v The Weekly Mail* 1994 1 SA 708 (A)), but it is uncertain whether a full onus or an evidentiary burden (a "weerleggingslas") suffices for the latter (*Suid-Afrikaanse Uitsaaikorporasie v O'Malley supra* 403; but cf *Neethling v Du Preez; Neethling v The Weekly Mail supra* 764 767). On the grounds of public policy, *Pakendorf*'s case modified the general principles by introducing strict liability in respect of the media: plaintiffs need not prove the intention element at all. If the defendant is a mass medium, only one presumption, that of wrongfulness, arises, and the onus is on the defendant to rebut it on a balance of probabilities. This means that the media can raise defences which exclude wrongfulness but not those which are directed at the fault element.

Is strict liability for mass media unconstitutional? The issue here is not the horizontal or vertical application of the bill of rights, for we are not considering whether or not the bill binds ordinary citizens or non-governmental institutions: instead we are testing the validity of a law to see whether or not it reflects constitutional values (*Gardener v Whitaker supra* 683–684; *S v Zuma* 1995 2 SA 642 (CC)). Section 35(2) of the interim Constitution (Act 200 of 1993) authorises the testing of law against the bill of rights and section 35(3) enjoins courts to

have regard to the section when using their ability to develop the common law (see also s 39(3) of the working draft of the new Constitution). In the same way as *Pakendorf*'s case developed the common law by imposing strict liability, so, too, can the courts develop the law by abandoning the concept. Any new provision, however, must reflect and promote the spirit, purport and objects of the bill of rights (s 35(3) of the interim Constitution; s 39(3) of the working draft). Courts may therefore consider the validity of the strict liability rule.

Two approaches are possible: first, that strict liability falls foul of the freedom of speech and expression provision (s 15 in both the interim Constitution and the working draft); and, secondly, that the law breaches the equality provision (s 8 in both documents).

In terms of the first approach, one would argue that strict liability places an undue restriction upon the media's right to freedom of expression (as was done in *Mandela v Falati* 1995 1 SA 251 (W) 259–260). I do not think it necessary, as part of this argument, to weigh this right against that of either dignity (s 10 in the interim Constitution and s 9 in the working draft), or privacy (s 13 in both documents), or both. Whatever the result of such a balancing act, it would not distinguish media liability from that of any other defendant. However, one would have to show (the onus being on the media: but cf *Gardener v Whitaker supra*) that strict liability places a prior restraint upon media which causes them to limit their comments more than would be the case if fault of some nature were required. Frankly, I doubt whether that feature makes one iota's difference to the behaviour of the media. But assuming that it would make a difference, the plaintiff would then have to show that the restraint is unreasonable, or unjustifiable in an open and democratic society, or that it negates the essential content of the right to freedom of expression (s 33(1)). In the context of free and fair political activity, the limitation must also be necessary (*ibid*). (Also of relevance is s 35(2), which states that restricted interpretations which *prima facie* exceed the bill of rights could still be acceptable if another justification, not in conflict with the bill of rights, can be found.)

The policy factors which justified strict liability – the greater potential harm of a defamatory remark by a mass medium and the plaintiff's difficulty in proving intent – are not trivial. However, while they may carry sufficient weight to render a lesser restriction of the right reasonable and justifiable, strict liability amounts to overkill. Courts may also find the restriction on freedom of expression unnecessary in a political context. In my view, the requirements of section 33 cannot be met and the strict liability provisions ought to be struck down.

The second approach is as follows. Media are treated differently from other defendants in defamation actions and the requirement of strict liability is clearly more onerous than that which applies generally. *Prima facie* section 8 has been breached. The onus then is on the plaintiff to show that the breach complies with the provisions of section 33. The result should be no different to that of the first approach. It is, however, an easier route to follow, with less opportunity for adverse decisions based purely upon policy.

Should the courts find that strict liability for the media is unconstitutional, the appropriate form of liability remains to be determined. The rationale for deviating from the traditional requirement of intention remains and commentators who attack the strict liability criterion tend not to favour a return to the position prior to *Pakendorf*. One option, in line with *New York Times Co v Sullivan* 376 US 254 (1964), is that plaintiffs who are public officials or public figures should

prove actual malice: knowledge of falsity or reckless disregard as to the truth of the material (see Van der Westhuizen in Van Wyk *et al* (eds) *Rights and constitutionalism* 287–288; Marcus 1994 *SAJHR* 143–144). I am reluctant to support this suggestion and I agree with Burchell's comments on the *Sullivan* decision:

> "The terms 'malice' and 'recklessness' are notoriously slippery and the distinction between public official/figure and private individual is not an easy one to draw and could even fall foul of equal treatment provisions. The obvious problems of defining public as opposed to private persons has led the United States Supreme Court to concentrate on the nature of the speech rather than the public status of the plaintiff . . ." ("Freedom of expression and the law of defamation" paper delivered at the Congress of the Society of University Teachers of Law 1996-1-24).

Others suggest negligence as a suitable fault criterion for media liability (see Burchell *The law of defamation in South Africa* (1985) 193–194; Neethling and Potgieter 1994 *THRHR* 517–518, 1995 *THRHR* 713; Van der Westhuizen *supra* 288). The unequal treatment is acceptable. The policy factors which justified strict liability still remain and serve to justify the less onerous restriction. I can support this solution but not without some reluctance. One of the reasons why I disliked strict liability was the fact that this form of liability disregarded a fundamental feature of the *actio iniuriarum*, the requirement of intention. Fault in the form of negligence would perpetuate this deviation from principle, regardless of whether it applies to all cases or media defendants only. If there is another way of dealing with the problem which does not deviate substantially from fundamental principles, such a solution, in my opinion, is to be preferred. Fortunately, such an option exists.

At the time of *Pakendorf v De Flaming supra* the choice was between strict liability and liability based upon intention, the latter

> "encompassing the direction of the will to the attainment of a particular consequence, and the consciousness of the fact that such result being achieved in an unlawful or wrongful manner" (8 *LAWSA* first reissue part 1 "Delict" par 87).

However, courts have recently acknowledged that policy considerations may justify an attenuated form of intention in which consciousness of wrongfulness is not required at all (*Ramsay v Minister van Polisie* 1981 4 SA 802 (A) 818–819; *Dantex Investment Holdings (Pty) Ltd v Brenner* 1989 1 SA 390 (A) 396; *Minister of Justice v Hofmeyr* 1993 3 SA 131 (A) 154; *Tödt v Ipser* 1993 3 SA 577 (A) 588). Intention, in this instance, consists of a single component only: the intention to achieve a particular result (*LAWSA supra*). If this attenuated form of intention were required in media cases, a defendant could rebut the presumption of *animus* by showing that no invasion of the plaintiff's rights was desired. However, a defence aimed at the consciousness-of-wrongfulness component, such as mistake, whether reasonable or unreasonable, could not be raised. This approach achieves all the objectives which critics of strict liability wish to attain, and more. It conforms, in my opinion, with the spirit, purport and objects of the bill of rights as well as the fundamental principles of the common law.

There are, of course, additional ways in which perceived hardship may be alleviated. One is by adjusting the onus of proof required for rebutting the presumption of intention. A full onus, on a balance of probabilities, favours the plaintiff, an evidentiary burden the defendant. As it stands at present, the law already leans towards defendants on this issue (*Suid-Afrikaanse Uitsaaikorporasie v O'Malley supra*; *Neethling v Du Preez*; *Neethling v The Weekly Mail supra*) and, in general, academics support this approach (see eg Burchell "Freedom of

expression and the law of defamation" *supra*; Neethling and Potgieter 1995 *THRHR* 712; but cf *LAWSA supra* par 90). Another is by re-examining the defence of public interest and introducing a defence of media privilege (see *LAWSA supra* par 84). The issue of media liability should therefore not be seen in isolation: the entire body of law applicable to the media should be considered to ensure the most equitable approach overall.

The attenuated form of intention provides an acceptable middle-ground alternative to strict liability. It places a less severe burden upon the media than is currently the case and it recognises the policy factors which led to strict liability in the first place. The suggestion also appears constitutionally sound: on the one hand, a balance between the right to dignity and the right to freedom of expression is achieved; on the other, the unequal treatment is less severe than before and complies with the provisions of section 33. Above all, the integrity of the *actio iniuriarum* is maintained. We have already experienced how hasty decisions regarding bail and the imprisonment of children have caused the legislature to introduce more restrictive, yet still constitutional, approaches to these issues. There is no need for the pendulum once again to swing to the other extreme.

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DIE NORMATIEWE SKULDBEGRIP IN DIE STRAFREG – 'N ANTWOORD

1 Inleiding

In 'n reeks van twee artikels onder die titel "The psychological fault concept versus the normative fault concept: *Quo vadis* South African criminal law?" wat in 1995 *THRHR* 361 en 568 verskyn het, weeg FFW van Oosten die psigologiese en die normatiewe skuldbegrippe in die strafreg teen mekaar op en verwerp dan uiteindelik die normatiewe skuldbegrip ten gunste van die psigologiese skuldbegrip. Aangesien ek nie saamstem met hierdie gevolgtrekking nie, sou ek graag enkele standpunte en argumente wil stel wat, volgens my beskouing, aantoon waarom ek Van Oosten se standpunt nie kan ondersteun nie, en waarom die normatiewe skuldbegrip bo die psigologiese skuldbegrip te verkies is.

Ter inleiding moet enkele aspekte van die aantekening wat volg eers beklemtoon word. Eerstens: ten einde onnodige herhaling van stof uit te skakel, gaan ek nie die twee skuldbegrippe waaroor hierdie bespreking handel, weer eens uiteensit nie. Die leser wat hom- of haarself op die hoogte wil bring oor die betekenis van hierdie begrippe, word na Van Oosten se artikelreeks verwys.

Tweedens: daar kan na my mening geen twyfel bestaan nie dat Van Oosten in sy goed deurvorsde artikelreeks die beoefening van wat as die "strafregwetenskap in Suid-Afrika" beskryf kan word, 'n groot guns bewys het. Om oor gemelde twee skuldbegrippe te skryf, behels 'n ondersoek na veel meer as slegs die skuldvereiste in die strafreg. Dit behels noodwendig 'n besinning oor die hele

samestelling van strafregtelike aanspreeklikheid, met ander woorde, 'n nadenke oor onder meer die verhouding tussen sekere kernbegrippe soos handeling, wederregtelikheid, toerekeningsvatbaarheid en skuld. So 'n besinning bestryk uit die aard van die saak bykans die hele gebied van die algemene beginsels van die strafreg. Gevolglik is besprekings van hierdie onderwerp – in elk geval besprekings wat gekenmerk word deur die graad van diepsinnigheid wat in Van Oosten se artikelreeks aangetref word – in die Suid-Afrikaanse regsliteratuur maar redelik skaars. (Die howe kan verskoon word dat hulle hulle byna nooit begewe in 'n ondersoek van hierdie aard nie, omdat 'n wye, dogmatiese ondersoek na die grondslae van aanspreeklikheid oor die algemeen nie deel van hulle normale alledaagse funksie is nie.)

Juis ómdat 'n besinning oor gemelde twee skuldbegrippe in die strafreg so 'n uiters breë gebied omvat, is dit onmoontlik om binne die beperkte ruimte van hierdie aantekening elke argument van Van Oosten in besonderhede te ontrafel en te beantwoord. 'n Vollediger uiteensetting van my eie standpunte oor die psigologiese en normatiewe skuldbegrippe verskyn in elk geval in my boek *Strafreg* (1992), veral op 69–77, 99–110 en 151–161. Slegs enkele kernaspekte van die onderwerp kan in hierdie aantekening onder die loep geneem word. Daar word gepoog om, deur die ander kant van die saak te stel, by te dra tot die debat, nie net omtrent die vraag na die aard van skuld nie maar (iets wat onvermydelik is in 'n debat van hierdie aard) ook omtrent die hele vraag oor hoe strafregtelike aanspreeklikheid begrond moet word.

2 Skuldbegrippe, verbodsbeskrywing en wederregtelikheid

Die elemente of "boustene" van aanspreeklikheid wat Van Oosten erken, is handeling, wederregtelikheid, toerekeningsvatbaarheid en skuld. Ofskoon hy wel deeglik bewus is van die element wat in Duitsland as "Tatbestand" (of "Tatbestandsmässigkeit") bekend staan, en wat ek self as "verbodsbeskrywing" tipeer, is daar geen blyke in die artikelreeks dat hy dit erken en aanvaar as 'n noodsaaklike bousteen vir aanspreeklikheid naas die ander elemente soos handeling, wederregtelikheid en skuld nie. In hierdie verband moet met Van Oosten se konstruksie van aanspreeklikheid verskil word. Die verbodsbeskrywing is in werklikheid 'n lewensnoodsaaklike bousteen in hierdie konstruksie. Sonder 'n erkenning van sy bestaan, is dit onmoontlik om (a) 'n behoorlike begrip van die element "wederregtelikheid" te verkry; (b) 'n wetenskaplik samehangende konstruksie van aanspreeklikheid te verkry; en (c) die noodsaaklikheid van die normatiewe skuldbegrip in te sien.

Voordat daar verder op hierdie punt uitgebrei word, is dit nodig om eerstens iets te sê oor die terminologie wat gebruik word om "Tatbestand" in Afrikaans te beskryf. Van Oosten (1995 *THRHR* 363 vn 3) is krities oor die woord wat ek gebruik om hierdie element te beskryf, naamlik "verbodsbeskrywing". 'n Mens kan lank debatteer oor die vraag of dit nie beter sou wees om, in plaas van "verbodsbeskrywing", eerder van "daadsbeskrywing" te praat nie. Om lank oor hierdie suiwer terminologiese vraag uit te brei, sal die aandag egter te veel aflei van die sentrale punt wat ek wil beklemtoon, naamlik die noodsaaklikheid van die erkenning van hierdie element. Ek is nie getroud met die term "verbodsbeskrywing" nie en sou bereid wees om te erken dat 'n mens net sowel kan praat van "gebods- of verbodsinhoud" (wat egter 'n omslagtige term is) of "paradigma" ('n baie akkurate beskrywing, maar een wat miskien – minstens in hierdie stadium van die debat of regsontwikkeling – nog ietwat vreemd op die

oor val), of selfs "die omskrywingselemente van die misdaad" ("the definitional elements of the crime"). Bloot om praktiese redes sal ek verder in hierdie antwoord maar by die begrip "verbodsbeskrywing" bly.

'n Miskenning van die bestaan van die verbodsbeskrywing as 'n selfstandige element lei daartoe dat die vereistes wat in werklikheid onder hierdie element tuishoort, bewustelik of onbewustelik op 'n kunsmatige wyse ingeforseer word by die handelings-, wederregtelikheids- en skuldelemente – waar hulle nie tuishoort nie. By die wederregtelikheidsvereiste is die vraag slegs of die verbodsomskrewe gedrag ingevolge die *boni mores* of regsoortuigings van die gemeenskap geregverdig kan word. Om hierdie vraag te beantwoord, moet die beoordelaar eers nagegaan het of die besondere vereistes wat deel vorm van die verbodsbeskrywing (soos die vraag by diefstal of die handeling gepleeg is *ten opsigte van 'n roerende, liggaamlike saak*, die vereiste by hoogverraad *dat die dader trou aan die Republiek verskuldig moet wees* en die vereiste by die misdaad van bestuur onder die invloed van drank dat die motor *op 'n openbare pad* bestuur moet gewees het) wel aanwesig was. Dit is verkeerd om, soos Van Oosten blykbaar doen, hierdie gemelde vereistes onder die handelings- en die wederregtelikheidsvereistes in te deel.

Dit is van die grootste belang om in gedagte te hou dat daar in die verbodsbeskrywing ook *subjektiewe* vereistes is *wat nie onder die skuldbegrip tuishoort nie*. Aanvaar 'n mens hierdie feit, is dit baie moeilik, indien nie onmoontlik nie, om skuld as bloot die psigologiese band tussen die dader en die daad te beskou.

Van Oosten is bewus van die bestaan van hierdie subjektiewe vereistes by die "onreg"-gedeelte van aanspreeklikheid (dws die handeling, verbodsbeskrywing en wederregtelikheid), maar beskou dit as blote uitsonderings op 'n reël (1995 *THRHR* 577–568). Met hierdie beskouing kan nie saamgestem word nie. Wat Van Oosten as blote uitsonderings op 'n reël beskou, blyk by nadere ondersoek eerder 'n vaste patroon te wees. Die patroon is die volgende: hierdie subjektiewe vereistes vorm deel van die minimum vereistes vir aanspreeklikheid wat nodig is om 'n verstaanbare of sinvolle verbod (of gebod) uit te maak. Dit is juis die rede waarom hulle deel van die verbodsbeskrywing vorm en nie van skuld nie.

Voorbeelde van hierdie subjektiewe vereistes binne die verbodsbeskrywing is die toe-eieningsvereiste by diefstal, die vyandige opset by hoogverraad, die opset vereis by poging om 'n misdaad te pleeg – veral by ondeugdelike poging – asook die bykomstige opset wat vereis word by die sogenaamde dubbele-opsetmisdade, soos abduksie (opset om die minderjarige weg te neem plus opset dat iemand met hom of haar geslagsgemeenskap het), korrupsie, alle gekwalifiseerde aanrandings, huisbraak en 'n verskeidenheid statutêre misdade. (Vir 'n breedvoeriger verduideliking van die subjektiewe komponente in die verbodsbeskrywing, insluitende die redes waarom die pasgemelde misdade subjektiewe vereistes bevat wat nie deel van die skuldelement kan vorm nie, sien my artikel "The definition of the proscription and the structure of criminal liability" 1994 *SALJ* 74–78.)

Dit staan bo twyfel dat die vraag na skuld eers beantwoord kan word nadat die beoordelaar vasgestel het dat daar wel aan die wederregtelikheidsvereiste voldoen is. 'n Mens kan tog nie skuld hê ten aansien van regmatige gedrag nie. Wat baie belangrik is om in gedagte te hou, is dat die vraag na wederregtelikheid eers beantwoord kan word nádat die beoordelaar vasgestel het dat die vereistes vervat in die verbodsbeskrywing, dit wil sê die bogemelde minimum vereistes vir 'n verstaanbare verbod – *wat die gemelde subjektiewe vereistes insluit* – wel

aanwesig is. In Van Oosten se artikelreeks is daar geen teken daarvan dat hy laasgenoemde beginsel erken nie. (Dieselfde kritiek kan ook ingebring word teen die opvattings oor wederregtelikheid wat deur De Wet in *De Wet en Swanepoel Strafreg* (1985) 69 en Burchell en Milton *Principles of criminal law* (1991) 106 gehuldig word.)

Die toets vir wederregtelikheid is in wese bloot negatief: 'n mens stel slegs vas of die vereistes waarvoor alreeds positief getoets is by die handeling en verbodsbeskrywing, nie dalk geregverdig kan word nie – in welke geval hulle aanwesigheid nie meer teen die dader se rekening geplaas word nie. (Sien in hierdie verband die insiggewende opmerkings van Rabie *A bibliography of South African criminal law (general principles)* (1987) 33.) Dit wil voorkom of Van Oosten, net soos die ander genoemde skrywers, verkeerdelik 'n positiewe toets by wederregtelikheid aanwend deur by die toets vir wederregtelikheid vas te stel of die "omskrywingselemente van die misdaad" – dit wil sê die vereistes wat in werklikheid deel vorm van die verbodsbeskrywing – aanwesig is. Hierdie omskrywingselemente van die misdaad (dws die elemente wat by die bestudering van die besondere misdade te voorskyn kom en aantoon hoe die een soort misdaad van die ander verskil) vorm nie deel van wederregtelikheid nie maar van die verbodsbeskrywing.

Dus: ten einde vas te stel of die handeling wederregtelik is, moet die beoordelaar eers tevrede wees dat die handeling aan die verbodsbeskrywing voldoen. Waar daar duidelik subjektiewe vereistes in die verbodsbeskrywing inbegrepe is, beteken dit dat die bestaan van hierdie subjektiewe vereistes nagegaan moet word *voordat* die vraag na wederregtelikheid beantwoord kan word. Hierdie feit maak dit onmoontlik om skuld te sien as die inbegrip van al die subjektiewe aanspreeklikheidsvereistes, oftewel die psigologiese band tussen dader en daad. (Hier word natuurlik slegs na opsetmisdade verwys. Wat nalatigheid in die strafreg betref, word daar algemeen aanvaar dat nalatigheid 'n rol speel by sowel die "onreg" (verbodsomskrewe handeling) as by die skuld.)

Kom ons illustreer hierdie punt aan die hand van 'n praktiese voorbeeld: X word van die misdaad korrupsie (dws oortreding van a 1 van die Wet op Korrupsie 94 van 1992) aangekla. Om aan hierdie misdaad skuldig bevind te word, word vereis dat X 'n voordeel aan iemand anders oorhandig met die opset om laasgenoemde te beweeg om op 'n sekere manier op te tree. Veronderstel X beroep hom op die verweer van noodtoestand in die vorm van dwang. Hierdie verweer is 'n regverdigingsgrond wat, indien dit sou slaag, die wederregtelikheid van die handeling ophef. Ten einde te weet of die handeling wederregtelik was, moet 'n mens eers nagaan of al die vereistes vervat in die verbodsbeskrywing nagekom is. Die vereiste dat X die opset moet hê om deur die gee van die voordeel die ontvanger te beweeg om op 'n sekere manier op te tree, is een van die minimum vereistes om 'n verstaanbare en sinvolle verbod daar te stel. Dit vorm derhalwe deel van die verbodsbeskrywing. Hoe is dit egter moontlik om die vraag na wederregtelikheid te beantwoord as die beoordelaar nie weet of X die voordeel aan die ontvanger gegee het *met die opset om hom oor te haal om op 'n sekere manier op te tree* nie? Die blote objektiewe oorhandiging van geld aan byvoorbeeld 'n beampte is tog nie strafbaar nie. Dit sal eers as verbodsomskrewe gedrag erkenbaar wees indien 'n mens weet dat die geld oorhandig is met die opset om die ontvanger te beweeg om, as teenprestasie, op die een of ander manier onbehoorlik op te tree, soos om aan die gewer op 'n onbehoorlike manier 'n tender toe te staan.

Dit volg dus dat die beoordelaar eers die opset waarmee die geld oorhandig is, moet vasstel vóórdat hy kan besluit of die handeling wederregtelik was – dit wil sê of X onder dwang opgetree het toe hy die geld oorhandig het. Omdat die vraag na skuld altyd beantwoord word eers nadat die vraag na wederregtelikheid positief beantwoord is, volg dit dat die opset om die ontvanger deur middel van die afgifte van die voordeel te beweeg om iets te doen, nie deel van die skuldvereiste kan vorm nie.

Deur die verbodsbeskrywing te erken as 'n selfstandige aanspreeklikheidselement naas handeling, wederregtelikheid en skuld, is dit geen probleem om die subjektiewe vereistes waarvan hierbo gepraat is, uit die skuldbegrip te verwyder nie; hulle word eenvoudig in die verbodsbeskrywing geakkommodeer.

3 Skulduitsluitende noodtoestand

Dit is nodig om kortliks iets te sê oor die verweer van noodtoestand, en meer bepaald oor die verband wat daar tussen sekere aspekte van hierdie verweer en die normatiewe skuldbegrip bestaan.

Na my mening slaag Van Oosten (en die ander aanhangers van die psigologiese skuldbegrip) nie daarin om te verduidelik hoe dit moontlik is dat iemand kan voldoen aan al die elemente vir aanspreeklikheid wat daar volgens sy konstruksie van aanspreeklikheid bestaan, maar nogtans onskuldig anderkant kan uitstap nie. Die moontlikheid dat die dader in hierdie omstandighede onskuldig bevind kan word, kom voor by skulduitsluitende noodtoestand. Wat hier gebeur, is die volgende: X, wat toerekeningsvatbaar is, word deur Z gedwing om 'n verbode daad te verrig. X moet kies tussen twee euwels. Deur die verbode daad te verrig, skend hy (X) egter 'n belang wat nie geringer is as die belang wat hy beskerm (soos sy eie lewe of liggaamlik integriteit wat bedreig word) nie. Omdat noodtoestand nie hier as 'n regverdigingsgrond kan geld nie, tree hy wederregtelik op. X *weet* dat hy wederregtelik optree, maar gaan nogtans voort om dit wat hy beveel word om te doen, uit te voer, omdat weiering om die bevel uit te voer daarop sou neerkom dat hy as 't ware 'n martelaar van homself maak, of 'n bogemiddelde heroïese daad sou verrig. Dit blyk uit die omstandighede dat die normale, deursnit-mens nie hierdie tipe dade sou verrig nie. X verdien dan om onskuldig bevind te word.

Die volgende is 'n voorbeeld van so 'n situasie: Z beveel vir X om Y dood te maak en dreig terselfdertyd om X dood te maak as hy nie die bevel gehoorsaam nie. X kan die noodsituasie nie ontkom deur te vlug nie. Uit vrees vir sy eie lewe maak X vir Y dood. Deur vir Y dood te maak het X 'n belang geskend wat nie geringer is as die belang wat hy beskerm nie. Die reg kan nie aanvaar dat Y se lewe minder werd is as X se lewe nie. X behoort nietemin in hierdie feitestel onskuldig bevind te word.

'n Onskuldigbevinding ten spyte van die aanwesigheid van al die "tradisionele" vereistes vir aanspreeklikheid wat die aanhangers van die psigologiese skuldbegrip vereis, is slegs verklaarbaar op die grondslag dat daar vir skuld, naas toerekeningsvatbaarheid, opset en wederregtelikheidsbewussyn, iets bykomstig vereis word. Dit is die sogenaamde "vergbaarheidskriterium", naamlik die oorweging dat iemand slegs skuld het as (bykomstig tot toerekeningsvatbaarheid, opset en wederregtelikheidsbewussyn) die omstandighede waarin die handeling plaasvind sodanig is dat die regsorde van hom kon *verwag* of *geverg* het om anders op te tree. In die voorbeeld hierbo kon die regsorde dit nie van X verwag het nie, en derhalwe het hy nie met skuld opgetree nie.

Ofskoon 'n algemene "vergbaarheidskriterium" moontlik te vaag is om, naas byvoorbeeld toerekeningsvatbaarheid en wederregtelikheidsbewussyn, in alle gevalle as 'n algemene voorvereiste vir of komponent van skuld te geld, kan dit nogtans 'n nuttige rol speel as 'n grond vir die bestaan van skulduitsluitende noodtoestand – 'n vorm van noodtoestand wat slegs verklaarbaar en bestaanbaar is indien die normatiewe skuldbegrip aangehang word.

Na my mening is enige twyfel wat daar dalk nog kon bestaan het oor die vraag of een mens se lewe kosbaarder is as 'n ander se lewe, uit die weg geruim deur die bepalings van artikel 9 van die Grondwet van die Republiek van Suid-Afrika 200 van 1993, wat bepaal dat elke persoon die reg op lewe het. Saamgelees met ander artikels in hoofstuk 3 van die Grondwet, wat 'n lys van fundamentele regte bevat, veral artikels 8(1) (wat handel oor die reg op gelyke beskerming deur die reg) en (2), 33(2) en 35, val dit na my mening nie te ontken nie dat X se optrede in die voorbeeld hierbo nie as regverdigende noodtoestand beskou kan word nie. Die enigste grondslag waarop 'n hof X onskuldig kan bevind, is deur die noodtoestand waarin hy verkeer het, as 'n skulduitsluitingsgrond te beskou. As 'n hof dit doen – soos 'n hof na my mening inderdaad móét doen – kom dit neer op 'n aanvaarding van die normatiewe skuldbegrip, want dan bevind 'n hof iemand onskuldig ten spyte van die feit dat hy aan al die vereistes vir aanspreeklikheid soos deur Van Oosten gestel, voldoen. So 'n bevinding is geensins so vergesog nie. Dit is reeds in die vooruitsig gestel in *S v Bailey* 1982 3 SA 772 (A) 796A, waarin die appèlhof uitdruklik verklaar het dat noodtoestand óf 'n regverdigingsgrond óf 'n skulduitsluitingsgrond kan wees, asook in die uitspraak van appèlregter Wessels in *S v Goliath* 1972 3 SA 1 (A) 27–37.

Die bepalings in die Grondwet waarna hierbo verwys is, kan in die toekoms 'n belangrike rol speel in die debat oor die aanvaarbaarheid van die normatiewe skuldbegrip, veral indien feitestelle soortgelyk aan *Bailey* en *Goliath* weer voor ons howe dien. Hierdie oorweging is nie deur Van Oosten (1995 *THRHR* 573–576) in sy bespreking van noodtoestand in aanmerking geneem nie (veral nie in sy argument in (vii) 575–576 nie). Sy stelling (576) "(t)aking into account the difference in quality of life . . .", is moeilik versoenbaar met die grondwetlik verskansde reg op lewe en reg op gelykheid voor die reg en op gelyke beskerming deur die reg (a 9 en 8(1) van die Grondwet).

Uit Van Oosten (1995 *THRHR* 573–576) se bespreking van noodtoestand wil dit voorkom of hy verkeerdelik van mening is dat 'n aanvaarding van die normatiewe skuldbegrip daartoe lei dat noodtoestand *slegs* as 'n skulduitsluitingsgrond kan dien. In werklikheid ontken die aanhangers van die normatiewe skuldbegrip nie vir een oomblik dat noodtoestand ook 'n regverdigingsgrond kan wees nie. Volgens hulle is noodtoestand óf 'n regverdigingsgrond óf 'n skulduitsluitingsgrond. Dit is 'n regverdigingsgrond indien die dader twee botsende belange teen mekaar moet opweeg en dan die belang wat volgens die regsoortuigings van die gemeenskap van geringer waarde is, skend ten einde die belang wat volgens dieselfde regsoortuigings van groter waarde is, te beskerm. Dit is 'n skulduitsluitingsgrond indien die dader die grotere belang skend ten einde die geringer belang te beskerm, maar in omstandighede waarin die opoffering van die geringer belang sou beteken dat hy soos 'n martelaar of 'n held sou moes optree – iets wat die reg in alle billikheid nie van hom kan verg nie. As toegewing teenoor verstaanbare menslike swakheid verskoon die reg hom sy wederregtelike optrede. (Sien die bewysplase genoem in Snyman 123–125 261.)

4 Toerekeningsvatbaarheid: Deel van skuld of afsonderlike element?

Van Oosten is van mening (bv 1995 *THRHR* 572–573) dat toerekeningsvatbaarheid nie as 'n onderdeel van die skuldvereiste beskou moet word nie maar as 'n heeltemal afsonderlike aanspreeklikheidsvereiste. Hierdie siening kan nie gedeel word nie. Die dader se toerekeningsvatbaarheid is 'n onmisbare bousteen van die skuldvereiste, want by skuld gaan dit om die gronde waarop 'n dader vir sy wederregtelike verbodsomskrewe handeling verwyt kan word.

By opsetmisdade word die dader verwyt omdat (a) hy kennis gedra het van die omstandighede vermeld in die verbodsomskrywing; (b) hy geweet het dat daar geen regverdigingsgronde vir sy optrede is nie (wederregtelikheidsbewussyn); (c) hy oor die geestesvermoëns beskik het om te kon onderskei tussen reg en verkeerd en om in ooreenstemming met hierdie insig te kon optree (toerekeningsvatbaarheid); en (d) hy nogtans voortgegaan het met sy normoorskrydende optrede. (As 'n mens die normatiewe skuldbegrip tot sy volle konsekwensies volg, moet nog ook bygevoeg word dat hy (e) opgetree het in omstandighede waarin die regsorde van hom kon geverg het om anders op te tree, dws om nie met sy onregspleging voort te gaan nie.)

Vastelandse skrywers behandel toerekeningsvatbaarheid deurgaans as 'n onderdeel van skuld. Selfs De Wet *De Wet en Swanepoel* 103, wat die psigologiese skuldbegrip volg (èn wie se invloedryke werk saam met Swanepoel soveel daartoe bygedra het om die idees onderliggend aan die psigologiese skuldbegrip in ons reg ingang te laat vind) bespreek dit onder skuld. De Wet beskryf skuld as "die laakbare gesindheid waarmee 'n persoon handel" en heeltemal tereg verklaar hy:

> "Die verwyt dat hy met 'n laakbare gesindheid gehandel het, is slegs geregverdig ten opsigte van die persoon wat oor die geestesvermoëns beskik om sy doen en late so in te rig soos van regsweë van hom verlang word."

Die gevolg van Van Oosten se verwydering van toerekeningsvatbaarheid uit die skuldbegrip is dat dit al hoe moeiliker, indien nie onmoontlik nie, word om laasgenoemde begrip nog hoegenaamd as "skuld" te tipeer. Van Oosten wil blykbaar nie begrippe soos verwyt, blaamwaardigheid of laakbaarheid as deel van die skuldbegrip beskou nie (sien bv 1995 *THRHR* 577–579 580). Hy skryf (580): "Blameworthiness can be no more than a consequence of fault and not fault itself." As dit so is, wonder 'n mens hoekom hierdie element reeds vanaf die tydperk van die Romeinse reg beskryf is as *culpa* – wat verwyt of blaam beteken. Volg 'n mens Van Oosten se siening moet 'n mens wegdoen met terme soos *culpa*, verwyt, verwytbaarheid, blaamwaardigheid, en Engelse ekwivalente daarvan soos *blameworthiness* en *culpability* ('n begrip wat tog direk van *culpa* afkomstig is). Verwyt word dan nie meer die poolster wat 'n mens volg om vas te stel hoe jy hierdie laaste vereiste vir aanspreeklikheid moet konstrueer nie.

Selfs al aanvaar 'n mens dat verwyt nie 'n *element* van skuld is nie, moet skuld nogtans "iets" bevat, dit wil sê so gekonstrueer wees dat dit die *gronde* uiteensit waarop die dader vir sy wederregtelike daad verwyt kan word. Blote opset, selfs gekoppel aan wederregtelikheidsbewussyn, is nog nie voldoende om 'n mens by verwyt of skuld uit te bring nie. Om hierdie rede moet minstens toerekeningsvatbaarheid ook nog as 'n onderdeel van die skuldvereiste beskou word.

5 Skuld en verwyt

As 'n mens Van Oosten se konstruksie van aanspreeklikheid volg, is daar geen rede waarom die woord "skuld" nie maar geheel-en-al uit die strafregwoordeskat verban kan word nie. Dan sou die elemente van aanspreeklikheid soos volg daar uitsien: handeling, wederregtelikheid, toerekeningsvatbaarheid en óf opset óf nalatigheid. Miskien is dit juis wat Van Oosten in gedagte het waar hy verklaar (1995 *THRHR* 583):

> "Forcing both intention and negligence under a single normative fault umbrella goes as much against the grain of South African criminal practice as forcing both intention and negligence under a single psychological fault umbrella."

As dit so is, vra 'n mens jouself af: wat is dan die sambreelbegrip waaronder sowel opset as nalatigheid tuisgebring word? Blykbaar (volgens Van Oosten) bestaan daar nie so 'n sambreelbegrip nie. Die gevolg is dat die skuldbegrip ophou om as 'n eenheid te bestaan.

Selfs al word aanvaar dat skuld en verwyt nie sinonieme is nie, is hierdie twee begrippe so nou met mekaar vervleg dat die een nie sonder die ander denkbaar is nie. Net so min as wat Van Gogh 'n skildery van 'n appelboord kon geskilder het as daar nie 'n werklike appelboord bestaan het wat hy gesien het nie, en net so min as wat iemand sy pragtigste angelier op 'n blommeskou sou geplaas het as hy nie geweet het dat daar 'n eerste prys vir die beste angelier toegeken sou word nie, net so min kan daar 'n skuldbegrip gekonstrueer word sonder die idee van verwyt of blaam as die rigtinggewende gedagte agter, of bestaansrede vir, die skuldbegrip.

Dit is nie verbasend dat die aanhangers van die psigologiese skuldbegrip sulke wye draaie om die idee van verwyt loop nie. Daar is 'n goeie rede hiervoor: die oomblik dat 'n mens erken dat skuld onlosmaaklik aan verwyt of verwytbaarheid gekoppel is, volg dit noodwendig dat, ten einde skuld vas te stel, die dader aan 'n maatstaf *buite* homself gemeet moet word. Verwyt druk altyd 'n verhouding uit. Die maatstaf of norm waaraan die dader gemeet word, is dit wat die reg van die deursneemens in die dader se skoene kon verwag het om te doen. Die dader kan nie aan sy eie standaarde gemeet word nie, want dit sou beteken dat hoe slegter 'n mens is, hoe moeiliker sou dit wees om hom vir sy dade te verwyt.

Indien die vraag ooit sou ontstaan of Robinson Crusoe, wat stoksielalleen op 'n eiland gewoon het, hom aan die een of ander misdaad op die eiland skuldig gemaak het, en die vraag gevolglik beantwoord sou moet word of hy met skuld opgetree het, sou sy skuld altyd aan die hand van 'n suiwer psigologiese grondslag vasgestel moet word want daar sou geen gemeenskap van mense buite homself wees wat as maatstaf gebruik sou kon word om vas te stel of hy vir sy optrede verwyt moet word nie. Geen mens is egter 'n Robinson Crusoe nie. Elke mens is lid van 'n gemeenskap – en omdat ons glo dat ons in 'n beskaafde gemeenskap leef of minstens wil leef, is hierdie gemeenskap 'n geordende gemeenskap. Die individu se lidmaatskap van hierdie geordende gemeenskap is vir hom voordelig; dit verleen aan hom sekere regte asook 'n sekere mate van beskerming teen gevare. Juis ten einde hierdie gemeenskapsordening te laat vlot, is dit net reg en billik dat die gemeenskap ook van die individu verwag om, in ruil vir hierdie voordele, hom aan sekere minimum standaarde te onderwerp. As hy dit nie doen nie, kan hy vir sy optrede verwyt word. Dit is hierdie eenvoudige waarheid wat die grondslag vir die normatiewe skuldbegrip vorm.

6 Regsdwaling en normatiewe skuld

Een van die redes waarom juriste in die Duitse strafregwetenskap nie kans sien om die psigologiese skuldbegrip te aanvaar nie, is die onbevredigende gevolge waartoe dit lei by die vraag of regsdwaling of -onkunde 'n volkome verweer behoort te wees. Volg 'n mens die psigologiese skuldbegrip, moet aanvaar word dat regsdwaling opset en skuld volkome uitsluit. In aansluiting by hierdie siening verklaar Van Oosten (1995 *THRHR* 581 punt (i)) dan ook:

> "A finding, in terms of the normative fault concept, that someone acted intentionally while labouring under (unreasonable) ignorance or mistake of law is both unfair and unrealistic."

Indien hierdie stelling van Van Oosten reg is, is die regsreëls met betrekking tot die uitwerking van regsdwaling in ál die buitelandse regstelsels waarvan ek kennis dra (en dit is die lande waarmee Suid-Afrika sy eie regsreëls die graagste sou wou vergelyk) "unfair and unrealistic". Daar is naamlik nie 'n enkele buitelandse regstelsel waarvan ek weet wat bereid is om, in die voetspoor van die suiwer psigologiese skuldbegrip (asook in die voetspoor van die aanvegbare uitspraak van ons appèlhof in *S v De Blom* 1977 3 SA 513 (A)) *alle* regsdwalings, selfs al is hulle ook hoe onredelik, as volkome skulduitsluitingsgronde by opsetmisdade te erken nie.

Hierdie skerp verskil tussen die psigologiese skuldbegrip en die regsreëls met betrekking tot regsdwaling wat elders in die wêreld toegepas word, is glad nie aan blote toeval te wyte nie. Dit weerspieël 'n verskil in uitgangspunt omtrent 'n fundamentele grondslag van die strafreg. As 'n mens die psigologiese skuldbegrip aanhang en by opsetmisdade alle regsdwalings voor die voet as skulduitsluitingsgronde toelaat, beteken dit dat jy by die vasstelling van skuld eensydig te werk gaan deur jou blind te staar teen slegs die dadersubjektiewe faktore. Geregtigheid in die strafreg (selfs in die konteks van opsetmisdade) vereis 'n gesonde balans tussen die gemelde dadersubjektiewe faktore aan die een kant, en die regmatige en billike aansprake van die gemeenskap as geheel aan die ander kant.

Omdat alle mense noodwendig deel van 'n gemeenskap vorm, is dit nie onbillik om van hulle te verwag om aan sekere minimum standaarde te voldoen nie. Een daarvan is dat hulle redelike stappe moet doen om hulle op die hoogte van die regsvoorskrifte te stel. Ek bepleit nie 'n bedeling waarin regsonkunde of -dwaling nooit as 'n verweer kan slaag nie. Soos alle (of die meeste) aanhangers van die normatiewe skuldbegrip, bepleit ek 'n bedeling waarin die verweer van regsdwaling beperk word tot slegs onvermydelike onkunde of dwaling aangaande die reg.

Dit is en bly 'n skreiende anomalie: in die regstelsels in die buiteland waar misdaad nie naastenby sulke skrikwekkende afmetings soos in Suid-Afrika aanneem nie, word regsonkunde óf nie verskoon nie, óf slegs verskoon in gevalle waar die onkunde onvermydelik is. In 'n land soos Suid-Afrika, wat dreig om deur 'n golf van misdaadpleging verswelg te word, volg ons reg 'n reël met betrekking tot die verweer van regsonkunde wat as die mees liberale, toegeeflike, "oortreder-vriendelike" ter wêreld beskryf kan word! Hierdie jammerlike toedrag van sake is alles te danke aan die dwaalspoor waarop beskouings omtrent skuld wat na my mening onaanvaarbaar is – en meer bepaald die psigologiese skuldbegrip – ons strafreg geplaas het.

7 Poging en normatiewe skuld

Van Oosten (1995 *THRHR* 578–579) se argument waarin hy probeer aantoon dat die bestrawwing van poging en veral ondeugdelike poging nie onversoenbaar is met die psigologiese skuldbegrip nie, gaan na my mening nie op nie omdat dit 'n kardinale reël uit die oog verloor. Hierdie reël is dat die ondersoek na die aanwesigheid van die algemene elemente van aanspreeklikheid in 'n bepaalde volgorde plaasvind. Die volgorde is om eerstens vas te stel of daar 'n handeling (of gedrag) was; daarna of die handeling ooreenstem met die verbodsbeskrywing; derdens of dit wederregtelik was; en vierdens of dit met skuld gepaard gegaan het.

'n Mens toets nie vir skuld voordat jy vasgestel het dat die handeling aan die verbodsbeskrywing voldoen en wederregtelik was nie. By ondeugdelike poging kan die opset om die misdaad te pleeg nie deel van skuld wees nie. Dit moet onder die verbodsbeskrywing tuisgebring word, anders is daar geen verbodsomskrewe, wederregtelike handeling aanwysbaar wat die objek van die opset kan wees nie. (Om met 'n speelgoedpistool te skiet na 'n voëlverskrikker wat soos 'n mens lyk, is tog nie verbode nie.) Van Oosten probeer om by hierdie feit verby te kom deur te betoog dat 'n mens opset vorm of kan vorm voordat die verbodsomskrewe handeling verrig word. Dit is korrek, maar die volgorde waarin opset gevorm word en die verbodsomskrewe handeling in die werklikheid voorkom, is tog nie dieselfde as die volgorde waarin die beoordelaar daarná gaan toets vir die aanwesigheid van die boustene (elemente) van aanspreeklikheid nie. Die beoordelaar kyk byvoorbeeld altyd heel eerste of daar 'n handeling was, ten spyte van die feit dat die opset in werklikheid vóórdat die handeling plaasgevind het, gevorm was of kon gewees het. Van Oosten se siening van ondeugdelike poging kom daarop neer dat iemand bestraf word vir heeltemal regmatige gedrag – iets wat tog indruis teen elementêre beginsels. Geen mens kan ooit bestraf word vir gedrag wat heeltemal regmatig is nie.

8 Enkele ander punte van kritiek

Met Van Oosten 1995 *THRHR* 582 se argument dat die normatiewe skuldbegrip "[has] failed to leave an impression upon German criminal practice", kan beslis nie saamgestem word nie. Hierdie skuldbegrip was direk verantwoordelik vir twee belangrike artikels in die Duitse strafkode, te wete artikels 17 en 35. Artikel 17, wat in 1973 in die strafkode geplaas is, handel oor regsdwaling, en bepaal dat iemand sonder skuld handel indien hy tydens die pleeg van die daad nie 'n insig in die onregmatigheid van sy daad gehad het nie, mits die regsdwaling onvermydelik was. Artikel 35 bepaal dat noodtoestand in sekere omstandighede 'n skulduitsluitingsgrond kan wees.

Die aandag moet ook gevestig word op 'n belangrike aspek rakende die bronne wat Van Oosten in sy navorsing gebruik het. Van Oosten verdien lof vir die groot aantal bronne uit die Duitse strafregwetenskap – sommige dateer omtrent 'n eeu terug – wat hy geraadpleeg het en waarna hy verwys. Tog is daar een uiters belangrike bron waarna hy nêrens verwys nie. Dit is die Amerikaanse skrywer George P Fletcher se *Rethinking criminal law* (1978). Terwyl die Duitse bronne vir betreklik min navorsers toeganklik is, is Fletcher se belangwekkende boek in eenvoudige Engels geskryf.

Dit is uiters vreemd dat Van Oosten, wat so 'n deeglike opspoorder van selfs moeilik toeganklike bronne is, nêrens na hierdie maklik bekombare, maklik verstaanbare, redelik onlangse Engelse boek verwys nie. Hierdie leemte in die

bronne waarna hy verwys, is soveel veelseggender as in gedagte gehou word dat Fletcher nie doekies omdraai in sy verwerping van die psigologiese skuldbegrip nie, en op oortuigende wyse die noodsaaklikheid van 'n aanvaarding van die normatiewe skuldbegrip uiteensit.

Nog 'n belangrike Engelse werk wat die beginsels van strafregtelike aanspreeklikheid in maklik verstaanbare taal behandel, is die Britse skrywer Andrew Ashworth se *Principles of criminal law* (1995). Omdat hierdie werk baie onlangs verskyn het, kan Van Oosten nie verkwalik word vir die feit dat hy dit nie gebruik het nie. Hierdie werk is geskryf deur 'n professor in *Criminal Law and Justice* aan King's College, Londen, weerspieël die jongste standpunte oor die strafreg in die Anglo-Amerikaanse reg, en is geskryf sonder raadpleging van enige Duitse regsbronne. (Dit is algemeen bekend dat regsgeleerdes in die Anglo-Amerikaanse lande in die algemeen selde of ooit kennis neem van die inhoud van die Duitse reg of van die Duitse strafregwetenskap.)

Groot is die verassing egter om te ontdek dat selfs in Ashworth se werk, wat na alle waarskynlikheid die heel jongste diepgaande besinning oor strafregtelike aanspreeklikheid in die Engelsregtelike regsliteratuur is, standpunte gestel word wat merkwaardig ooreenkom met dié gehuldig in die Duitse strafregwetenskap, en meer bepaald standpunte wat met die normatiewe skuldbegrip in verband staan. So spreek Ashworth hom uit ten gunste van die erkenning van noodtoestand (*duress* of *necessity*) as 'n verweer wat *fault* uitsluit, en dit ten spyte van die feit dat dit vir hom duidelik is dat "duress and necessity do not negative intent, knowledge, or recklessness" (220). Die rede hiervoor is dat

> "it is unfair to expect D to resist pressure which a reasonably steadfast citizen would not have resisted" (221–222).

Ashworth erken die verskil tussen *justification* (regverdigingsgrond) en *excuse* (skulduitsluitingsgrond) (145), maar beskou gevalle van noodtoestand waar X vir Y doodmaak omdat hy gedreig word dat hy self doodgemaak sal word indien hy Y nie doodmaak nie, as 'n skulduitsluitingsgrond. Hy verklaar uitdruklik (224):

> "Where it is a question of liability for taking one innocent life to save another, the issues concern excuse, not justification."

Hy (222) verwys ook met goedkeuring na die aanbeveling in die Law Commission se konsepkodifikasie van die Engelse reg dat 'n beskuldigde in hierdie soort gevalle 'n verweer behoort te hê, onder meer as daar bewys word dat die dreigement 'n dreigement was "which in all the circumstances ... he cannot reasonably be expected to resist" (sien Law Commission No 218 *Legislating the criminal code: Offences against the person and general principles* (1993) a 25(2)). Hierdie standpunt van sowel Ashworth as die Law Commission – veral die klem op dit wat redelikerwys van die beskuldigde verwag kan word – is niks anders nie as 'n toepassing van die beginsels wat uit die normatiewe skuldbegrip voortvloei. As daar selfs in die Engelse reg – waar die psigologiese skuldbegrip tot dusver nog altyd die septer geswaai het – 'n standpunt ingeneem word wat so merkwaardig ooreenkom met dié gehuldig in die Duitse strafregwetenskap (en meer bepaald binne die konteks van die normatiewe skuldbegrip), sonder dat daar enigsins eers op laasgenoemde strafregwetenskap gesteun word, moet dit tog vir enige navorser duidelik wees dat die gedagtes en begrippe binne die normatiewe skuldbegrip toenemend steun kry onder juriste, en dat dit in 'n toenemende mate verteenwoordigend is van die jongste opvattings binne die Westerse regsdenke omtrent skuld en strafregtelike aanspreeklikheid.

Terloops kan net daarop gewys word dat, ook sover dit die verweer van regsonkunde betref, Ashworth se beskouings heeltemal op een lyn is met die beskouings oor hierdie onderwerp wat ek self vroeër in hierdie bespreking ingeneem het. Hy bepleit naamlik 'n reël waarvolgens "a mistake of law might excuse if it is reasonable" (235), want so 'n standpunt

> "is to forsake the atomistic view of individuals in favour of a recognition of persons as social beings, with both rights and responsibilities within the society in which they live" (234).

Hierdie standpunt is weer eens heeltemal in ooreenstemming met die normatiewe skuldbegrip.

9 Slot

Ek weet nie van enige erkende hedendaagse Duitse skrywer oor die strafreg wat die normatiewe skuldbegrip verwerp en nog aan die psigologiese skuldbegrip vasklou nie. Van Oosten se bespreking bring ook geensins aan die lig dat daar vandag nog sulke skrywers bestaan nie. Selfs indien dit blyk dat daar wel hier en daar 'n (seker redelik onbekende) skrywer in die wêreld van die Duitssprekende juriste is wat nog bereid is om die psigologiese skuldbegrip te verdedig, moet hy of sy 'n duidelike uitsondering wees.

'n Mens kan, soos in die verlede al hier te lande gedoen is, die Duitse strafregwetenskap afkraak deur allerhande argumente, soos die bekende argument dat dit by hierdie Duitse skrywers gaan oor 'n onnodig ingewikkelde, praktyksvreemde "Professorenrecht" in die styl van *ars gratia artis*, oftewel 'n intellektuele "speletjie" oor abstrakte begrippe bloot ter wille van die "speletjie". Dit is egter 'n feit dat dit hierdie einste Duitse strafregwetenskap is wat aan Suid-Afrika kernbegrippe soos wederregtelikheid, *dolus eventualis*, toerekeningsvatbaarheid en wederregtelikheidsbewussyn gegee het. Hierdie begrippe, wat vreemd aan byvoorbeeld die Anglo-Amerikaanse reg is, is by ons al so ingeburger dat ons dit vreemd sou vind as iemand hier te lande hulle bestaan in twyfel sou trek.

In die lig van hierdie oorweging vra 'n mens jouself nou af: is dit redelik om te aanvaar dat dieselfde tradisie van juridiese denke wat aan ons die bogenoemde kernbegrippe gegee het, die bal heeltemal mis sal slaan wanneer hulle skuld as normatief in plaas van psigologies beskryf? Of as hulle deurgaans, tussen die handelingsvereiste en die wederregtelikheidsvereiste, met 'n bykomstige vereiste werk wat hulle as *Tatbestandsmässigkeit* (die korrekte Afrikaanse ekwivalent van hierdie term daargelaat) beskryf? Die antwoord op hierdie vraag moet wees dat dit meer as twyfelagtig is. Natuurlik kan daar verskil van mening wees aangaande allerlei besonderhede binne hierdie begrippe. Dit doen egter nie afbreuk aan hulle bestaan nie. 'n Mens sal in elk geval nooit 'n sisteem van boustene vir strafregtelike aanspreeklikheid hê ten opsigte waarvan daar geen ruimte vir verskil van mening omtrent die fynere besonderhede is nie.

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GREEN ISSUES, BLUEPRINTS, GREEN AND WHITE PAPERS

Introduction

The advent of full democracy and the adoption of an entirely different, new Constitution, together with South Africa's re-integration into the international world, gave rise to opportunities and provided an impetus for profound and far-reaching re-evaluation and reform of almost every subject which is administered by government departments. Owing to its pervasive nature, the environment features in many of these reforms. Several policy and other review and reform processes have thus been initiated since 1994. These processes are mostly driven jointly by the government department involved and by relevant non-government organisations, stakeholders and other interest groups; they aim at being inclusive and transparent and offer unprecedented opportunities for public participation. A process is usually initiated by the minister's identifying stakeholders and other interest groups and appointing a review, reform or steering committee to produce a basic discussion document. This document is then subjected to wide-ranging consultation, usually including workshops and conferences, after which another discussion document or Green Paper emerges. A further round of debate is then stimulated, after which, finally, a White Paper, containing the government's policy, is published. Not all review processes follow this exact route, but in general most correspond to the above process. The following environmentally relevant issues are currently subject to review and reform initiatives at central government level.

Constitution

A new constitutional dispensation which deviates radically from the previous one was introduced by the (interim) Constitution of the Republic of South Africa Act 200 of 1993. An environmental right was included in the Bill of Rights (s 29) and is also contained in the final Constitution (s 24). Moreover, the environment is now relegated as a provincial competence, whereas it had been mainly a national responsibility (s 126(1) and sch 6 of the interim Constitution; s 104(1)(b)(i) and sch 4 of the final Constitution). Nevertheless, the above provincial competence is a concurrent competence, shared with Parliament, which has the power in certain circumstances to enact legislation which will prevail over provincial legislation (s 126(3) of the interim Constitution; s 146(2) of the final Constitution). (See generally on the Constitution and the environment Glazewski "The environment and the new interim Constitution" 1994 *SAJELP* 3–16; Winstanley *Entrenching environmental protection: An analysis of several provisions of the interim Constitution which affect environmental conservation and some proposals for the new Constitution* (LLM dissertation Natal 1995) and the proceedings of the Workshop on the Constitution and the Environment, February 1996, reported in 1996 *SAJELP* 1 *et seq*.)

Reconstruction and Development Programme

The Government of National Unity (dissolved in June 1996) embarked upon a programme of fundamental transformation, entitled the Reconstruction and Development Programme (RDP), originally published in 1994 (cf also the White Paper on the RDP, GN 1954 of 1994-11-23). The RDP amounts to a blueprint

for development in the new South Africa. The environment, however, does not feature in any of the six basic principles which constitute the political and economic philosophy that underlies the whole RDP (par 1 3), although several environmental issues are addressed in the course of the RDP's consideration of strategies to meet basic human needs (par 2 10). Concern about this lack of sufficient attention to the environment prompted the International Mission on Environmental Policy to adopt as its main focus the integration of environmental sustainability into the RDP. The mission saw its key challenge as being

> "to convince the economic and social planners of the new South Africa that the environment, as provider of natural resources and ultimate absorber of all waste, underwrites the viability of economic growth and social redistribution" (*Building a new South Africa Vol 4 Environment, reconstruction and development* (1995) 3).

Environmental policy

There is currently a process to determine a new environmental policy which is to replace the policy which was promulgated in terms of the Environment Conservation Act 73 of 1989 just before the 1994 elections (GN 51 of 1994-01-21, promulgated in terms of s 2(1) of the Act). There was nothing sinister in this policy having been determined only three months before the election. Actually, it was long overdue and came in the wake of persistent and widespread calls on the Department of Environmental Affairs and Tourism (DEAT) to determine such policy, for which the Act had provided since 1989.

In a departure from previously followed procedures, a new environmental policy is to emerge from the reform process which commenced in 1995 and is planned to come to fruition in May 1997. Although the Environmental Conservation Act renders the Council for the Environment the principal body to advise the Minister of Environmental Affairs and Tourism on the determination of environmental policy (s 5(1)(a)), a new initiative has been launched, involving new role players. The process was stimulated by the report of the International Mission on Environmental Policy, later published as *Building a new South Africa Vol 4 Environment, reconstruction and development* (1995). This report formed the background document for a consultative conference in August 1995 which was designed to bring together a variety of government and non-government bodies in order to develop a national environmental policy. This process, now known as CONNEPP (Consultative National Environmental Policy Process), has gained such momentum that an organising committee produced a discussion document entitled *Towards a new environmental policy for South Africa* in April 1996. A second consultative conference is planned for October 1996 in order to subject the Green Paper (which is to emerge from the discussion document) to discussion, after which a White Paper on environmental policy will be submitted to Cabinet in 1997. Eventually, the principles contained in the White Paper will be promulgated as the new environmental policy, probably in terms of the enabling provision in the Environment Conservation Act.

Two other policy processes which had commenced prior to 1994 have been included in CONNEPP, namely those concerning national noise control and the environmentally safe management of hazardous materials.

Biodiversity

South Africa's ratification during November 1995 of the Convention on Biological Diversity provided an added stimulus for a re-examination and harmonisation

of its activities relating to biodiversity conservation. A process has been set in motion by the DEAT to prepare a blueprint for the country's fulfilment of its obligations in terms of the convention.

The first official document in the comprehensive process to solicit the views of organisations and individuals who may be affected by, or interested in, issues concerning the conservation and sustainable use of biodiversity is the discussion document: *Towards a policy for the conservation and sustainable use of South Africa's biological diversity*, which was released in March 1996. Subsequently, a workshop was held in May 1996. The next step will be the publication of a Green Paper, expected in September 1996, followed by a White Paper, probably early in 1997. A similar process has been launched in August 1996 in respect of climate change.

Integrated pollution control

Dissatisfaction with the prevailing fragmented regulatory system of pollution control caused the DEAT to launch a project to develop a national holistic policy on integrated pollution control. The Department of Water Affairs and Forestry has also recently begun to reassess its strategy pertaining to waste management in terms of the Environment Conservation Act. These two projects have now been co-ordinated into a single initiative, managed by a project management committee with representatives from four national government departments and from all the provinces. The first proposals for an integrated system have been published in a document entitled *Towards integration of pollution control*, while a comprehensive discussion document is expected by October 1996 and a Green Paper by March 1997.

Coastal zone management

A process to formulate a policy for coastal zone management was already under way prior to the promulgation of the Constitution and the subsequent elections. This process, initiated by the DEAT, commenced with the identification of, and consultation with, several interest groups, both parliamentary and non-parliamentary. Several workshops on the process were held prior to the elections, and among the documents that have been released, are a preliminary issue-scoping document and a draft policy framework discussion document. Subsequently, a policy committee was appointed by the Minister of Environmental Affairs and Tourism and a founding document was released in February 1996, entitled *Coastal management policy programme for South Africa.*

Environmental resource economics

Another issue which has been addressed simultaneously with the transition to South Africa's new democratic and constitutional dispensation, and which did not actually result from this new dispensation, is that of environmental resource economics. Three discussion documents have been published by the DEAT, namely *Managing South Africa's environmental resources: a possible new approach* (November 1993), *Towards a national policy for the use of environmental resource economics in environmental impact management* (September 1994) and *A possible mode for the use of economic instruments in environmental resource management in South Africa* (June 1995).

In addition, two research reports were prepared for the department: *The role of common law and statutory measures* Research report 9 (1995) and *An assessment*

f market based instruments: suitability for environmental management in South frica Research report 11 (1996). There is a final publication, containing the ackground material for the workshop on integrating economic and environental policies for sustainable development, which was held in July 1996.

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A decision was accordingly taken by the Minister and the Department of Wa- r Affairs and Forestry (DWAF) to embark upon a process of reform. The first ep in this direction was the publication in November 1994 of the *White Paper n water supply and sanitation policy*. In this document reference was made to e department's supplementary policy on water and the environment and as riefing information the White Paper foreshadowed the revision of water legistion.

The water law reform process commenced in March 1995, with the publicaon of the document *You and your water rights*, which extended an invitation to e public to submit contributions to the review process. A water law review anel was subsequently appointed by the minister. The submissions that were ceived were studied and evaluated, whereupon the panel formulated a set of rinciples to guide the drafting of a new Act. These principles, which are coined in a report entitled *Fundamental principles and objectives for a new water w in South Africa* (February 1996) were also referred to the DWAF for the epartment's comments.

The above-mentioned draft principles were purely provisional, but have now een refined and finalised by a water law steering committee in April 1996 and re contained in a discussion document entitled *Water law principles*. The nalised draft principles are to serve a further round of consultations within rovincial context and this process will be concluded with a national water law

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Although not strictly falling within the scope of policy initiatives in the new South Africa, reference should be made to the DEAT's White Paper, *Policy on a national environmental management system for South Africa*, published in 1993.

Water

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Finally, reference should be made to complementary reforms. While lip service has for a considerable time been paid to the philosophy of integrated catchment management, the DWAF, as part of its transformation process, has embarked on a serious search for measures and institutions through which this philosophy may be implemented. To this end, and in conjunction with the Water Institute of Southern Africa, a workshop was held during February 1996 and the search is now being intensified.

Another concept which is currently the focus of the department's attention is that of water pricing. Comments and discussion have been elicited through the publication, during October 1995, of a discussion document (the forerunner of an anticipated Green Paper) entitled *Bulk water tariffs for South Africa – a possible new approach*. Reference should also be made to the department's *National vision and strategy document*, released at a national future search conference during April 1996.

While environmental issues were addressed in recent documents published by the DWAF before the current reform process was initiated, notably in *Water quality management policies and strategies in the RSA* (April 1991) and in the *Draft policy on water for managing the natural environment* (January 1992), the environment also features prominently in the principles identified in the current reform process. Thus a fundamental principle proposed by the water law review panel is that the quantity and quality of water necessary to sustain ecosystem function and biotic integrity at the desired state of ecological health, the "ecological reserve", together with water required for basic human needs, enjoy priority over any other user sector (principles 2 5, 4 4 and 7 2). Several principles relate to water quality management incorporating, *inter alia*, the principles of integrated pollution control (principle 5 2), the precautionary principle (principle 5 4) and the "polluter pays" principle (principle 5 5).

The water law steering committee endorsed the principle that water to meet peoples' basic domestic needs and the needs of the environment, "the reserve", should enjoy priority of use (principles C3 and C4). The criterion of sustainability is to guide the development, apportionment and management of water resources (principle D2), while an integrated approach, consistent with broader environmental management approaches, such as integrated environmental management and integrated pollution control, is proposed for water quality and quantity management (principle D4).

Forestry

Forestry is another resource, the management of which is currently subject to a fundamental reform process. A discussion document, entitled *Towards a policy for sustainable forest management in South Africa*, was published by the DWAF in July 1995, following a national forest policy conference held in March 1995. The outcome of these developments was the publication of a *White Paper on sustainable forest development in South Africa* in March 1996, which envisages a new forest policy, based on the philosophy of sustainability (par 1 4 10, 2 1, 2 5 and 2 8). The effects of afforestation on water supplies and on biodiversity are also addressed in the White Paper (par 1 4 11–12) as is the duty to conserve natural forests and woodlands (par 2 7). Ultimately, the reform proposals will be reflected in a new law which will promote the sustainable development of all forest resources, follow an integrated approach to the protection, management and utilisation of forest and woodland resources and will be co-ordinated with associated land and water resource legislation (par 3 1).

Land

An official indication of land reform proposals – even before the new Constitution and the ensuing elections – was given through the publication of the *White Paper on land reform* of 1991. This White Paper also addressed conservation and protection of the environment and resources (par C5). The current initiative

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The demand for land law reform may be ascribed to the injustices of racially sed land dispossession in the past and the unequal distribution of land owner-ip among different racial groups. Land reform programmes, carried out at tional level through the Ministry of Land Affairs, involve land restitution, land distribution and land tenure reform. Implementation of these programmes ses formidable challenges to the environmental sustainability of land-use actices. Thus the Green Paper states that the legislative framework for land form should foster an environmentally sustainable approach to land develop-ent (par 3 4 1, 4 4 1). And one of the general principles of the Development cilitation Act 67 of 1995, which is to guide land development, and which is e of the consequences of the reform process, is that policies, administrative actices and laws should encourage environmentally sustainable land develop-ent practices and processes (s 3(1)(c)(viii); cf also s 3(1)(h)(iii)).

griculture

ie *White Paper on agriculture*, which was published in 1995, had been devel-ed by a committee and resulted from a consultative process which culminated a workshop. The White Paper identified the following principles in respect of e sustainable utilisation of natural resources (par 4):

- all South Africans are custodians of and should accept responsibility for the country's natural resources;
- all farmers must be made aware of and accountable for the sustainable utilisation of the natural agricultural resources;
- South Africa's productive agricultural land should be retained for agricultural use;
- land users' responsibility towards the land will include the rehabilitation of mismanaged natural agricultural resources;
- the government recognises its responsibility to provide assistance and law enforcement for the appropriate management of the natural agricultural resources, while maintaining a balance between the basic needs of people and the promotion of an all-inclusive environmental ethic; and
- natural resources (such as water) constituting the agricultural potential of land are national assets.

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organisation. The process, which is to be inclusive and consultative, aims at eventually producing a White Paper on desertification.

Urban and rural development strategies

The *Urban development strategy of the Government of National Unity of October 1995: a discussion document* (GN 1111 1995-11-03) proceeds from the basis that environmental management forms an integral part of the urban strategy (par 6 1 3) and, *inter alia*, pays allegiance to the principles of integrated environmental management, including environmental impact assessment, sustainable development and integrated pollution control (par 6 1 3).

The *Rural development strategy of the Government of National Unity of October 1995: a discussion document* (GN 1153 1995-11-03) is likewise based upon the principle of sustainable development (par 5) and refers particularly to the integration of land-use planning and water provision, both responsibilities of local government (par 5 1). Reference is also made to water and sanitation (par 5 2) and to energy (par 5 3).

Housing

A *White Paper on housing* was published in December 1994 (GN 1376 1994-12-23). Within the scope of the overall policy approach, it is acknowledged that policies, administrative practice and legislation should promote efficient and integrated development, in that they facilitate and encourage environmentally sustainable development (par 5 7 1 3). As far as environmental standards are concerned, a need is recognised for a set of national standards for the provision of water and sanitation services and the management and control of human activities on the country's water resources (par 5 8 2(a)).

Heritage

During November 1994, the Minister of Arts, Culture, Science and Technology appointed the arts and culture task group. This task group was mandated to consult as widely as possible in formulating recommendations for a new arts and culture dispensation consistent with non-racist, non-sexist and democratic ideals. The task group submitted its report to the Minister in July 1995. After further departmental and other input, the *Draft White Paper on arts, culture and heritage* was published in June 1996.

The draft White Paper proceeds from a definition of "heritage" which includes wildlife and scenic parks (ch 1 par 12) and reference is made to the preservation of heritage through the care of sites which have scientific, archaeological or environmental significance (ch 5 par 1). The term "monuments" is regarded as too narrow and for this reason the term "heritage resources" is preferred (ch 5 par 14). It is envisaged that the National Monuments Act will be replaced with new legislation, which should maximise co-ordination across all the fields of national heritage conservation (ch 5 par 16). In fact, the National Monuments Council (through a writing committee) is currently engaged in a process to prepare new heritage resources legislation. The third, and final, consultative forum, at which the framework for such new legislation is to be discussed, will be held in September 1996.

ourism

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Inadequate environmental management is identified as one of the key conraints which limit the effectiveness of the tourism industry (par 2 2 (vi)), while ell-managed tourism is regarded as kind to the environment (pars 3 2 (viii) and 6). The application of sustainable environmental practices is regarded as one of e critical success factors for the government to achieve its vision for tourism ar 4 3). The government pledges its commitment to responsible tourism evelopment which, *inter alia*, implies the avoidance of waste and overnsumption, the sustainable use of local resources, environmental impact sessment as a prerequisite to developing tourism and market tourism that is sponsible in that it respects the natural environment (par 3 4).

Among the principles which are to guide the development of responsible urism, are the following environmentally relevant factors:

- tourism development will be underpinned by sustainable environmental practices; and
- tourism development will support the environmental goals and policies of the government (par 4 2).

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- to require integrated environmental management principles for all tourism projects and all major economic development projects;
- to encourage the conservation and sustainable usage of tourism resources; and
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Tourism

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Transport

Early in 1995 the Department of Transport embarked on a project to review and revisit transport policy. After the involvement of several sectoral working groups and the holding of two plenary meetings and public seminars, a *Green Paper on national transport policy* was published in March 1996. A draft White Paper is expected in September 1996.

The environmental impact of transport is identified as one of ten key thrusts to provide direction in the context of vision and a criterion against which to assess

current and future recommendations. The key thrusts represent a set of higher level imperatives which form the basis of transport policy.

The vision is that transport infrastructure, *inter alia*, be structured to ensure environmental sustainability and internationally accepted standards. One of the strategic objectives for transport infrastructure to achieve this vision, is to promote environmental protection and resource conservation.

Environmental protection and resource conservation relating to transport infrastructure are recognised as one of the key policy areas. Accordingly, a key recommendation is that transport infrastructure itself must be environmentally acceptable, which means that planning for the provision of infrastructure should include the performance of environmental impact assessments. Issues to be considered are environmental impacts, energy conservation and the transport of hazardous materials. This key recommendation is to be implemented in that public bodies must take the implications of sustainability into account in their activities and that environmental issues should explicitly form part of multiple criteria decision-making systems.

Living marine resources

A fisheries policy development committee was appointed by the Minister of Environmental Affairs and Tourism in October 1994 to draft a national fisheries policy for the country. After extensive deliberation and consultation with interested parties, the sixth draft of the policy was submitted to the fishing forums in the four coastal provinces for comment.

The final draft, entitled *National marine fisheries policy for South Africa*, was submitted to the Minister in June 1996. The draft acknowledges that sustainable utilisation and the maintenance of biodiversity are the fundamental principles of managing living marine resources on a long-term basis (par 1 2). Environmental disturbance and pollution are also addressed in the document (par 5 7). The draft will eventually result in Green and White Papers, ultimately to be followed by new legislation.

Minerals

The first step in the development of a new minerals and mining policy was the submission for public comment, in November 1994, of draft principles by the ANC and by the Department of Mineral and Energy Affairs. Thereafter, in April 1995, the Minister of Mineral and Energy Affairs convened a meeting of mineral industry stakeholders to consider the process of minerals policy formulation, and a tripartite working group was set up to prepare proposals. Once consensus had been reached, a steering committee set out to prepare a discussion document. The *Discussion document on a minerals and mining policy for South Africa* was published in November 1995. This document served as the basis for many consultations, workshops and meetings. It is to be succeeded by a Green Paper in September 1996, whereafter a White Paper is expected before the end of the year.

A separate chapter is devoted to environmental management. Three areas of environmental challenge are identified:

- minimising the environmental impacts of exploration;
- ensuring that for currently active and future mine sites, regulatory mechanisms and financial assurances are in place to achieve both environmental protection and economic viability; and

- rehabilitating sites where a mining activity has ceased (par 5 2).

After documenting certain "issues and arguments" (par 5 3), several policy proposals are set forth, including the following:

- a balance should be maintained between environmental concerns and economic development;
- the "polluter pays" principle should apply;
- the feasibility should be investigated of a one-stop shop for administering mining-related environmental legislation through the establishment of the Department of Mineral and Energy Affairs as the lead agent with seconded professionals from the DEAT, the DWAF and the Department of Agriculture;
- environmental policy should comply with international norms of mining;
- environmental controls should be adapted to the stage of economic development and affordability;
- subject to environmental factors, mining should continue to take precedence in land use (par 5 4).

Energy

The first step in establishing a new energy policy was the release by the Department of Mineral and Energy Affairs of a *South African energy policy discussion document* in July 1995 (a summary was published in September 1995). Workshops, briefing sessions and a national energy policy summit in November 1995 followed on this document; a refined draft of the discussions document is expected in September 1996.

In the discussion document it is noted that cognisance will be taken of important international trends which are placing greater emphasis on environmental sustainability. It is acknowledged that South Africa's energy economy reveals a degree of market failure in the lack of internalisation of environmental externalities in energy prices.

A number of options have been identified in respect of different issues relating to the environment, health and safety. Among these issues are the following:

- health and environmental impacts caused by emissions from coal and wood combustion (par 86 and 87);
- sustainability of rural fuelwood supplies (par 89);
- external environmental costs of bulk energy supply (par 90);
- integrated resource planning framework (par 91);
- environmental issues in the energy regulatory framework (par 92);
- environmental impacts of the nuclear industry (par 93);
- energy efficiency and conservation strategies in industry (par 94);
- pollution emissions from vehicular transport (par 95);
- environmental considerations in regional energy projects (par 96); and
- South Africa's role in global climate change processes (par 97).

Science and technology

During January 1996 the Department of Arts, Culture, Science and Technology published *South Africa's Green Paper on science and technology – preparing for the 21st century*. The Green Paper subscribes to the philosophy of sustainable

development (par 10 1) and emphasises the importance of compliance with environmental controls (par 6 10 3). A draft White Paper was released in May 1996.

Education

Environmental education was the subject of a *White Paper on environmental education*, published in 1989, but is not again addressed in the recent education White Papers, namely *Education and training in a democratic South Africa* (February 1995) and *The organisation, governance and funding of schools* (February 1996).

Human population

A comprehensive review of South Africa's population policy was stimulated by the United Nations' International Conference on Population and Development (ICPD), held in Cairo in September 1994. *A Green Paper for public discussion: population policy for South Africa?* was accordingly produced by a working group on population policy in April 1995, after which a national conference on population policy formulation was held. Subsequent to a public consultation process, a *Green Paper summary report* was presented to the Minister for Welfare and Population Development in October 1995. Next, a core committee compiled a first draft discussion document on population policy, based on the contents of the *Green Paper summary report*. Following comments, rounds of deliberations and an in-house forum in March 1996, the discussion document was redrafted and finalised in July 1996. The aim is to produce this document as a draft White Paper and to submit a final White Paper by the end of 1996.

Whereas in the past, the international focus was on the impact of population growth on the environment and on poverty, the ICPD Programme of Action – upon which the Green Paper is based – reflects an understanding that the real need is to consider the interaction between, and combined impact of, population trends, consumption and production patterns, resources, and the environment, on sustainable development. The Green Paper makes it clear that population size is not meaningful by itself, but only in relation to a country's access to resources, patterns of production and consumption, and environmental management.

Concluding remarks

From the above review, it appears that the environment features in many of the current reform initiatives and that it is attracting far greater official attention than ever before. This is a welcome and encouraging development. However, several difficulties should also be noted.

An initial problem is ignorance of the existence of reform initiatives and associated documents. It is only by way of exception that they are published in the *Government Gazette* and most are not even published by the government printer. For the most part, one has to rely upon the media or upon telephone calls to, or correspondence with, the relevant government departments for such information and to obtain the documents concerned. If publication of the relevant documents in the *Government Gazette* is regarded as too expensive or cumbersome, the departments involved should at least use the gazette pertinently to draw attention to the existence of the review processes, the relevant documents and the telephone and fax numbers and addresses where copies of the documents concerned may be obtained.

Another problem is that the various reviews and reforms constitute dynamic processes and are in varying stages of progress. The description of some of the reviews involved in this note are consequently bound to be dated by the time of its publication; the note attempts to describe the situation prevailing in August 1996. Associated with this problem, is the fact that most of the above processes are by their very nature rather time-consuming, lasting over several years. This tends to bring about some uncertainty concerning the current controls, a situation which lends itself to exploitation by unscrupulous operators.

A further concern is that the many policy and other reviews and reforms do not seem to be satisfactorily co-ordinated and integrated, at least not as far as the environment is concerned. This is ironic because the most persistent and pervasive single problem identified in most reviews is the fragmentation of the relevant legislation and its administration.

Finally, admirable though most of the above review and reform processes and the environmental substance of the various documents undoubtedly are, they may yet create expectations which cannot be fulfilled, given the poor performance record of many government administrations concerned with the environment. It is one thing to formulate adequate policies, but quite another to implement them effectively. Nevertheless, a satisfactory policy is fundamental to the success of environmental administration and in this respect the policy reviews and reforms represent a positive and hopeful development.

ANDRÉ RABIE
University of Stellenbosch

NOODWEER, DIE REDELIKE MAN EN MISDAADELEMENTOLOGIESE DINAMIEK

1 Inleiding

In 'n redelik onlangse saak (*R v Pétel* (1994) 87 CCC (3d) 97 (SCC)) wat voor die Kanadese Supreme Court gedien het, was die feite kortliks soos volg: P is van moord in die tweede graad aangekla weens die dood van 'n metgesel van haar dogter se vriend. Laasgenoemde en die oorledene was in dwelmhandel betrokke wat dikwels vanaf P se woning plaasgevind het. Getuienis is aangevoer dat die vriend by verskeie geleenthede P, haar dogter en kleindogter gedreig het. Op die dag van die beweerde misdaad het die vriend by P se huis aangekom met kokaïne, weegskale en 'n rewolwer en haar gevra om laasgenoemde weg te bêre. Hy het haar vervolgens gedwing om van die kokaïne af te weeg en gesuggereer dat hy haar, haar dogter en kleindogter sal doodmaak. Kort daarna het P se dogter vergesel van die oorledene daar aangekom. P het in daardie stadium 'n klein hoeveelheid dwelmmiddel ingeneem. Sy het die wapen geneem en eers op die vriend geskiet en daarna op die oorledene toe hy in haar rigting gespring het. P het haar op noodweer beroep.

Artikel 34(2) van die Kanadese Strafkode is hier van toepassing en lui soos volg:

> "Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if
>
> (a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and
>
> (b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm."

Teen die agtergrond van hierdie saak word die oorsprong en dinamiek van die begrip "reasonable" nie slegs in artikel 34(2)-verband bespreek nie, maar dit word meer in besonder in 'n konsepsueel-universele perspektief binne veral die Suid-Afrikaanse reg geplaas.

2 Regshistoriese agtergrond

Insigmatig is die volgende onderskeiding in dié verband van wesenlike belang:

2 1 Regsantropologiese geskiedenis

Die eerste misdade was beliggaam in religieuse taboes en skending daarvan was in eerste instansie 'n vergryp teen die bonatuurlike (Maine *Ancient law* (1885) 370–372; Radcliffe-Brown *Structure and function in primitive society* (1963) 208–209; Makarewicz *Einführung in die Philosophie des Strafrechts* (1906) 175). Wat gestraf is, was die konkreet-sigbare veroorsaking van 'n sekere gevolg of verrig van 'n sekere handeling (Binavince "The ethical foundation of criminal liability" 1964 *Fordham LR* 4; Barnes *The story of punishment* (1972) 45; Von Hippel *Deutsches Strafrecht* (1925) 46; Rein *Das Kriminalrecht der Römer* (1844) 158). Tot in die Middeleeue is selde tussen toeval en skuld onderskei (Von Schwerin *Grundzüge der deutschen Rechtsgeschichte* (1950) 211). In die vroegste gemeenskappe het optrede in noodweer nie aanspreeklikheid opgehef nie (Labuschagne "Van instink tot norm: Noodweer en noodtoestand in strafregtelik-evolusionêre perspektief" 1993 *TRW* 134). Daar is veral twee universele evolusieprosesse in die menslike gemeenskapslewe, insluitend die strafreg, werksaam wat dié toedrag van sake erodeer. Eerstens is daar die dereligiërings- en deritualiseringsproses wat die oorspronklike bonatuurlike basis van die strafreg in 'n toenemende mate vermenslik, dit wil sê die mens en sy behoeftes geniet al hoe meer voorkeur. Tweedens is daar die dekonkretiseringsproses wat die konkreet-sigbare basis van die strafreg erodeer. Hiervolgens tree die geestelike prosesse agterliggend aan menslike gedrag in 'n toenemende mate op die voorgrond (Labuschagne "Die voorrasionele evolusiebasis van die strafreg" 1992 *TRW* 41). Daar is myns insiens duidelik sprake van wat genoem kan word 'n misdaadelementologiese dinamiek.

2 2 Regstegniese geskiedenis

In die Romeinse reg bestaan nie fyn uitgewerkte reëls wat noodweer reël nie. Geweld mag aangewend word om 'n gewelddadige poging tot besitsontneming af te weer (*C* 8 4 1). 'n Persoon wat jou lewensgevaarlik aanval, mag gedood word asook iemand wat poog om *per vim stuprum* op jou of jou onderhoriges te pleeg (*D* 9 2 45 4; *C* 9 16 2; *D* 48 8 1 4; Mommsen *Römisches Strafrecht* (1899) 620; Rein 141). Uit *D* 43 16 39 blyk dat 'n handeling wat in noodweer geskied, onmiddellik afgeweer moet word en nie eers as die aanval afgeloop het nie. Uit

dieselfde teks blyk ook dat wapens met wapens afgeweer mag word wat die idee van simmetriese proporsionaliteit skep. Blykens *D* 9 2 45 4 moet die handeling ter afwering van 'n aanval en nie in wraak geskied nie. Hieruit kan die bestaan van 'n subjektiewe element by noodweer afgelei word, naamlik die sogenaamde "bedoeling om in noodweer op te tree" of "noodafweringsgerigtheid". Trouens, daar is aanduidings dat noodweer in die Romeinse reg onder wat hedendaags bekend staan as die skuldbegrip geresorteer het (*D* 9 2 52 1; Van Warmelo "Noodweer" 1967 *Acta Juridica* 14).

Volgens Bartolus (*In secundam codicis partem ad cod* 8 *unde vi rubr lex prima* 7–13) is die noodweervereistes drieledig: (i) *modus* wat (onder andere) beteken dat wapens met wapens afgeweer mag word; (ii) *tempus*, wat meebring dat die aanval daar en dan (*incontinenti*) en nie na 'n tydsverloop (*ex intervallo*) nie afgeweer moet word; en (iii) *causa*, wat die afweringshandeling tot die aanval beperk en weerwraakoptrede uitsluit (*ad defensionem, non ad vindictam*). Hoewel dit met die eerste oogopslag so mag blyk, verwys proporsionaliteit (*modus*) blykbaar nie hier na simmetriese proporsionaliteit nie (sien Azo *Ad Cod* 8 4 1; Baldus *Consilia* 2 237 2).

Volgens Donellus behoort 'n *puer* of *imbecilis* wat 'n *vir robustus* aanval nie met 'n wapen afgeweer te word nie. 'n Ongewapende kan wel as dit vir self-beskerming nodig is (*si quid ad tutelam necesse fit*) 'n aanval met 'n wapen afweer. Van iemand wat die aanvalsgevaar kan ontsnap deur byvoorbeeld by 'n deur in te glip en dit dan te sluit, word verwag om dit te doen (*Commentariorum in codicem Justiniani* 8 4 1 6. Perezius se uitsetting is tot dieselfde strekking (*Praelectiones in duodecim libros codicis Justiniani* 3 27 4; 9 16 36). Ook Carpzovius volg basies dieselfde benadering. Hy wys daarop dat geometriese ("meetkonstige") gelykheid van wapens eerder as aritmetiese ("telkonstige") gelykheid van wapens vereis word (*Rer Crim qu* 28 27; Van Hogendorp se vertaling *Verhandeling der lyfstraffelyke misdaden* hfst 28 12 ev).

In 'n Utrechtse konsultasie (*Utrechtsche consultatien* 2 17) wys Matthisius en Van Zutphen daarop dat gelykheid van wapens nie vereis word nie (*paritas armorum tam stricte et praecise non exigatur*) en dat die aanval slegs geweld-dadig afgeweer mag word as die gevaar nie op 'n ander wyse vermy kon word nie. Hierdie benadering verteenwoordig substansieel die algemene siening van die skrywers van die Romeins-Europese reg (sien bv Boehmer *Meditationes in CCC* 140 1; Hoppius *Commentatio succincta ad Institutiones Justinianeas* 4 3 2; Moorman *Verhandelinge over de misdaden* 2 2 8 ev; Van der Keessel *Praelectiones ad ius criminale* 48 8 11; Püttmann *Elementa iuris criminalis* 1 20 312; Van der Linden *Regtsgeleerd, practicaal en koopmans handboek* 2 5 9; Labuschagne "Noodweeroordadigheid" in Coetzee (red) *Gedenkbundel HL Swanepoel* (1976) 158–169; Labuschagne "Noodweer teen 'n regmatige aanval?" 1974 *De Jure* 108–110). Noodweer ter beskerming van sekere nie-fisiese persoonlikheidsgoedere was ook toelaatbaar of is ligter gestraf (Labuschagne "Noodweer ten aansien van nie-fisiese persoonlikheidsgoedere" 1975 *De Jure* 59).

Die konklusie wat uit bogaande uiteensetting gemaak kan word en wat vir onderhawige doeleindes van wesenlike belang is, is dat die grense van noodweer nêrens aan die hand van die redelike man of soortgelyke figuur bepaal word nie. Die redelike man, soos so baie ander fiksies, is 'n oorwegend Engelsregtelike figuur. In die kontinentale regstelsels word dieselfde bereik met dinamiese begrippe, soos *boni mores* en "Socialadäquanz", as wat met die redelike man-fiksie in die Anglo-Amerikaanse regstelsels bereik word. Die universele

evolusieprosesse is werksaam in alle regstelsels en die terminologiese medium – met 'n fiksiebasis of nie – waardeur dit werk, is nie van primêre belang nie. Dit kan egter wel 'n effek op die tempo van ontwikkeling hê. Gesien in die lig van die uiteensetting van die (voorrasionele) regsantropologiese agtergrond hierbo, het daar duidelik 'n tempering van die aanvanklike rigiditeit van blote gevolgsaanspreeklikheid plaasgevind (sien ook Labuschagne "Die eindbestemming van die dekonkretiseringsproses in die strafreg" 1990 *THRHR* 101).

3 Die opkoms van die redelike man in die noodweerreg

In die Engelse saak *R v Rose* 1884 Cox CC 540 541 het R sy vader, wat na bewering sy moeder aangeval het, doodgeskiet. Regter Lopes wys in sy opdrag aan die jurie daarop dat indien R ten tyde van die vuur van die skoot "honestly believed, and had reasonable grounds for the belief, that his mother's life was in imminent peril ..." hy op vryspraak geregtig is. Hierdie benadering word algemeen in die Engelse reg aangetref (sien *R v Chisam* (1963) 47 Cr App Rep 130 134; *Vaughan v McKenzie* [1968] 1 All ER 1154 (QBD); *R v Fennell* [1970] 3 All ER 215 (CA) 217). Dit vind ook wye ondersteuning in die Amerikaanse reg (sien bv *Hill v Alabama* (1915) 2 ALR 509 (Alabama SC) 515; *Idaho v Woodward* (1937) 114 ALR 627 (Idaho SC); *De Vaughn v Maryland* (1963) 100 ALR 2d 761 (Maryland CA) 767).

In *R v Koning* 1953 3 SA 220 (T) 225 word verklaar dat iemand die reg het om 'n ander in noodweer te dood indien hy kan aantoon dat hy *bona fide* en op redelike gronde geglo het dat hy aangeval word. In *R v Bhaya* 1953 3 SA 143 (N) 149 verklaar die hof dat "the standard to be applied is that of a reasonable man both as regards the belief entertained by the appellant as to the imminence of an assault ..." Dit wil voorkom of dié siening tans ons positiewe reg verteenwoordig (sien verder *R v Hele* 1947 1 SA 272 (OK) 276; *R v Britz* 1949 3 SA 293 (A) 297–298; *R v Pope* 1953 3 SA 890 (K) 894–895; *S v Mnguni* 1966 3 SA 776 (T) 778; *R v Ndara* 1955 4 SA 182 (A) 185; *S v De Oliveira* 1993 2 SASV 59 (A) 63–64). Hierdie toets word ook deur ons howe aangewend by bepaling van die grense van noodweer (sien bv *R v Mfuseni* 1923 NPD 68; *R v Jack Bob* 1929 SWA 32 34; *R v Kleyn* 1937 CPD 288 293; *R v Karvie* 1945 TPD 159 161; *R v Bhaya* 1953 3 SA 143 (N) 149; *R v Zikalala* 1953 3 SA 568 (A) 573; Snyman *Strafreg* (1992) 118–120).

In artikel 34(2) van die Kanadese Strafkode, wat hierbo aangehaal is, word die begrip "redelike" (*reasonable*) uitdruklik aangewend by bepaling van die bestaan van 'n noodweersituasie asook by bepaling van die grense van die afweersoptrede. In *R v Nelson* (1992) 71 CCC (3d) 449 (Ontario CA) 467–468 word daarop gewys dat dié begrip van "reasonable" nie faktore uitsluit wat buite 'n persoon se beheer val nie:

> "If the young age of an accused is properly to be taken into account in applying the standard of reasonableness, then it would also be proper, in my view, to take into account a condition of arrested intellectual or mental development. Both situations can result in an accused having a mental age clearly below that of an adult and may equally affect his or her perception of, and reaction to, events. Both, too, are beyond the control of the accused" (468).

Die hof verwys in dié verband met goedkeuring na die opmerkinge wat hoofregter Dickson van die Kanadese Supreme Court in *R v Hill* ((1986) 25 CCC (3d) 322 (SCC) 335) maak:

> "What lessons are to be drawn from this review of the case-law? I think it is clear that there is widespread agreement that the ordinary or reasonable person has a

normal temperament and level of self-control. It follows that the ordinary person is not exceptionally excitable, pugnacious or in a state of drunkenness.

In terms of other characteristics of the ordinary person, it seems to me that the 'collective good sense' of the jury will naturally lead it to ascribe to the ordinary person any general characteristics relevant to the provocation in question. For example, if the provocation is a racial slur, the jury will think of an ordinary person with the racial background that forms the substance of the insult. To this extent, particular characteristics will be ascribed to the ordinary person. Indeed, it would be impossible to conceptualise a sexless or ageless ordinary person. Features such as sex, age or race do not detract from a person's characterisation as ordinary. Thus particular characteristics that are not peculiar or idiosyncratic can be ascribed to an ordinary person without subverting the logic of the objective test . . ." (468; sien ook *R v Tutton* (1989) 48 CCC (3d) 129 (SCC) 143 per Lamer R, soos hy toe was).

R v Pétel, waarmee die onderhawige aantekening ingelei is, verklaar hoof-ter Lamer namens die meerderheid van die hof soos volg:

"It can be seen from the wording of s 34(2) of the *Code* that there are three constituent elements of self-defence, when as here the victim has died: (1) the existence of an unlawful assault; (2) a reasonable apprehension of a risk of death or grievous bodily harm, and (3) a reasonable belief that it is not possible to preserve oneself from harm except by killing the adversary.

In all three cases the jury must seek to determine how the accused perceived the relevant facts and whether that perception was reasonable. Accordingly, this is an objective determination. With respect to the last two elements, this approach results from the language used in the *Code* . . ." (103; sien ook *R v Reilly* (1984) 15 CCC (3d) 1 (SCC) 7–8).

die lig van die bewoording van artikel 34(2) van die Kanadese Strafkode ak hoofregter Lamer verder die volgende insiggewende opmerking:

"There is thus no formal requirement that the danger be imminent. Imminence is only one of the factors which the jury should weigh in determining whether the accused had a reasonable apprehension of danger and a reasonable belief that she could not extricate herself otherwise than by killing the attacker."

t uit bogaande bespreking duidelik blyk, is dat die redelike man besig is om, sifiek in die Kanadese reg, geleidelik sy "objektiewe aard" te verloor. Die deringsresultaat van bogenoemde universele evolusieprosesse, onderliggend die strafreg, is hier duidelik sigbaar.

Die afskeid van die redelike man by putatiewe noodweer

R v Ndara 1955 4 SA 182 (A) 185 is die argument geopper dat die beskul-de in putatiewe noodweer opgetree het. Hierop reageer waarnemende hoof-ter Schreiner soos volg:

"Now if full effect is given to these findings there is a good deal to be said for the view that they amount to holding that the appellant believed that the conditions required for self-defence existed in his favour; if so it would be arguable that even though he was mistaken he should be treated as if those conditions did in fact exist. It should, however, be observed that there is no finding by the trial Court that the belief, assuming it to have existed, was reasonable and it is difficult to see how the appellant could reasonably have entertained more than a fear, perhaps a strong fear, that his pursuers would not only hand him over to the police but would also themselves assault him. For a mistaken belief to operate in favour of an accused person it is commonly said that the belief must be reasonable . . . and the circumstances of this case provide a strong argument in favour of this view."

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Wat uit bogaande bespreking duidelik blyk, is dat die redelike man besig is om, spesifiek in die Kanadese reg, geleidelik sy "objektiewe aard" te verloor. Die eroderingsresultaat van bogenoemde universele evolusieprosesse, onderliggend aan die strafreg, is hier duidelik sigbaar.

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In *S v De Oliveira* 1993 2 SASV 59 (A) 63–64 verduidelik appèlregter Smalberger die huidige regsposisie soos volg:

> "A person who acts in private defence acts lawfully, provided his conduct satisfies the requirements laid down for such a defence and does not exceed its limits. The test for private defence is objective – would a reasonable man in the position of the accused have acted in the same way? In putative private defence it is not lawfulness that is in issue but culpability ('skuld'). If an accused honestly believes his life or property to be in danger, but objectively viewed they are not, the defensive steps he takes cannot constitute private defence. If in those circumstances he kills someone his conduct is unlawful. His erroneous belief that his life or property was in danger may well (depending upon the precise circumstances) exclude *dolus* in which case liability for the person's death based on intention will also be excluded."

Hieruit blyk dat ons appèlhof nie meer 'n redelikheidsvereiste (redelike manvereiste) by putatiewe noodweer stel nie. Die uitwerking van die dekonkretiseringsproses in die strafreg is derhalwe ook hier duidelik sigbaar.

5 Konklusie

Uit bogaande uiteensetting blyk dat vier (oorvleuelbare) fases in die ontwikkeling van die noodweerreg in die onderhawige verband onderskei kan word.

5 1 Die bonatuurlike in beheer

In die eerste fase is optrede in noodweer ook gestraf bloot omdat 'n konkreetsigbare gevolg, doding of besering, in stryd met 'n heilige- of voorvaderlike (goddelike; bonatuurlike) taboe was. Geen ag is geslaan op die menslike dilemma van die noodweerdader nie (sien Labuschagne 1993 *TRW* 134).

5 2 Die konkreet-sigbare en simmetriese noodweer

In die tweede fase het die aard en behoeftes van die mens na vore begin tree. In dié fase kon optrede in noodweer aanspreeklikheid ophef. Die proporsionaliteitsvereiste was in dié fase, so kan 'n mens aflei, gegrond op 'n konkreetsigbare en simmetriese "wapengelykheid", waarin egter geleidelik ruimte vir die erkenning van individuele eienskappe en vermoëns van die noodweerdader, vir sy menswees dus, voorsiening gemaak is.

5 3 Die fase van die redelike man

In dié fase vind daar 'n skerp klemverskuiwing weg van die belange van die bonatuurlike na dié van die mens plaas. Die redelike man, as 'n supermens, verteenwoordig egter nog steeds nie die individuele noodweerdader nie. In 'n emosionele sin kan die redelike man as 'n meer vermensde nakomeling van die heilige oervader beskou word. Hy verteenwoordig nog steeds iets van 'n "heilige en onskendbare objektiwiteit". Die redelike man-toets word geërodeer deur die toenemende betrekking van die subjektiewe of persoonlike eienskappe van die spesifieke "noodweerdadermens" (sien Labuschagne "Dekriminalisasie van nalatigheid" 1985 *SASK* 220–221; Labuschagne "Putatiewe noodweer: Opmerkinge oor 'n dadersubjektiewe benadering tot misdaadomskrywing" 1995 *THRHR* 116).

5 4 Die fase van die spesifieke dadermens

Die eindbestemming van die universele evolusieprosesse wat in die strafreg werksaam is, is myns insiens in onderhawige verband die gelykstelling van die

isionele verweer van noodweer met die verskoningsgrond van putatiewe dweer. In ons huidige positiewe reg word, wanneer "noodweersoptrede" ter ıke is, eers ondersoek of die redelike man sou dink dat hy aangeval word en ıoodweer sou optree ensovoorts. Indien dié ondersoek tot 'n negatiewe klusie lei, word die vraag gestel of die dader (subjektief) gedink het dat hy geval word ensovoorts. Waarom kan laasgenoemde vraag nie sommer dadegevra word nie? Dit is tog die uiteindelike en finale vraag! Die relevante ektiewe faktore dien dan slegs as bewysmateriaal waaruit sekere afleidings ıaak kan word. Daardeur sal die huidige standaardmisdaadelement derregtelikheid" in die dader se gees (*mens rea*) opgaan (sien ook Labusgne "Onregmatigheidskriterium in die straf- en deliktereg: 'n Regsevolusêre beskouing" 1993 *THRHR* 663). Die aard van die misdaadelementologie sou hiervolgens derhalwe onderworpe aan 'n (dinamiese) evolusieproses s. Dit wil voorkom of die redelike man (of eerder: die redelike mens) hierin ıonseptueel-emosionele oorbruggingsfunksie vervul, naamlik vanaf 'n suiwer georiënteerde strafreg, waarmee veral die (voorrasionele) vrees vir die heioervader verlig word, tot 'n mensgeoriënteerde strafreg, waarin in 'n toenede mate rekening gehou word met en erkenning verleen word aan indiueel-menslike uniekheid en menslike behoeftes (sien in die algemeen in die band verder Labuschagne "Die voorrasionele evolusiebasis van die strafreg" 2 *TRW* 29–41). Die redelike man het naamlik beide 'n goddelike (heilige) en nslike dimensie en vind derhalwe aanknopingspunte in beide die fases van die el-" en die "mensstrafreg".

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PROTECTING RELIGIOUS BELIEFS AND RELIGIOUS PRACTICES UNDER S 14(1) OF THE INTERIM CONSTITUTION: WHAT CAN WE LEARN FROM THE AMERICAN CONSTITUTION?

ntroduction

tion 14(1) of the interim Constitution (Constitution of the Republic of South ica, Act 200 of 1993) guarantees the right to freedom of religion, by provid-

> "Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning."

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tradisionele verweer van noodweer met die verskoningsgrond van putatiewe noodweer. In ons huidige positiewe reg word, wanneer "noodweersoptrede" ter sprake is, eers ondersoek of die redelike man sou dink dat hy aangeval word en in noodweer sou optree ensovoorts. Indien dié ondersoek tot 'n negatiewe konklusie lei, word die vraag gestel of die dader (subjektief) gedink het dat hy aangeval word ensovoorts. Waarom kan laasgenoemde vraag nie sommer dadelik gevra word nie? Dit is tog die uiteindelike en finale vraag! Die relevante objektiewe faktore dien dan slegs as bewysmateriaal waaruit sekere afleidings gemaak kan word. Daardeur sal die huidige standaardmisdaadelement "wederregtelikheid" in die dader se gees (*mens rea*) opgaan (sien ook Labuschagne "Onregmatigheidskriterium in die straf- en deliktereg: 'n Regsevolusionêre beskouing" 1993 *THRHR* 663). Die aard van die misdaadelementologie self sou hiervolgens derhalwe onderworpe aan 'n (dinamiese) evolusieproses wees. Dit wil voorkom of die redelike man (of eerder: die redelike mens) hierin 'n konseptueel-emosionele oorbruggingsfunksie vervul, naamlik vanaf 'n suiwer reëlgeoriënteerde strafreg, waarmee veral die (voorrasionele) vrees vir die heilige oervader verlig word, tot 'n mensgeoriënteerde strafreg, waarin in 'n toenemende mate rekening gehou word met en erkenning verleen word aan individueel-menslike uniekheid en menslike behoeftes (sien in die algemeen in die verband verder Labuschagne "Die voorrasionele evolusiebasis van die strafreg" 1992 *TRW* 29–41). Die redelike man het naamlik beide 'n goddelike (heilige) en menslike dimensie en vind derhalwe aanknopingspunte in beide die fases van die "reël-" en die "mensstrafreg".

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1 Introduction

Section 14(1) of the interim Constitution (Constitution of the Republic of South Africa, Act 200 of 1993) guarantees the right to freedom of religion, by providing:

> "Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning."

The constitutionalisation of this right will undoubtedly give rise to new questions concerning the relationship between the state, the law and religion in South Africa. One of the more important will, it is submitted, be the extent to which the interim Constitution protects not only religious *beliefs* but also religious *practices*.

While it is generally accepted that religious beliefs may be afforded absolute protection by the Bill of Rights the same is not true for religious practices (see Devenish "An examination and critique of the limitation provision of the bill of rights contained in the interim Constitution" 1995 *SA Public Law* 131). No state can, for example, permit practices such as enforced polygamy, ritual murders, or public disturbances simply because they are mandated by religious beliefs. The state must be able to limit those practices, whether religious or not, which endanger the life and health of others or which limit the rights of others or which create public disturbances or undermine public morals (see Du Plessis and Corder *Understanding South Africa's transitional Bill of Rights* (1994) 158). On the other hand, religion is, for many believers, as much a matter of conduct as it is of belief. Often the two cannot simply be disentangled. The constitutional promise of religious liberty contained in section 14 of the interim Constitution would be immeasurably weakened if practices such as the Christian sacrament of communion, the kosher preparation of meat or the confidentiality of the confessional were excluded from the scope of the right to religious freedom.

In determining the extent to which religious conduct should be afforded constitutional protection, the courts will thus be required to strike an appropriate balance between the constitutional promise of religious liberty and the state's duty to legislate for the common good. In establishing what would be an appropriate balance it will be helpful to consider the approach adopted by the United States Supreme Court which has developed a rich jurisprudence in this area. As Klaaren (reviewing *The culture of disbelief* by Stephen L Carter 1994 *SAJHR* 287) has observed, there are important parallels between the United States and South Africa in so far as the interface between law and religion is concerned. Both countries are characterised, first of all, by religious pluralism within the context of dominant religions and secondly, by a commitment to constitutionalism.

2 The jurisprudence of the United States Supreme Court

The First Amendment to the American Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

Two provisions are contained within this clause, namely the "establishment clause" and the 'free exercise clause". The question whether the First Amendment protects both religious beliefs and religious practices and the extent to which these rights may be limited form a part of the Supreme Court's free exercise jurisprudence.

From the beginning the Supreme Court has distinguished the freedom to believe from the freedom to act (see *Reynolds v United States* 98 US 145 (1879)). This fundamental dichotomy and its significance was clearly expressed by the court in *Cantwell v Connecticut* 310 US 296 (1940), where Justice Roberts observed that while the free exercise clause embraces both the freedom to believe and the freedom to act,

> "the first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to [governmental] regulation for the protection of society. The freedom to act must have an appropriate definition to preserve the enforcement of that protection" (303).

In terms of this "belief-act" dichotomy, the right or freedom to hold religious beliefs and opinions, and to worship is absolute. It cannot be limited. However,

freedom to act or express religious beliefs is not absolute; rather, it is limited qualified and remains subject to limitation. As a result of this "belief-act" otomy, constitutional litigation under the free exercise clause has focused ost exclusively on the extent to which religious *practices* may be limited by ernmental acts.

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laws or measures which intentionally limit or prohibit the practices of a icular faith; and

laws or measures which were written with no particular religious group in d but which have the unintended effect of limiting or prohibiting the prac- of a particular faith.

Tribe (*American constitutional law* (1988) 1184–1185) explains, in the ıer set of cases, the state imposes burdens or denies benefits on the basis of ;iously motivated choices. These choices may take on various forms such as profession of faith, or the pursuit of a religious vocation, or the undertaking eligiously motivated acts. In the last group of actions, religiously neutral ernment actions have only the incidental effect of burdening such choices.

Laws which directly discriminate against religious conduct

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his approach was recently confirmed by the Supreme Court in *Church of the umi Babalu, Aye Inc v City of Hialeah* 124 L Ed 2d 472, 113 S Ct 2217. In case the church and its congregants practised the Santeria religion, which loys animal sacrifice as one of its principal forms of devotion. After the rch leased land in the city of Hialeah, in Florida, and announced plans to blish a house of worship, the city council enacted a series of ostensibly ral ordinances designed to prohibit the ritual sacrifice of animals. The rch challenged the validity of these laws under the free exercise clause.

ıstice Kennedy, who delivered the majority opinion, observed that the strict tiny test applied whenever a law singled out a religion, or a particular sect, disfavourable treatment. He noted:

> "Although a law targeting religious beliefs as such is never permissible, if the object of a law is to infringe upon or restrict religious practices because of their religious motivation, the law is not neutral; and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest" (490; citations omitted).

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the freedom to act or express religious beliefs is not absolute; rather, it is limited and qualified and remains subject to limitation. As a result of this "belief-act" dichotomy, constitutional litigation under the free exercise clause has focused almost exclusively on the extent to which religious *practices* may be limited by governmental acts.

In determining the extent to which religious practices may be limited the Supreme Court has drawn a distinction between–

(a) laws or measures which intentionally limit or prohibit the practices of a particular faith; and

(b) laws or measures which were written with no particular religious group in mind but which have the unintended effect of limiting or prohibiting the practices of a particular faith.

As Tribe (*American constitutional law* (1988) 1184–1185) explains, in the former set of cases, the state imposes burdens or denies benefits on the basis of religiously motivated choices. These choices may take on various forms such as the profession of faith, or the pursuit of a religious vocation, or the undertaking of religiously motivated acts. In the last group of actions, religiously neutral government actions have only the incidental effect of burdening such choices.

2 1 Laws which directly discriminate against religious conduct

Laws which intentionally discriminate against religious conduct will pass constitutional muster only if they can overcome the Supreme Court's "strict scrutiny" standard of review. In terms of this test, the law in question will be upheld only if it is necessary to achieve some important or compelling governmental objective and if it is the least restrictive means of achieving that objective (for a more detailed discussion of the "strict scrutiny" test see Peltason *Understanding the Constitution* (1994) 354–358).

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Justice Kennedy, who delivered the majority opinion, observed that the strict scrutiny test applied whenever a law singled out a religion, or a particular sect, for disfavourable treatment. He noted:

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Having examined the legislative history of the ordinances and other evidence, Kennedy J concluded that, although the ordinances were framed in secular and neutral language, they contained so many exceptions that it was clear that the city had intentionally targeted religiously motivated animal sacrifice by Santeria worshippers. Since the city could not advance any compelling governmental

interest for having discriminated against the religious practices of the Santeria, the court set aside the ordinances.

2 2 Laws which indirectly discriminate against religious conduct

Since modern legislation only very rarely intentionally discriminates against religious conduct, litigation under the free exercise clause has largely focused on those laws which are written with no particular religious group in mind but which indirectly impose a burden on the practices of a particular faith. In such cases the court is typically asked to mandate a free exercise *exemption* in order to protect action, grounded in religious beliefs, from state interference either through criminal prosecution or through the denial of benefits.

It is in respect of these cases that the Supreme Court has had the greatest difficulty in striking an acceptable balance between religious liberty and governmental acts. The court first attempted to demarcate a boundary between governmental interests and religious liberty in the case of *Reynolds v United States supra*, where it was held that although polygamy was permitted by the Mormon Church as a part of its religious beliefs, it none the less remained prohibited by the criminal law. In arriving at its decision, the court reasoned that while the First Amendment prohibits governmental regulation of religious beliefs, religious acts must yield to the supremacy of neutral legislation governing conduct.

Chief Justice Waite, who delivered the opinion of the court, observed that "laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices" (166).

The "belief-action" doctrine articulated by the court in the *Reynolds* case meant that while the government could not regulate an individual's religious beliefs, it nevertheless had full authority to regulate religiously motivated actions, as long as it had a rational basis for doing so (the rational basis test is the Supreme Court's least stringent standard of review; see Peltason 354). Since the government can almost always meet this relatively light burden of justification, the "belief-action" doctrine effectively eliminated the possibility of a religiously motivated exemption under the free exercise clause.

The "belief-act" doctrine articulated in *Reynolds* survived for almost a century. By the 1960s, however, the court began to retreat from its position in *Reynolds*. The court now adopted the view that the protection of beliefs alone amounted to an emasculation of the free exercise guarantee, and in future the free exercise clause would be construed as extending protection to both religious beliefs and religious acts (see Chase "The free exercise of religion" *Guide to American law* (vol 8) 451).

This new approach was first articulated in *Sherbert v Verner* 374 US 398 (1963). At issue in this case was the application of a South Carolina law which denied unemployment compensation to anyone who was available for work but refused to accept a job. Sherbert, who was a member of the Seventh-Day Adventist Church, was dismissed from her employment in a textile mill because she refused to work on a Saturday, the Sabbath day of her faith. Her refusal to work on a Saturday also meant that she could find no other employment. The South Carolina Employment Security Commission refused to grant her unemployment compensation on the ground that her refusal to work on a Saturday disqualified her for failure to accept suitable work. Sherbert claimed that the statute violated her free exercise of religion.

In granting her an exemption from the provisions of the statute, the Supreme Court held that the government could burden a fundamental right like the free exercise of religion only if it was protecting a "compelling interest" by the least intrusive means possible. Under this standard of review

> "[a]ny incidental burden on the free exercise of a [claimant's] religion . . . [must] be justified by a 'compelling state interest in the regulation of a subject within the state's constitutional power to regulate'" (per Brennan J 406–409).

The application of the "compelling interest" test obliged the court to weigh state interests against the impact upon religion worked by state policies. Almost a decade later the Supreme Court reaffirmed the "compelling interest" test in *Wisconsin v Yoder* 406 US 205 (1972), where the consequences appeared to be even more drastic than those in *Sherbert's* case. In *Yoder*, members of the Old Order Amish religious sect had been convicted under a state criminal law for refusing to send their children to public school beyond the eighth grade. Yoder brought suit claiming that formal education beyond the eighth grade is strictly forbidden by the Amish faith. The court upheld the challenge, arguing that the state could not enforce a criminal statute against the Amish because it compelled them "to perform acts undeniably at odds with fundamental tenants of their religious beliefs" (per Burger CJ 218).

Having considerably widened the scope of the free exercise clause in *Sherbert* and *Yoder*, the Supreme Court subsequently began to fear that it would be overwhelmed by a flood of claims for exemptions involving factual circumstances far more difficult than those present in either *Sherbert* or *Yoder*. This fear was voiced in *United States v Lee* 455 US 252 (1982) where the court unanimously refused to exempt Amish employers from paying social security taxes. One basis for the decision was that recognising such an exemption might require future courts to exempt religious groups which opposed the state's use of tax monies from paying generally applicable revenue taxes.

However, rather than lower the standard it had adopted in *Sherbert's* case, the Supreme Court, during the 1980s, strove to limit the number of possible claims by manipulating the requirements necessary to establish a violation of the free exercise clause. Claims for exemption under the free exercise clause were thus divided into two stages. At the first stage the onus was on the claimant to establish a *prima facie* violation of the free exercise clause. In order to establish this *prima facie* violation, the claimant was required to prove:

(a) First, that the law or policy in question "significantly" *burdened* her beliefs. Only those laws which tended to coerce individuals into acting contrary to their religious beliefs were considered significantly burdensome. Laws which simply made religion more expensive or inconvenient did not constitute burdens (*Lyng v Northwest Indian Cemetery Association* 485 US 439 (1988));

(b) secondly, that her beliefs were *sincere*. The sincerity inquiry was employed to distinguish between *bona fide* claims and spurious ones (*United States v Ballard* 322 US 78 (1944)); and

(c) finally, that her beliefs were *religious*. The free exercise clause was interpreted as only authorising exemptions based on religious beliefs. If an objection to a law arose out of political or philosophical convictions the free exercise clause was inapplicable (*Yoder v Wisconsin supra*).

Once a *prima facie* case had been made out, the burden shifted to the government to demonstrate that the law or practice in question was necessary to achieve

some compelling secular objective and that it was the least restrictive means of achieving that objective. If the plaintiff met her burden and the government did not, the plaintiff was entitled to an exemption from the law or practice in question.

Although the "compelling interest" test appeared to have set a very high standard of review, the Supreme Court, in practice, rarely upheld free exercise exemptions. Besides its decisions in *Sherbert* and *Yoder*, the court has granted free exercise exemptions in only three other cases all involving unemployment compensation (see *Frazee v Illinois Department of Employment Secretary* 489 US 829 (1989); *Hobbie v Unemployment Appeals Commissioner* 480 US 136 (1987); *Thomas v Review Board* 450 US 707 (1981)).

This reluctance to grant free exercise exemptions culminated in 1990 when the Supreme Court brought its free exercise jurisprudence to full circle by reaffirming the "belief-action" doctrine first expounded over one hundred years ago in *Reynolds*'s case. In *Employment Division v Smith* 494 US 872 (1990) the Supreme Court held that the state of Oregon need not exempt two members of the Native American Church from a law proscribing the possession of peyote (an hallucinogenic drug). Delivering the opinion of the majority, Justice Scalia observed:

> "[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)" (879).

Having effectively abolished the "compelling interest" test in the context of free exercise claims, the decision in *Smith's* case simply requires neutral laws to pass the much weaker rational basis standard of review. This decision evoked enormous criticism in the United States and Congress enacted the Religious Freedom Restoration Act of 1993. This Act overruled the approach adopted in *Smith* and restored the "compelling interest" test which was applied prior to 1990.

3 Religious practices and section 14(1)

In the light of the American experience set out above, it is submitted that the following points can be made in respect of section 14(1) of South Africa's interim Constitution.

(a) First, it is submitted that the wording of section 14(1) is broad enough to encompass both religious beliefs and religious practices. Public international law and comparable foreign case law confirm this submission. As far as public international law is concerned the right to religious freedom is to be found in various international human rights documents. Without exception, these documents recognise that the right to religious freedom includes the right of the individual to practise his or her religious beliefs.

Article 18(1) of the Universal Declaration of Human Rights thus provides:

> "Everyone has the right to freedom of throught, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, *to manifest his religion or belief in teaching, practice, worship and observance*" (my emphasis).

Similar provisions are to be found in article 18(1) of the International Covenant on Civil and Political Rights and in article 1(1) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination on Religion and Belief. The right to religious freedom has also been judicially defined. In the Canadian

se *R v Big M Drug Mart Ltd* (1985) 18 CCC (3d) 385 Dickson J (as he then s) defined religious freedom as follows:

> "The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear or hindrance or reprisal, and the *right to manifest religious belief by worship and practice or by teaching and dissemination*" (my emphasis; 417).

similar approach has also been adopted by the European Court of Human ghts. In *Kokkinakis v Greece* (1993) 17 EHRR 397 the court defined religious edom as follows:

> "While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to '*manifest [one's] religion*'. Bearing witness in words and deeds is bound up with the existence of religious convictions" (my emphasis; 418).

rthermore, the right to hold a belief or opinion, whether secular or religious, is eady protected by the right to free expression (which is guaranteed in s 15 of the erim Constitution). A reading of the right to religious freedom which does not otect at least some religiously based conduct would thus leave the right to relig-us freedom devoid of any practical consequences. Such an interpretation is rticularly untenable when one considers that the state is most likely to restrict the igious practices of unpopular minorities who are most in need of protection.

Secondly, it is submitted that the approach adopted by the American Su-eme Court prior to its decision in *Smith's* case will prove to be a useful guide the South African constitutional context. In determining whether or not a law olates a fundamental right the interim Constitution requires that a two-stage proach should be adopted (*S v Zuma* 1995 4 BCLR 401 (CC) 414; *S v Mak-nyane* 1995 6 BCLR 665 (CC) 707).

At the first stage, the court must determine the scope of the right and whether law complained of interferes with its exercise. The first stage requires the rty alleging the violation of the right to establish the existence of the right and violation. If our courts were to follow the American approach, the require-nts of this first stage would be satisfied if the plaintiff could show that the law question placed a significant *burden* on her *sincerely* held *religious beliefs* e Canadian Supreme Court has adopted a somewhat similar approach: see *R v ward Books and Art Ltd* (1986) 30 CCC (3d) 385 418 433). The determina-n of each of these factors would depend on the facts of each individual case.

At the second stage the party seeking to limit the established right must per-ade the court that the limitation meets the requirements of section 33(1) – the itations clause. The limitations clause provides for a hierarchy of limitations. me rights may be limited by a law of general application if such a law is sonable and justifiable and does not negate the essential content of the right. her rights may be limited only if the additional and stricter requirement of *cessity* is satisfied. The right to religious freedom attracts the additional quirement of necessity.

In *S v Makwanyane supra* Chaskalson P noted that the limitation of a consti-ional right for a purpose that is reasonable and necessary involves a balancing ocess. In this regard the president observed:

> "[T]here is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests" (708).

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A similar approach has also been adopted by the European Court of Human Rights. In *Kokkinakis v Greece* (1993) 17 EHRR 397 the court defined religious freedom as follows:

> "While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to '*manifest [one's] religion*'. Bearing witness in words and deeds is bound up with the existence of religious convictions" (my emphasis; 418).

Furthermore, the right to hold a belief or opinion, whether secular or religious, is already protected by the right to free expression (which is guaranteed in s 15 of the interim Constitution). A reading of the right to religious freedom which does not protect at least some religiously based conduct would thus leave the right to religious freedom devoid of any practical consequences. Such an interpretation is particularly untenable when one considers that the state is most likely to restrict the religious practices of unpopular minorities who are most in need of protection.

(b) Secondly, it is submitted that the approach adopted by the American Supreme Court prior to its decision in *Smith's* case will prove to be a useful guide in the South African constitutional context. In determining whether or not a law violates a fundamental right the interim Constitution requires that a two-stage approach should be adopted (*S v Zuma* 1995 4 BCLR 401 (CC) 414; *S v Makwanyane* 1995 6 BCLR 665 (CC) 707).

At the first stage, the court must determine the scope of the right and whether the law complained of interferes with its exercise. The first stage requires the party alleging the violation of the right to establish the existence of the right and its violation. If our courts were to follow the American approach, the requirements of this first stage would be satisfied if the plaintiff could show that the law in question placed a significant *burden* on her *sincerely* held *religious beliefs* (the Canadian Supreme Court has adopted a somewhat similar approach: see *R v Edward Books and Art Ltd* (1986) 30 CCC (3d) 385 418 433). The determination of each of these factors would depend on the facts of each individual case.

At the second stage the party seeking to limit the established right must persuade the court that the limitation meets the requirements of section 33(1) – the limitations clause. The limitations clause provides for a hierarchy of limitations. Some rights may be limited by a law of general application if such a law is reasonable and justifiable and does not negate the essential content of the right. Other rights may be limited only if the additional and stricter requirement of *necessity* is satisfied. The right to religious freedom attracts the additional requirement of necessity.

In *S v Makwanyane supra* Chaskalson P noted that the limitation of a constitutional right for a purpose that is reasonable and necessary involves a balancing process. In this regard the president observed:

> "[T]here is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests" (708).

The necessary standard required in the interim Constitution is thus akin to the "compelling interest" test adopted by the United States Supreme Court in its pre-*Smith* jurisprudence. It may thus be argued that implications of the "necessary" standard of review are:

(i) that the freedom to *hold* religious beliefs cannot be limited; and

(ii) that the freedom to *manifest* religious beliefs may be limited only by a law that pursues an overridingly important government concern and does not impair the right more than is absolutely necessary, regardless of whether the law directly or indirectly burdens the plaintiff's religious conduct.

(c) Thirdly, it is submitted that should a plaintiff succeed under section 14(1), an *exemption* from the application of the applicable law or policy would be an appropriate remedy for the Constitutional Court to grant. Section 7(4)(a) of the interim Constitution reads:

> "When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights."

Section 7(4)(a) confers a wide discretion on the courts to award "appropriate relief". This discretion is certainly wide enough to exempt an individual from the application of a law or policy. The advantages of adopting such a form of relief are twofold:

(i) First, court mandated exemptions save religious believers from making difficult choices between religious tenets and conflicting secular laws, while at the same time ensuring that the laws in question remain applicable to most people.

(ii) Secondly, exemptions provide small, unfamiliar, and unpopular religions with government access similar to the political influence exercised by popular and well-known religions. Popular and well-known religions often possess sufficient political influence to ensure that laws which do conflict with their religious principles are either defeated, or contain statutory exemptions for religious believers. Small unpopular religions, on the other hand, face far more uncertain treatment from the political branches of government. Legislators unfamiliar with a religious group may pass a law that conflicts with the group's tenets. In these circumstances small religious groups often lack the political influence necessary to obtain a statutory exemption (see Steinberg "Rejecting the case against a free exercise exemption: a critical assessment" 1995 *Boston Univ LR* 253).

The constitutional protection of religious freedom has provided the South African courts with a unique opportunity to establish a constitutional jurisprudence in which the promise of religious liberty is given the broadest possible scope. However, the pervasive influence of religious beliefs and practices on all aspects of everyday life will inevitably give rise to conflicts between the individual's religious conscience and the state's regulatory schemes. In balancing these conflicting interests there are important lessons to be learnt from the American experience. We would do well to heed them.

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VONNISSE

PLANNING LAW, ADMINISTRATIVE JUSTICE AND THE CONSTITUTION

Van Huyssteen v Minister of Environmental Affairs and Tourism 1996 1 SA 283 (C)

1 Introduction

One of the major environmental controversies of the mid-nineties was Iscor's proposed steel mill at Saldanha. From an environmental angle the main criticism was that the mill should not be built in the proximity of the sensitive and internationally significant eco-system near Langebaan. The result was a number of official environmentally-based actions concerning the siting of the steel mill: an investigation in terms of section 15 of the Environment Conservation Act 73 of 1989 under the chairmanship of a former judge of the Supreme Court; an environmental impact study by the CSIR; and an evaluation of the environment impact study by the Council for the Environment. Numerous, often conflicting, specialist opinions were also expressed.

Related to the environmental concerns was the planning dimension. This is where the *Van Huyssteen* decision comes into the picture. It deals with opposition to the rezoning of land in terms of the Cape Land Use Planning Ordinance 15 of 1986 to accommodate the steel mill near the West Coast National Park and the Langebaan lagoon. The judgment is significant for a number of reasons: first, it illustrates the point at which planning law and environmental issues interface (Preston, Robins and Fuggle "Integrated environmental management" in Fuggle and Rabie (eds) *Environmental management in South Africa* (1992) 748–761). Secondly, it provides a concrete example of the impact of the Constitution and the fundamental rights dispensation in a planning situation (Van Wyk "Planning law – will Cinderella emerge a princess?" 1996 *THRHR* 1–22). Thirdly, it shows a sound understanding on the part of the court of the need for co-operative governance (cf ch 3 of the 1996 Constitution). Finally, the judgment reinforces the view in *Knop v Johannesburg City Council* 1995 1 SA 1 (A) that there are three parties that play a role in planning decisions, namely the state, owners and neighbours. In particular, it emphasises the rights of neighbours in a planning context.

2 Background

The applicants were Mr Van Huyssteen and two other trustees of the Wittedrift Trust, the owner of a stand at Meeuklip, Langebaan, directly opposite the lagoon and near the site of the proposed steel mill. The trustees intended building a holiday or permanent home on the property. Five of the eight respondents are relevant to this discussion: the first (the national Minister of Environmental

Affairs); the second (the Premier of the Western Cape); the third (the Western Cape Minister of Agriculture, Planning and Tourism); the sixth (Iscor Ltd); and the seventh (Saldanha Steel, a subsidiary of Iscor's).

The trouble started when Iscor applied to the Western Cape government for the rezoning of a piece of land near the West Coast National Park to allow them to erect the steel mill. Such a rezoning is permissible in terms of the Land Use Planning Ordinance 15 of 1985 (C). The application led to wide differences of opinion, both popular and expert, on the impact of the steel mill. The applicants felt that an investigation in terms of the national Environmental Conservation Act 73 of 1989 was required before any rezoning decision was taken.

In their notice of motion the applicants sought an urgent interdict to–

- compel the Minister of Environmental Affairs in terms of section 23 of the 1993 Constitution to allow them access to all the documentation in his possession concerning the proposed steel factory
- order the same minister to appoint a board of investigation in terms of section 15(1) of the Environment Conservation Act 73 of 1989 to assist him in the evaluation of the proposed development of the steel factory
- order the Premier of the Western Cape and his Minister of Agriculture, Planning and Tourism to delay their rezoning decision until the finalisation of the enquiry in terms of section 15(1). Proceeding with the decision, so they argued, would deprive them of their right to fair administrative action in terms of section 24(b) of the 1993 Constitution.

After the application was lodged, the Minister of Environmental Affairs appointed a board of investigation in terms of section 15(1) of Act 73 of 1989 and offered to make available to the applicants the relevant documents. Two of the applicants' prayers accordingly fell away (the court none the less addressed them (298–300)). The applicants then amended their motion to compel the Minister of Environmental Affairs to expand the terms of reference of the board of investigation. The minister's response boiled down to the simple contention that since the appointment of a board of investigation is not mandatory, the applicants had no say over the terms of reference.

The Western Cape ministers adopted a similar attitude in respect of the fair administrative action issue. They advanced a number of grounds why the applicants could not compel them to delay their rezoning decision. As they would be affected by a delay in the decision, Iscor and Saldanha Steel also opposed the interdict, questioning the *locus standi* of the applicants and maintaining that their rights had not been infringed.

3 Issues requiring decision

The court distilled ten questions for decision from the papers before it: (i) whether the applicants had a right to an order compelling the minister to appoint a board of investigation; (ii) whether the minister could be forced to amplify or amend the terms of reference of the board; (iii) whether the applicants had the right to the documentation in the possession of the minister relating to the proposed steel mill; (iv) whether the applicants had *locus standi* to claim an order requiring second and third respondents to refrain from deciding the rezoning application before the board of investigation had finalised its work; (v) whether the applicants had shown that they had a right which was going to be infringed and if so, (vi) whether they had shown an actual or threatened

infringement; (vii) whether the applicants had an alternative remedy; (viii) whether they had shown that they would suffer irreparable harm unless the interdict sought was granted; (ix) whether they had shown that the balance of fairness is in their favour; and (x) whether the Supreme Court, in the exercise of its discretion, should grant the interdict sought (297H–298C).

The court prefaced its ruling on these issues by a comprehensive quotation of all the relevant constitutional and other statutory provisions applicable to the case. Included was the general environmental policy laid down by the Minister of Environmental Affairs in 1994.

4 The judgment

Not surprisingly, the court found that the applicants had no right to compel the Minister of Environmental Affairs to appoint a board of investigation (298–299). This part of the judgment is noteworthy for Farlam J's interpretation of the word "shall" in section 15(1) of the Environment Conservation Act 73 of 1989. There is nothing new in the interpretation. It merely confirms that "shall" has more than one meaning and that its meaning in a specific case is not always obvious. This is probably one of the reasons why the drafters of the 1996 Constitution deliberately steered away from the term, using words and phrases which convey the right meaning in simple terms: for example, where a duty is intended, "must" is used. One may say, what is good for the supreme Constitution, should be good for ordinary legislation. The time is ripe for ordinary legislation to follow the Constitution's "plain language" style – and improve on it.

As could be expected, the court also refused to grant the applicants' request to direct the minister to amplify the terms of reference of the board (299). However, this is where the good fortunes of the authorities ended. On all the other issues the court ruled in favour of the applicants.

4 1 Their right of access to the documentation

Section 23 of the 1993 Constitution provides that

> "every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights".

This section has been cited on a number of occasions, mostly with regard to access to police dockets (see *Shabalala v Attorney-General of Transvaal* 1996 1 SA 725 (CC) 741I–742A and the references in fns 52 and 53).

Farlam J interpreted section 23 in this case to mean that a person is entitled to information held by the state where it is "reasonably" required for the protection of rights (300B–C, F). Not too much should be read into the word "reasonably". In using the word Farlam J followed Marais J's interpretation in *Nortje v Attorney-General, Cape* 1995 2 SA 460 (C) 474 where the term was employed to counter the state's argument in a criminal trial that "require" in section 23 means "need". It would appear that "reasonably" can mean only one thing, namely that the court, after weighing the circumstances of the case, is satisfied that there is no limitation on the applicants' right to the information sought. In other words, if anything, "reasonably" should broaden and not narrow down the meaning of "require". This would be consonant with the judgment in *Jeeva v Receiver of Revenue, Port Elizabeth* 1995 2 SA 433 (SEC) 459E. (See also Klaaren "Access to information" in Chaskalson *et al Constitutional law of South Africa* (1996) par 24.3 where the uncertainty about the meaning of "require" is discussed.)

4 2 Did applicants have locus standi *to ask for the interdict?*

Traditionally, *locus standi* in environmental and planning issues was an uneasy matter. Two of the respondents sought support from *Jacobs v Waks* 1992 1 SA 521 (A) for the restrictive view that the applicants had to show a direct interest. (The actual finding in *Jacobs* 534I–J that the applicants had a "voldoende belang" (sufficient interest) indicated the beginning of a more relaxed view of standing: see eg Bray "*Jacobs v Waks* from an environmental angle" 1992 *SAPR/PL* 329–333; Van Wyk "The Appellate Division takes another look at locus standi" 1992 *SAPR/PL* 320–329.)

However, Farlam J had little difficulty in finding that the traditional restrictive application of *locus standi* had given way to a "very liberalised" approach in matters pertaining to fundamental rights (301H–I; see also *Ferreira v Levin; Vryenhoek v Powell* 1996 1 SA 984 (CC), where the Constitutional Court discussed the application of s 7(4) in detail; despite differences among the judges, there was no disagreement that s 7(4) should be interpreted generously. See also Du Plessis and Corder *Understanding South Africa's transitional bill of rights* (1994) 117–118). In terms of section 7(4)(a) and (b)(i) of the Constitution, any person who alleges "an infringement of or threat to" a fundamental right contained in the Constitution, is entitled to approach a court in his or her own interest. In Farlam J's view, "own interest" was wide enough to cover an interest as trustee. In this case the threatened fundamental right which entitled the applicants to standing in terms of section 7(4), was section 24(b) which requires procedurally fair administrative action where any right or legitimate expectation is affected or threatened.

4 3 Would it be procedurally unfair to the applicants if the rezoning application were to be decided before the board had finalised its investigation?

On this score, Farlam J wasted no time in ripping the heart out of the respondents' argument that the applicants had no right to expect the rezoning authority to consider the findings of an investigation conducted under different legislation. First, the judge pointed out, the Environment Conservation Act 73 of 1989 and the general policy published in terms of section 2 of the Act, enjoined all government institutions ("organs of state" in current constitutional parlance) to "apply appropriate measures based on sound scientific knowledge" in the protection of ecologically unique and sensitive areas (303E–F). Secondly, the court held that the applicants were entitled to procedurally fair administrative action in terms of section 24(b) of the Constitution. The link between the two points and the court's conclusion that the rezoning had to stand over until the investigation by the board lay in the court's interpretation of section 24(b).

Van Huyssteen was the first reported case in which serious judicial attention was paid to section 24(b). (Earlier judgments in which s 24(b) was referred to, are *Matiso v Commanding Officer, Port Elizabeth Prison* 1994 4 SA 592 (SEC) 601I – the issue of a warrant in the absence of a judgment debtor may offend against s 24(b); *Jeeva v Receiver of Revenue, Port Elizabeth* 1995 2 SA 433 (SEC) 443F–444C – a commission of inquiry appointed by the Master under the Companies Act performs an administrative action which entitles an affected person to the rights guaranteed by s 24(a), (b) and (d) (see, however, the less conclusive, even opposite, view of the Constitutional Court in *Bernstein v Bester* 1996 2 SA 751 (CC) par 93–101 131); *Tseleng v Chairman, Unemployment Insurance Board* 1995 3 SA 162 (T) 178H–179A – it is administratively unfair

for a board not to draw the attention of an applicant to the fact that the board relies on a particular policy in its decision-making; *Claude Neon Ltd v Germiston City Council* 1995 3 SA 710 (W) 719G–J – it is unfair for an administrative official to give an undertaking to an applicant and not abide by it; *Batista v Commanding Officer, SA Police, Port Elizabeth* 1995 4 SA 717 (SEC) 723A–B, where section 24(b) was merely referred to.)

Section 24(b) has three distinct elements. The first is administrative action; the second that a person's rights or legitimate expectations have to be affected or threatened by such action; in which case, thirdly, the administrative action has to be procedurally fair. In *Van Huyssteen*, the application of these elements ran along the following lines: a rezoning decision is administrative action; such action would undoubtedly affect the rights of the applicants if the effect of the rezoning and the erection of the steel mill would, for example, be pollution of the lagoon. Therefore, the applicants are entitled to fair administrative action. So far nothing new has been said. It is in his understanding of "fair administrative action" that Farlam J broke new ground. He did so in two ways: on the one hand by his interpretation of section 24(b); and by his application of this reasoning to the facts of the case, on the other.

Under the conventional approach to administrative law in South Africa, the enquiry would have stopped at a positive reply to the question whether the rules of natural justice had been complied with. Not so in this case. Farlam J's point of departure was that section 24(b) should not be "read down" to be a mere codification of the existing law. However, his search for the true meaning of section 24(b) was not a flight of fancy. He anchored his approach in the words of Lord Morris of Borth-y-Gest (*Wiseman v Borneman* 1971 AC 297 (HL)) that natural justice requires principles and procedures which are "right and just and fair" in the circumstances of a particular case. Invoking South African Constitutional Court judgments, and a number of foreign ones, Farlam J stated that the Constitution – of which section 24(b) is a part – should be interpreted generously to ensure that individuals are afforded the "full measure" of their fundamental rights. Legalism should be avoided. Applying natural justice in the way the respondents contended for would amount to legalism.

In his application of section 24(b) to the facts of the case, the judge practised what he preached. He was at pains to point out that he was trying to ascertain what was right and just and fair in this particular case. He found that there could be two major negative effects if the rezoning had to go ahead and the board's investigation subsequently advised against the operating of the steel mill: first, Iscor would not be entitled to operate the mill, resulting in possible claims for compensation from public funds; second, the Premier of the Province or the Minister of Environmental Affairs would be put in an impossible position. Faced with the expensive *fait accompli* of an erected steel mill and the possible claims for compensation, either functionary would find it very hard to exercise a discretion against the operation of the mill. This could have a devastating effect on the rights of the applicant.

The court's preference for a delay of the rezoning decision is based on its greater faith in the investigative procedures of the board, compared to the departmental or "administrative" inquiry of the rezoning authority. The former would have the advantage of testimony on oath, proper interrogation and cross-examination, publicity, and the power to subpoena witnesses. This and the fact that the board would have to make a decision based on the policy as laid down in

section 2(1) of Act 73 of 1989, rendered its investigations superior to that of an administrative investigation. To deliberately ignore the advantages of a better investigation would amount to a procedure which is unfair to the persons affected by the decision (307B–C).

The virtue of Farlam J's dealing with procedural fairness does not lie in the novelty of his approach. In fact there is little new in what he has *said* about the law in this field. The breakthrough is in the *application* of the established principles of fair procedure, consciously in the context of a substantially changed and value-laden constitutional dispensation. The implications should be felt in planning law, where procedure has often become formality: notices of rezoning are small and widely-worded, sometimes inadequately displayed; removal of restrictions are applied for when building operations have proceeded to a point where they are unlikely to be reversed, and so on.

4 4 Other requirements for the interdict

In dealing with the other requirements for the interdict, Farlam J assumed that a person seeking such an order on the basis of an infringement of a constitutional right, has to prove all the elements of an interdict (308E–F). This attitude was probably spurred on by the wording of section 7(4)(a) of the Constitution, in terms of which any person alleging an infringement of a fundamental right is entitled to apply for "appropriate relief". An interdict would clearly be appropriate relief, and there is nothing in paragraph (a) which suggests that the requirements of an interdict should not be met if that is the relief sought.

This is not the end of the matter, though. In *Ferreira v Levin* 1995 2 SA 813 (W) 836B–D Heher J suggested that in "constitutional issues" the courts are not bound by "the standard which applies in an ordinary application for an interim interdict". It would appear that Heher J did not confine "constitutional issues" to the validity of legislation. This judgment has led Klaaren ("Judicial remedies" in Chaskalson *et al South African constitutional law* 9.11) to conclude that in constitutional matters there are only three requirements for an interim interdict: first, whether there is a serious question to be tried (which is wider than the conventional *prima facie* right); second, a real prospect of irreparable harm; and third, taking into account the public interest, the balance of convenience. Even this shorter route is not the end of the "appropriate relief" element. From a statement by Froneman J in *S v Melani* 1995 4 SA 412 (E) 420H the inference may be drawn that since the Constitution does not say what "appropriate relief" means, it has to be determined by the courts in view of the express provisions and underlying values of the Constitution. The scene may be set for judicial creativity.

These observations are borne out by the ease with which Farlam J found the "other elements" of the "ordinary" interdict to be present in *Van Huyssteen*. The discretionary nature of common law review and the Minister of Environmental Affairs' power to stop the operation of the steel mill ruled these remedies out as viable alternatives; so did the difficulty of quantifying damages (308G–309B). On the question of the balance of convenience, the judge in so many words queried the need to decide this issue in what could be termed a "constitutional matter" (309C–D). Farlam J addressed the matter more out of politeness than conviction, it would seem, and found the discretionary, and hence unpredictable, outcome of the Minister of Environmental Affairs' decision in the matter lacking in weight to tilt the balance of convenience in the respondents' favour. Iscor and

aldanha Steels' contention that the board's investigation might take too long, e judge answered by allowing them, with proper notice, to approach the court hen they felt that time was running out.

Conclusions

here is more to *Van Huyssteen* than meets the eye. Apart from the court's terpretation of section 24(b) of the Constitution, planning authorities would be ell-advised to consider at least the following implications of the judgment:

Planning, like all administrative action, finds itself fully exposed to the piercing light of the supreme Constitution. There is no escape.

The court, in its own approach to the case as a whole and the individual issues, confirmed the celebrated words of the late Etienne Mureinik about the new constitutional dispensation: we have moved from a culture of authority to one of justification ("A bridge to where?" 1994 *SAJHR* 32). This requires a specific attitude and style on the part of the administration in the performance of its duties. The emphasis is less on power than on service; more on openness, co-operation, interaction and assistance than on skilful and legalistic narrowing down of individual rights.

The final Constitution is not in force yet, but notice of greater emphasis on co-operative governance has been served (cf ch 3 of the final Constitution). From the first page to the last, Farlam J's judgment underscores the duty of different authorities dealing with the same issue to have regard for each other. This is particularly applicable to "physical" planning, as a typical function shared by the various "spheres" of government (the term used by the final Constitution for what previously were "levels").

Fair procedure is more than proper compliance with procedure. "Fair" has a value side to it; "fair" in fundamental rights terms means substantive or material fairness. Farlam J's finding on this issue in *Van Huyssteen* suggests that the trigger is rather light.

It is clear that merely the first shots have been fired about "appropriate relief" in constitutional matters. A conclusion might not yet be justified, but there is a strong indication from *Van Huyssteen* that where an infringement of the right to fair administrative procedure has been proved, a finding of irreparable harm and balance of convenience in favour of the applicant would almost follow as a matter of course. However far-fetched this might sound, the possibility exists that in many cases proof of the infringement of a fundamental right would be sufficient for interim relief. This view is based on Farlam J's conclusion that the denial of fair administrative procedure, as called for by section 24(b) of the Constitution, is tantamount to irreparable harm.

From another angle it may even be argued that, in view of the fact that fair administrative procedure is a fundamental right, once a person has persuaded a court that this right has been infringed, the burden would shift to the administration to justify the infringement. This would be a very hard task. A planning authority might find its decisions thrown out of court far more easily than before solely on the basis of unfair procedure.

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Saldanha Steels' contention that the board's investigation might take too long, the judge answered by allowing them, with proper notice, to approach the court when they felt that time was running out.

5 Conclusions

There is more to *Van Huyssteen* than meets the eye. Apart from the court's interpretation of section 24(b) of the Constitution, planning authorities would be well-advised to consider at least the following implications of the judgment:

- Planning, like all administrative action, finds itself fully exposed to the piercing light of the supreme Constitution. There is no escape.
- The court, in its own approach to the case as a whole and the individual issues, confirmed the celebrated words of the late Etienne Mureinik about the new constitutional dispensation: we have moved from a culture of authority to one of justification ("A bridge to where?" 1994 *SAJHR* 32). This requires a specific attitude and style on the part of the administration in the performance of its duties. The emphasis is less on power than on service; more on openness, co-operation, interaction and assistance than on skilful and legalistic narrowing down of individual rights.
- The final Constitution is not in force yet, but notice of greater emphasis on co-operative governance has been served (cf ch 3 of the final Constitution). From the first page to the last, Farlam J's judgment underscores the duty of different authorities dealing with the same issue to have regard for each other. This is particularly applicable to "physical" planning, as a typical function shared by the various "spheres" of government (the term used by the final Constitution for what previously were "levels").
- Fair procedure is more than proper compliance with procedure. "Fair" has a value side to it; "fair" in fundamental rights terms means substantive or material fairness. Farlam J's finding on this issue in *Van Huyssteen* suggests that the trigger is rather light.
- It is clear that merely the first shots have been fired about "appropriate relief" in constitutional matters. A conclusion might not yet be justified, but there is a strong indication from *Van Huyssteen* that where an infringement of the right to fair administrative procedure has been proved, a finding of irreparable harm and balance of convenience in favour of the applicant would almost follow as a matter of course. However far-fetched this might sound, the possibility exists that in many cases proof of the infringement of a fundamental right would be sufficient for interim relief. This view is based on Farlam J's conclusion that the denial of fair administrative procedure, as called for by section 24(b) of the Constitution, is tantamount to irreparable harm.
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ONREGMATIGHEID, NALATIGHEID; REGSPLIG, "DUTY OF CARE"; EN DIE ROL VAN REDELIKE VOORSIENBAARHEID – PRAAT DIE APPÈLHOF UIT TWEE MONDE?

Government of the Republic of South Africa v Basdeo 1996 1 SA 355 (A)

Die weermag het 'n nagtelike padblokkade opgestel ten einde onwettige wapens te onderskep in voertuie wat vanaf die Transkei noordwaarts deur Natal beweeg. A was 'n passasier in B se voertuig wat suidwaarts na die Transkei op pad was, verby die padversperring in die teenoorgestelde baan gery het, toe omgedraai het in die rigting van die versperring, dit opgemerk, weer 'n U-draai gemaak en in die rigting van die Transkeise grens begin wegjaag het. Onbewus daarvan dat die voertuig oorspronklik suidwaarts onderweg was, en onder die indruk dat die insittendes die blokkade probeer ontduik, het die soldate die voertuig met handgebare en flitsligte probeer stop. Die voertuig het egter onverpoos deur die soldate gebars en een van hulle (C) het 'n skoot na 'n agterband geskiet om die voertuig te probeer stuit. Die ongelukkige resultaat was dat die koeël die teeroppervlakte van die pad getref, opgeslaan en A noodlottig verwond het. A se weduwee stel namens haar en haar minderjarige kinders 'n onderhoudseis teen die staat in. Die kernvrae voor die hof was of A onregmatig gedood is; indien wel, of die skoot nalatig afgevuur was; en, indien wel, of B bydraend nalatig was. Net die eerste twee vrae is vir hierdie bespreking van belang.

Wat die onregmatigheidsvraag betref, aanvaar appèlregter Hefer (365H–I) dat "every man has a right not to be injured in his person or property" en dat die onus dus op die verweerder rus om regverdiging vir A se dood aan te toon. Die hof aanvaar voorts – sonder om so te beslis – dat wat B betref, die gewraakte skoot ingevolge artikel 49(2) van die Strafproseswet 51 van 1977 geregverdig was. Op grond van die beginsel "that conduct which is lawful towards one person may be unlawful towards others" (367B), geld hierdie aanname egter nie sonder meer ten aansien van A nie. Daarom moet steeds bepaal word of die skoot ook met betrekking tot A se dood regmatig was. Regter Hefer vervolg (367E–F):

> "This question falls to be decided by applying the general criterion of reasonableness ... In doing so we must bear in mind that the value judgment which the application of the general criterion of reasonableness requires is based on considerations of morality and policy and the Court's perception of the legal convictions of the community, and entails a consideration of all the circumstances of the case."

Uit die uitspraak is dit duidelik dat nie alleen C se (subjektiewe) *wete of kennis* van A se teenwoordigheid in die voertuig nie, maar ook die objektiewe *redelike voorsienbaarheid* daarvan, die skaal volgens die regter ten gunste van 'n onregmatigheidsbevinding sou laat swaai. (Vir doeleindes van kommentaar, is dit nodig om die uitspraak ietwat breedvoerig aan te haal.) Ten aansien van eersgenoemde verwoord die hof dit so (368B–H):

> "There can be no doubt that, had [C] actually been aware of the deceased's presence, he would have had a legal duty towards him to act reasonably in the exercise of his powers of arrest. In saying this I am not unmindful of the need for criminals to be detained and brought to justice, and of the duty of every police

> officer, and all others to whom police powers have been entrusted, to do so; nor am I insensitive to the inherent difficulties of such a hazardous task. We cannot pretend to be unaware, moreover, of the public outcry in recent times for better protection against crime, and for offenders to be brought to book speedily and effectively in order to receive their just deserts. On the other hand, however, we must bear in mind that s 49(2) invests arresting officers with the power of taking human lives even on a mere (albeit reasonably held) suspicion. Such an awesome power plainly needs to be exercised with great circumspection and strictly within the prescribed bounds. Section 49(2) should not, and indeed cannot, be regarded as a licence for the wanton killing of innocent people; nor can any attempt to extend its operation to cases not falling within its ambit be countenanced . . .
>
> It is in effect for such an extension that Mr *Marnewick* [for the defendant] contended because what his argument really amounts to is that an arresting officer may exercise his powers under s 49(2) notwithstanding any actually foreseen harm it may cause to innocent bystanders. If correct, his submission would entail, for instance, that a police officer would be legally blameless if he were to shoot in a crowded street at a fleeing suspect and his bullets were to kill innocent bystanders . . . The submission falls to be rejected as *offensive to the legal convictions of the community and accepted principles of morality and legal policy*" (my kursivering).

En wat redelike voorsienbaarheid betref, vervolg appèlregter Hefer (368H) dat dit duidelik is dat "the foreseeability of harm is a relevant consideration in the determination of lawfulness". Volgens hom (368H–369A) vind hy steun vir dié standpunt by Millner *Negligence in modern law* (1967) 25 waar Millner verklaar:

> "The law lays down two tests for ascertaining the existence of a duty of care; firstly that the injury was such as *a reasonable man would have foreseen and guarded against*; secondly, that the nature of the interest infringed was one which the law protects against negligent conduct. These two elements must occur to give rise to a duty of care.
>
> *Now it is plain that the first test is in no way different from the test applied in order to decide the 'negligence issue', that is, in order to answer the question: was the defendant's conduct negligent?* It reiterates the identical abstract standard of reasonableness. If *the reasonable man*, placed in the circumstances of the defendant, would have foreseen that his conduct might endanger or prejudice others in regard to their legally protected interests, then the defendant is deemed to have been under a legal duty towards such others to exercise appropriate care" (my kursivering).

Die regter verwys (369B–C) dan na die volgende *dictum* van hoofregter Rumpff in *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 (A) 833:

> "The duty concept, on the contrary, shows abounding vitality. The key to this paradox is the utility of the concept as a device of judicial control over the area of actionable negligence on grounds of policy. *Here the ascertainment of liability is linked to the second of the two elements of duty of care referred to above. This second element is not at all concerned with reasonable foresight; it is to do with the range of interests which the law sees fit to protect against negligent violation*" (my kursivering);

en lewer soos volg kommentaar daarop (355C–D):

> "The remark in the last sentence refers, not to the duty concept in general, but to that concept in so far only as it allows for judicial control on grounds of policy. That this is what *Millner* intended to convey appears from his own emphasis on the words 'on grounds of policy' and from his analysis which has already been quoted. This is obviously how Rumpff CJ understood it since he found (at 835E–G) that the defendant did not owe the plaintiff a legal duty because he could not reasonably have anticipated that the plaintiff would not make proper enquiry."

Appèlregter Hefer beslis dan op die feite *in casu* dat nie alleen die moontlikheid van die aanwesigheid van 'n passasier in die motor nie, maar ook die moontlikheid van besering van sodanige persoon weens die gewraakte skoot "real and entirely foreseeable" (vgl 369E–370B) was. Gevolglik het C onregmatig opgetree. Hy stel dit so (369G 370C):

> "The conclusion that the presence of a passenger was reasonably foreseeable leads us to the last stage of the enquiry into the lawfulness of [C's] conduct. As indicated in the first-quoted passage from Millner, the so-called 'duty issue' is determined by the answer to the question whether it was reasonably foreseeable that others may be harmed by the conduct in question ... In these circumstances ... the possibility of harm to a passenger was real and entirely foreseeable. The trial Court's finding that [C] unlawfully caused the deceased's death was unavoidable."

In die lig van hierdie slotsom het die regter geen probleme om nalatigheid aan C se kant te bevind nie (370C–D):

> "The finding that he was negligent is beyond criticism. The enquiry relating to this issue is, of course, so intertwined with the previous one that much of what has already been said goes towards proof of the unreasonableness of his conduct. All that needs to be added is that the circumstances in which he fired at the car were such that a reasonable man in his position would not have done so ... In my view his conduct deviated from the norm of the reasonable man to such an extent that it cannot be ascribed to a non-culpable error of judgment."

Alhoewel nou met die resultaat van die uitspraak saamgestem word, te wete dat C wel op onregmatige en nalatige wyse A se dood veroorsaak het, dui dit tog op 'n ongelukkige verwarring van nalatigheid en onregmatigheid as selfstandige delikselemente deur ons hoogste hof – 'n verwarring wat vergroot word deur enersyds 'n verkeerde aanwending van die Engelsregtelike "duty of care"-begrip in ons reg, en andersyds weens die feit dat die appèlhof klaarblyklik uit twee monde spreek oor die rol van redelike voorsienbaarheid by die onregmatigheidsvraag.

Ten aanvang moet duidelikheid oor die onderskeid tussen onregmatigheid en nalatigheid verkry word. Die volgende faktore is hier van belang (sien Neethling, Potgieter en Visser *Deliktereg* (1996) 148–150):

(a) By onregmatigheid word die *redelikheid* van die dader se optrede beoordeel deur 'n belange-afweging aan die hand van die *regsopvattings van die gemeenskap* (*boni mores*) (sien ook *Basdeo* 367E–F, hierbo aangehaal); by nalatigheid word die *redelike man* se optrede bepaal met verwysing na die *redelike voorsienbaarheid en voorkombaarheid van skade* (sien Neethling, Potgieter en Visser *Deliktereg* 35 ev 134 ev; sien ook *S v Robson; S v Hattingh* 1991 3 SA 322 (W) 333; *Knop v Johannesburg City Council* 1995 2 SA 1 (A) 27).

(b) By onregmatigheid word die *juridiese ongeoorloofdheid van die daad* bepaal (onregmatigheid kwalifiseer dus die daad); by nalatigheid word die *juridiese verwytbaarheid van die dader* vir sy ongeoorloofde daad vasgestel (nalatigheid kwalifiseer dus die dader) (Van der Walt *RAU Studiehandleiding: onregmatige daad* (1983) 40).

(c) Omdat dit oor juridiese ongeoorloofdheid gaan, word die onregmatigheid van die handeling beoordeel in die lig (of met kennisname of inagneming) van *al die relevante feite en omstandighede wat werklik aanwesig was en al die gevolge wat werklik ingetree het*. Omdat dit oor juridiese verwytbaarheid gaan, word die nalatigheid van die dader beoordeel vanuit die *posisie waarin die dader hom inderdaad bevind het*: dit geskied deur die redelike man in die posisie van die

dader op die tydstip van die handeling te plaas en dan, met inagneming *slegs van 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*, te bepaal welke gevolge waarskynlik uit sy handeling sou gevolg het (redelike voorsienbaarheid van skade) en of die gevolge redelik voorkombaar was. Kort gestel, onregmatigheid word beoordeel op grond van *werklikhede* ('n diagnose), nalatigheid op grond van *waarskynlikhede* ('n prognose) (sien Van Rensburg *Normatiewe voorsienbaarheid as aanspreeklikheidsbegrensingsmaatstaf in die privaatreg* (1972) 19 vn 65; Neethling "S v Pretorius 1975 2 SA 85 (SWA)" 1975 *THRHR* 301–303; Van Aswegen *Die sameloop van eise om skadevergoeding uit kontrakbreuk en delik* (1991) 138 vn 145 152; vgl ook Van der Merwe en Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 131; Boberg *The law of delict Vol I Aquilian liability* (1984) 38–40).

Beskou 'n mens nou appèlregter Hefer se beroep op Millner 25 as sou dié skrywer steun vir sy standpunt bied dat redelike voorsienbaarheid 'n relevante oorweging by die onregmatigheidsvraag is, dan is dit duidelik dat hy die toets vir nalatigheid – soos Millner dit self ook sien (vgl weer sy stelling dat die eerste toets (of element) vir die bepaling van 'n "duty of care" geensins verskil van die toets vir die sg "negligence issue" nie, nl die vraag: "was the defendant's conduct negligent?") – pens en pootjies by onregmatigheid betrek. Die gesaghebbendste formulering van die toets vir nalatigheid in ons reg (sien Neethling, Potgieter en Visser *Deliktereg* 127) word gevind in *Kruger v Coetzee* 1966 2 SA 428 (A) 430:

> "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.
>
> This has been constantly stated by this Court for some 50 years. Requirement (a)(ii) is sometimes overlooked. Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend on the particular circumstances of each case. No hard and fast rules can be laid down."

Dat hierdie formulering van nalatigheid "reiterates the *identical* abstract of reasonableness" (Millner 25 *supra*) as die eerste toets (element) vir die bepaling van die bestaan van 'n Engelsregtelike "duty of care", behoef werklik geen betoog nie. In 'n onlangse Vrystaatse beslissing, *Masureik (t/a Lotus Corporation) v Welkom Municipality* 1995 4 SA 745 (O) 756–757 op 757, stel regter Hattingh dit onomwonde so:

> "The foreseeability test for the determination of negligence is basically similar to reasonable foresight as a criterion to establish the existence of a duty of care (cf the test as formulated in *Kruger v Coetzee* . . .)"

Anders as wat appèlregter Hefer ook laat blyk, het die tweede been (element) van die Engelsregtelike "duty of care"-begrip soos deur Millner geformuleer en myns insiens korrek in die *Trust Bank*-saak *supra* 833 verduidelik word, niks met redelike voorsienbaarheid (nalatigheid) te make nie maar betrek dit die vraag ("value judgment") na die beskermingswaardigheid van individuele belange met behulp van die toepassing van beleidsoorwegings ("grounds of policy"), dit wil sê die vraag na onregmatigheid (vgl Neethling, Potgieter en

Visser *Deliktereg* 287–289 mbt suiwer ekonomiese verlies; sien Van Aswegen "Policy considerations in the law of delict" 1993 *THRHR* 171 ev oor die rol van beleidsoorwegings). Hierdie siening blyk in soveel woorde ook uit 'n resente beslissing van die appèlhof, *Knop v Johannesburg City Council* 1995 2 SA 1 (A) 27, waar appèlregter Botha verklaar (vgl ook die klaarblyklike goedkeuring van die benadering in *Trust Bank supra* in *Indac Electronics (Pty) Ltd v Volkskas Bank Bpk* 1992 1 SA 783 (A) 786–787):

> "For present purposes . . . the difference between the two elements of a duty of care is perhaps more aptly described by Millner . . . 'The duty concept in negligence operates at two levels. At one level it is fact-based, at another it is policy-based.' The fact-based duty of care forms part of the enquiry whether the defendant's behaviour was *negligent* in the circumstances. The *whole enquiry is governed by the foreseeability test*, and 'duty of care' in this sense is a convenient but dispensable concept. In the phraseology of our law the 'policy-based or notional duty of care is more appropriately expressed as a legal duty', in consonance with the requirement of wrongfulness as an element of delictual liability . . ." (my kursivering).

Juis omdat regter Hefer nalatigheid inspan om onregmatigheid vas te stel, is dit glad nie verbasend nie dat hy, nadat hy bevind dat C onregmatig opgetree het, summier tot die slotsom geraak dat nalatigheid ook by hom teenwoordig was (370C):

> "The enquiry relating to [negligence] is, of course, so intertwined with the previous one [wrongfulness] that much of what has already been said goes towards proof of the unreasonableness of his conduct."

Uit bostaande blyk duidelik dat appèlregter Hefer se benadering die onderskeid tussen nalatigheid en onregmatigheid geheel en al verdoesel. Ten onregte. Hierdie twee elemente word nie net in die Suid-Afrikaanse deliktereg nie maar in talle Westerse stelsels om klaarblyklike oorwegings (sien weer die faktore hierbo) as selfstandige aspekte van 'n onregmatige daad geag (vgl ook *Simon's Town Municipality v Dews* 1993 1 SA 191 (A) 196 waar Corbett HR met goedkeuring verwys na die "modern distinctions in our law of delict between fault and unlawfulness"). Indien hierdie gevestigde onderskeid negeer word, word nie alleen die regsteoretiese grondslae van ons deliktereg ondergrawe nie, maar kan die proses ook net dien as 'n geleibuis vir verwarring en gevolglike regsonsekerheid – en soveel te meer as selfs ons hoogste hof oënskynlik nog nie klaarheid in die onderhawige verband het nie deur duidelik uit twee monde te praat. 'n Mens kan maar net vertrou dat die appèlhof die aangeleentheid by die eersvolgende geleentheid in die reine sal bring.

Gesien die peil van gesofistikeerdheid wat die ontwikkeling van die deliktereg in Suid-Afrika bereik het, bly dit in elk geval onbegryplik waarom regters (sien bv die *Masureik*-saak *supra* 756H–757D) soms nog ook wat nalatigheid betref, terugval op die omslagtige en verwarringstigtende "duty of care"-leerstuk van die Engelse reg (sien Neethling, Potgieter en Visser *Deliktereg* 144–145), in plaas daarvan om nalatigheid eenvoudig deur die redelike voorsien- en voorkombaarheidstoets, oftewel redelike man-toets, vas te stel.

Volgens die "duty of care"-benadering word daar gevra of die verweerder teenoor die eiser 'n "duty of care" verskuldig was (die sg "duty-issue", wat weer, soos gesien, sowel nalatigheid as onregmatigheid betrek); en of daar 'n nienakoming ("breach") van daardie "duty" was (die sg "negligence-issue"). As albei vrae bevestigend beantwoord word, bestaan daar nalatigheid. In die eerste

plek moet dan vasgestel word of 'n "duty of care" bestaan. Die kriterium is of die redelike man in die posisie van die verweerder sou voorsien het dat sy handeling nadeel vir die eiser kan veroorsaak. Om die tweede vraag te beantwoord, naamlik of daar 'n "breach of the duty to take care" plaasgevind het, word nagegaan of die dader die sorgvuldigheid aan die dag gelê het wat 'n redelike man aan die dag sou gelê het om nadeel te voorkom. Anders gestel, sou die redelike man die gevolg wat die dader nie voorkom het nie, wel voorkom het (sien in die algemeen Boberg 30–31 274 279 736; Van der Walt *Delict: principles and cases* (1979) 23 ev; Van der Merwe en Olivier 129–130)?

Die benadering onderliggend aan "duty of care" is vreemd aan die beginsels van die Romeins-Hollandse reg wat die grondslag van ons deliktereg vorm. Daar kan dus uit 'n regshistoriese oogpunt beswaar gemaak word teen die toepassing daarvan in ons reg. 'n Belangriker beswaar teen die invoering en toepassing van "duty of care" in ons reg is egter, soos duidelik uit die voorafgaande uiteensetting daarvan blyk, dat dit 'n onnodige en omslagtige metode is om te bepaal wat direk deur die redelike man-toets gedoen word, naamlik of die redelike man nadeel sou voorsien en voorkom het. Daar bestaan werklik dus geen rede om die "duty of care"-benadering te gebruik in die vasstelling van nalatigheid nie en dit wil tans voorkom of die howe in die meeste gevalle eenvoudig met die toets van die redelike man werk. Nieteenstaande herhaling moet voorts nogmaals onderstreep word dat die gebruik van "duty of care" boonop net verwarring kan laat ontstaan tussen die toets vir onregmatigheid en dié vir nalatigheid – soos duidelik uit die bespreking van *Basdeo* hierbo, en die volgende *dictum* uit die *Masureik*-saak *supra* 757B–C blyk:

> "The existence of a duty of care depends on a comparative judicial evaluation of the relevant individual and social interests involved in the particular circumstances of the case. The basic question remains whether the plaintiff's interest should be accorded judicial protection against inadvertent conduct in the particular type of situation [onregmatigheidsvraag]. The foreseeability of harm is a factor which is taken into consideration [nalatigheidsvraag]."

Hierdie verwarring blyk ook uit die feit dat die howe soms die "duty of care"-begrip as sinoniem vir 'n regsplig by onregmatigheid (sien hieroor Neethling, Potgieter en Visser *Deliktereg* 53 ev) gebruik. Ten einde regsonsekerheid te voorkom, is dit daarom beter om "regsplig" by onregmatigheid met "legal duty" te vertaal (vgl die *Knop*-saak 27, aangehaal hierbo; Neethling, Potgieter en Visser *Deliktereg* 145) en die begrip "duty of care" geheel en al te vermy.

Indien onregmatigheid en nalatigheid suiwer uitmekaar gehou word, ontstaan die vraag ten slotte hoe onregmatigheid dan volgens die feite in *Basdeo* hanteer moet word. Die uitgangspunt is (vgl ook Hefer AR op 365H–I, aangehaal hierbo) dat onregmatigheid *in casu* in die op die oog af onredelike (*contra bonos mores*) skending van A se subjektiewe reg op sy fisiese integriteit geleë is, welke *prima facie* onregmatigheid deur die aanwesigheid van 'n regverdigingsgrond aan C se kant opgehef kan word (sien in die algemeen Neethling, Potgieter en Visser *Deliktereg* 43–44 47 ev 51–52 71–73; Neethling, Potgieter en Visser *Neethling's Law of personality* (1996) 60–62 90 ev 101 ev). Die voor-die-hand-liggende regverdigingsgrond waarop C hom kon beroep het en inderdaad ook baie aandag van die hof in *Basdeo* 367–368 ontvang het, is statutêre of amptelike bevoegdheid, en wel ingevolge artikel 49(2) van die Strafproseswet 51 van 1977 (vgl Neethling, Potgieter en Visser *Deliktereg* 102–105; *Neethling's Law of personality* 109–110). Waar die fisiese integriteit van 'n persoon ingevolge 'n

statutêre of amptelike bevoegdheid gekrenk word, is sodanige krenking regmatig. Oorskry die dader egter sy bevoegdheid, is daar natuurlik nie van regverdiging sprake nie. Met betrekking tot liggaamsaantasting kom hierdie regverdigingsgrond veral ter sprake by die optrede van vredesbeamptes, soos die polisie en weermagslede in *Basdeo*.

Alhoewel die vraag na die regmatigheid al dan nie van 'n liggaamsaantasting deur die uitoefening van hierdie bevoegdhede primêr met verwysing na die betrokke veroorlowende statuut of gemeenregtelike reël geskied, moet die uitoefening van die bevoegdhede steeds redelik wees (en hier het 'n mens steeds, soos ook hieronder blyk, met onregmatigheid te doen). (In die *Basdeo*-saak 367E–F, aangehaal hierbo, lê Hefer AR ook klem op die "general criterion of reasonableness".) Die toepassing van die redelikheidskriterium in hierdie verband deur die regspraak word juis goed geïllustreer deur uitsprake in verband met die verwonding van 'n verdagte wanneer hy hom verset en geweld teen hom gebruik word of wanneer hy vlug en op gewelddadige wyse verhinder word. Besonder insiggewend vir huidige doeleindes is die volgende *dictum* van hoofregter Rumpff in *Matlou v Makhubedu* (1978 1 SA 946 (A) 956; sien ook bv *Macu v Du Toit* 1983 4 SA 629 (A) 637 ev oor die analoë uitleg van a 49 van die Strafproseswet 51 van 1977, wat a 37 van die 1955-Strafproseswet vervang het):

> "Ek dink dit moet aanvaar word dat wanneer 'n reg tot arrestasie in die gemene reg en in die 1955-Wet . . . gegee word, implisiet 'n reg toegeken word om gebode weerstand teen te gaan en om vlug te verhinder. Dit beteken ook dat *noodsaaklikerwys* daar opsetlike geweld op die oortreder of verdagte toegepas kan word wat 'n besering kan veroorsaak. Ek dink ook dat by die toepassing van geweld 'n *redelike optrede* van die arresteerder toegelaat moet word en dit sal, in die algemeen, van al die relevante omstandighede afhang of die geweld redelik was of nie. En hierby sal oa die erns van die misdaad teen die mate van geweld wat toegepas is opgeweeg moet word. Ook die vraag wat in art 37 genoem word, nl of die verdagte nie *op 'n ander wyse* in hegtenis geneem en verhinder kan word om te ontsnap nie, en die vraag of die arresteerder *redelike gronde tot verdenking* gehad het, sou in die gemene reg oorweeg moet word" (my kursivering).

Regter Rumpff (958) verduidelik die toepassing van hierdie beginsels op die geval van 'n vlugtende verdagte soos volg: Indien die omstandighede dit toelaat, behoort eers 'n mondelinge waarskuwing gegee te word; indien hieraan nie gehoor gegee word nie, dan 'n waarskuwingskoot in die lug of op die grond; waar hierdie optrede ook geen gevolg het nie, dan eers 'n poging om die verdagte in die bene te skiet. Hierdie benadering kan onderskryf word. Dit kom ooreen met die beginsels wat ten aansien van noodweer en noodtoestand geld (vgl Neethling, Potgieter en Visser *Deliktereg* 77–81 86 88; *Neethling's Law of personality* 103–104 105). Dit is naamlik dat die noodwendigheid van 'n liggaamsaantasting moet vasstaan en, indien dit vasstaan, dat die dader steeds redelik moet optree. Wat redelik is, is natuurlik 'n feitelike vraag (sien *Neethling's Law of personality* 110). Hieruit behoort onmiddellik reeds duidelik te wees dat die verwonding of dood van 'n onskuldige persoon in die proses van die uitoefening van die bevoegdheid ingevolge artikel 49 in die reël nie geregverdig sal kan word nie – in elk geval nie waar die verwonding en dood hoegenaamd nie noodsaaklik of die noodwendige middel was om die verdagte aan te keer nie – soos in die *Basdeo*-feitestel – en die dader boonop daarvan bewus was dat 'n onskuldige persoon die slagoffer van sy optrede kan word (sien *Basdeo* 368B–G, aangehaal hierbo; vgl Neethling, Potgieter en Visser *Deliktereg* 42 oor die rol van sg dadersubjektiewe faktore, soos wete of motief,

by die onregmatigheidsvraag). (Hoe ook al, dit is in elk geval te bevraagteken – soos Hefer AR 368D–G, aangehaal hierbo, dan ook doen – of a 49 ooit aangewend mag word om die dood van 'n onskuldige persoon te regverdig. Hierbenewens kan verwag word dat vir sover die artikel wel die dood van 'n verdagte regverdig, dit as 'n ongrondwetlike beperking van die reg op lewe ingevolge a 9 en 33(1) van die Grondwet van die Republiek van Suid-Afrika 200 van 1993 aangeveg sal word (*Neethling's Law of personality* 110).) En aangesien geen ander regverdiging vir A se dood aangebied is nie, is sy dood dus op 'n onredelike wyse, *contra bonos mores*, en bygevolg onregmatig deur C veroorsaak.

In verband met die onredelike uitoefening van 'n statutêre bevoegdheid word soms gesê dat die verweerder aanspreeklik is indien hy die bevoegdheid op "nalatige" wyse uitgeoefen het en die eiser daardeur skade gely het. Dit is 'n verkeerde manier van stel. Die vraag is hier nie of die verweerder nalatig (skuldig) gehandel het nie, maar of hy deur onredelike optrede sy bevoegdhede oorskry het en dus onregmatig gehandel het (sien *Simon's Town Municipality v Dews* 1993 1 SA 191 (A) 196, met verwysing na Neethling, Potgieter en Visser *Deliktereg* 103–104, Van der Merwe en Olivier 105–106 en Boberg 771–773). Hoofregter Corbett verwoord dit soos volg:

> "[T]hese writers all correctly state that jurisprudentially the consequences of the repository of the statutory power having exercised it without due care and without having taken reasonable precautions to avoid or minimise injury to others, are that the repository must be taken to have exceeded the limits of his authority and accordingly to have acted unlawfully ... I am ... satisfied that the analysis is sound and that it accords with modern distinctions in our law of delict between fault and unlawfulness. The principle of statutory authority renders lawful what would otherwise have been unlawful; and if the implied limits of the statutory authority are not observed the repository of the power acts without authority, or in excess of his authority, and consequently unlawfully."

Hierdie gesonde en regsteoreties-korrekte benadering tot onregmatigheid en nalatigheid as twee onafhanklike, selfstandige elemente van die onregmatige daad, wat onder andere ook uit die *Trust Bank*- en *Knop*-saak *supra* blyk, sal hopelik genoeg stukrag hê om die pendulum in die nabye toekoms finaal teen die onaanvaarbare tendens in *Basdeo* te laat swaai.

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CESSION OF FUTURE RIGHTS

First National Bank of SA Ltd v Lynn 1996 2 SA 339 (A)

1 Introduction

Like most cases dealing with cession, this one is very interesting for various reasons. It deals principally with the legal construction of a cession of future rights, but also touches on controversial issues such as the object of cession and the nature of security cessions.

Although the cession of future rights has been accepted in South African case law, very little attention has been paid to the problems surrounding such recognition. De Wet and Van Wyk (*Die Suid-Afrikaanse kontraktereg en handelsreg* (1992) 254) reject the possibility that future rights can be ceded and the courts have not concerned themselves with the legal construction of such cessions. For years I have accepted the cession of future rights and propagated a construction which gives effect to the intention of the parties to such cessions (see *The law of cession* (1991) ch 10 2 2 3).

In *Sashwood (Pty) Ltd v The Fund Constituting Proceeds of the First and Second Judicial Sales of the MV Nautilus (Erasmus, Nel and Standard Bank of SA Ltd Intervening)* 1994 2 SA 528 (C) 556D–I, Scott J affirmed the construction which I advocate of a cession of future rights and which, to a certain extent, had already been confirmed in *Muller v Trust Bank of Africa Ltd* 1981 2 SA 117 (N) 126G–H. However, he found it unnecessary to decide the issue.

Van den Heever JA, in *Standard General Insurance Co Ltd v SA Brake CC* 1995 3 SA 806 (A) 815E, basically also adopted this approach. She clearly and correctly distinguished between a future and a contingent right, and also indicated that a right to claim in terms of an insurance policy is a contingent and not a future right (see also Scott *Cession* ch 10 2 2 3). It is a contingent right because the obligation creating agreement already exists, but the insurer's liability in terms of this contract is subject to a condition or a term, depending on the terms of the contract.

Very recently, however, the Appellate Division of the Supreme Court expressed itself conclusively on this issue in *First National Bank of SA Ltd v Lynn.*

2 Facts

On 31 December 1984 the cedent, Natal Earthworks (Pty) Ltd ("the contractor"), executed a deed of cession of all money "which may now (be) or which may hereafter become due and owing to us . . ." *in securitatem debiti* in favour of the cessionary, the First National Bank of Southern Africa Ltd ("the bank"). Much later, on a date not mentioned in the papers, the contractor concluded a building contract with the Government of QwaQwa ("the employer"). By 29 August 1990 the contractor had completed all work in terms of the contract and had moved off the site. A "certificate of completion" was issued on 27 August 1990, specifying the exact sum that was retained by the employer against defective work and for maintenance for the agreed period of one year. At the expiry of this period, namely on 27 August 1991, subject to any defect being repaired, the contractor's claim for the payment of the retention moneys would become enforceable. On 10 February 1991, a progress certificate was issued. It certified a sum of R1 106 376,37 as the balance of the retention money. This sum would become payable when a final certificate had been issued by the engineer, which he was obliged to do within 14 days of the expiry of the retention period. On 10 June 1991 the contractor was placed under provisional liquidation, and the respondents were appointed as liquidators of the company. A final order of liquidation of the contractor was issued on 26 July 1991. On 2 July 1992 the engineer issued a final certificate of completion, which meant that any retention money not yet paid out, had become due and payable. The respondents contended that the appellant, the bank, was not a secured creditor in relation to the said retention money. The crux of their contention was that there was no indebtedness to the contractor by the employer in respect of retention money prior to

the provisional order of liquidation, because it was not due and payable to the contractor prior to the said order. When the appellant disputed this contention, the respondents approached the Natal Provincial Division for an appropriate declaratory order. The court upheld the respondents' contention. It is against this judgment that the appeal was lodged.

3 Judgment

The court's judgment was not unanimous. However, all the judges concurred in the decision of Joubert JA on the definition and legal nature of cession. In the minority judgment, Joubert JA, with Nestadt JA concurring, supported the view of De Wet and Van Wyk, referred to above, and held that a cession of future rights is not possible. He consequently dismissed the appeal. The majority judgment of Van den Heever JA, Van Coller JA and Olivier JA upheld the appeal and held that the bank was entitled to be treated as a secured creditor. Van Coller JA concurred with Van den Heever JA, and although Olivier JA also concurred on the outcome of their judgment, he gave a separate judgment. I shall now discuss the various issues that were raised in this case and the different judges' approach to them.

3 1 Definition of cession

Joubert JA, with all the judges concurring, defined cession as follows:

> "Cession is a particular method of transferring rights in a movable incorporeal thing in the same manner in which delivery (*traditio*) transfers rights in a movable corporeal thing. It is in substance an act of transfer ('oordragshandeling') by means of which the transfer of a right (*translatio juris*) from the cedent to the cessionary is achieved. The transfer is accomplished by means of an agreement of transfer ('oordragsooreenkoms') between the cedent and the cessionary arising out of a *justa causa* from which the former's intention to transfer the right (*animus transferendi*) and the latter's intention to become the holder of the right (*animus acquirendi*) appears or can be inferred. It is an agreement to divest the cedent of the right and to vest it in the cessionary. Moreover, the agreement of transfer can coincide with, or be preceded by, a *justa causa* which can be an obligatory agreement, also called an obligationary agreement ('verbintenisskeppende ooreenkoms'), such as a contract of sale, exchange or donation. See *Johnson v Incorporated General Insurances Ltd* 1983 (1) SA 318 (A) at 331G. Even an agreement to provide security by means of a cession in *securitatem debiti* is in itself adequate *justa causa* for the cession. See De Wet and Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 5th ed vol 1 at 420: 'As 'n *causa* noodsaaklik is vir die sessie, dan is die afspraak dat dit in *securitatem debiti* geskied, tog seker genoegsame *causa* daarvoor . . .' (345G–346A).

3 2 Security cession

Although it was not necessary for the judges to express an opinion on the nature of the security cession involved here, and their remarks are therefore clearly *obiter dicta*, it is interesting to take note of these briefly. Joubert JA did not express an opinion on the issue, but Van den Heever JA (349J–350A) and Olivier JA (357D–E) seemed to regard a security cession as a pledge or at least in the nature of a pledge.

3 3 Future rights

With reference to Van Bynkershoek (1673–1743) (*Observationes Tumultuariae Obs* 2448), Gomezius (a 16th century Spanish jurist) and De Wet and Van Wyk

254 Joubert JA, in his minority judgment on this issue, rejected the possibility of a cession of future rights (346A–347D). Since he apparently regarded the right to claim retention money as a future right and not as a conditional right, he dismissed the appeal (349E–H). In a discussion of *Muller v Trust Bank of Africa Ltd* 1981 2 SA 117 (N) 126G–H (see 1982 *DJ* 183) and in my textbook (*Cession* ch 10 2 2 3) I indicate that it is incorrect to regard a claim for retention money as a future claim, since the origin of this claim, the obligation which creates it, already exists, but is subject to an uncertain future event.

In a stimulating and lucid judgment Van den Heever JA came to a different conclusion. She crisply phrased the issues to be determined as follows:

> "In my view the questions to be determined are:
>
> (a) whether the cession contemplated a transfer only of the contractor's then exigible debts and of future ones as and when they became so exigible; or whether the parties to the document contemplated also a transfer of the contractor's claims then extant but imperfect because, for example, subject to some time clause or condition, and of similar imperfect claims as and when they arose in the future; and , if the latter,
>
> (b) whether the contractor's claim against the employer is merely a future claim or such an imperfect one; and, if so,
>
> (c) whether present effective transfer is possible of such a claim, or whether future and contingent rights are equally incapable of present 'delivery'" (350C–E).

The judge clearly regarded the right to claim retention money as a conditional right and not as a future right. She also indicated that as such it was cedable and came to the following conclusion:

> "In short, in my view the contractor acquired before liquidation a personal right to performance by the employer of its part of their bargain. The performance-payment was delayed for the maintenance period, and was subject to the condition that the amount held in the retention fund could be reduced. That personal right was transferred in terms of the cession to the bank before liquidation and the Master was in my view correct in upholding the objection of the appellant to the joint liquidators' account" (353F–G).

After giving a clear exposition of the facts of the case, Olivier JA gave the correct interpretation of the nature of a right to claim retention money. He described it as a contingent (conditional) right which can be freely ceded. He furthermore accepted and explained the nature of a cession *in anticipando* of a future right. Olivier JA referred to De Wet and Van Wyk and the various cases in which cession of future rights were accepted – despite De Wet's consistent criticism against such a possibility. The judge also evaluated the two approaches to the issue (357H–I), referred to the cases supporting the idea of a cession of future rights (358J–359I) and considered the impact of rejecting the validity of such cessions (359J). He then came to the following conclusion:

> "The position, in my view, then is that it has been accepted in commerce and by the Courts of our country for more than a century that future rights can be ceded and transferred *in anticipando*. The decisions of our Courts have thus been regarded for a very long period of time as being correct. Clearly these decisions have been acted upon and served as the basis for the general and well-known practice of taking security in the form of the cession of book debts (including future debts), cession of existing and future rights *in securitatem debiti* and factoring of existing and future rights. In these circumstances I am not inclined to hold that these decisions are wrong . . ." (360A–B).

4 Evaluation of judgment

4 1 Criticism

This case illustrates why one should be very careful in relying on the head notes of reported cases. This one, for example, may at first glance create the impression that the majority judgment was given by Joubert JA on all the issues whereas all the judges concurred only with that part of his judgment which dealt with the definition of cession.

I have some difficulty in accepting the decision of Joubert JA: It is regrettable that he described the object of the cession in this case as "rights in a movable incorporeal thing" (345G), whereas he had described it so aptly and correctly as a claim ("vorderingsreg") in *Johnson v Incorporated General Insurances Ltd* 1983 1 SA 318 (A) 331G–H. It would, furthermore, appear as if Joubert JA preferred to consult 16th century Spanish jurists rather than modern writers on contentious issues pertaining to the law of cession. He is also wrong in regarding the right to retention money as a future right, as the decisions of Van den Heever JA and Olivier JA also indicate.

4 2 Interesting aspects

Although it has been generally accepted, in this judgment it was clearly stated (for the first time, to my knowledge) that a security agreement can be the *causa* of a cession (346A).

I find various remarks by Van den Heever JA very interesting and stimulating. For example, she referred to "the legal fiction" equating a cession of incorporeal rights *in securitatem debiti* with the legal institution of a pledge of corporeals as security and stressed the problems caused by this as follows:

> "The fiction has its origin in the practical needs of modern commerce but has caused much strenuous intellectual gymnastics on the part of scholars and lawyers in trying to prise one legal concept into the garb not ideally suited" (350A).

I fully agree. The latter is the main reason for the confusion that exists in practice on the nature of security cessions. The only way to remedy this situation is legislation, as I have often advocated.

Van den Heever JA also explained the specificity principle in the following words:

> "The requirement that the object of a cession must be certain does not mean that the money value of the (defined) right which is ceded must be precisely calculable when the transfer of that right occurs" (352H–I).

I may be wrong, but I perceive a slight measure of irritation on the part of the judge with both the minority judgment (see eg the following statement 349I–J: "I have read the judgment of Joubert JA but have come to a different conclusion. I obviously have no quarrel with his erudite elaboration on the propositions that a cession is by definition an act of transfer . . .") and the so-called "old authorities". For her own interpretation of the effect of the cession of the right to claim retention money, she relied on logic and rejected the view of Sande:

> "There is nothing in logic that militates against acceptance of the notion that an extant right may be transferred to another forthwith despite its being subject to a condition. If *Sande* perhaps said it was impossible, it was in another age and of procedural rules different to ours, not rules of logic" (352E–F).

It must, however, be pointed out that Sande actually, even on Joubert JA's and De Wet's interpretation of his viewpoint, states that such a cession is possible. It is jurists of more recent times who have difficulties in accepting this notion!

I think the judgment of Olivier JA is excellent, one that can be highly recommended to students. The judge commenced with a chronological exposition of the facts (353I–354G), then discussed and separated the various legal questions in issue and rounded off his discussion with a conclusion. He clearly distinguished between a conditional right and a future right (355E–356H), and indicated that conditional rights may be ceded (356I–357A), although he seemed to be uncertain about the moment at which this right is created.

From one statement it would appear as if he was, correctly, of the opinion that the right is created on conclusion of the contract ("But the fact that a claim to payment is dependent on the fulfilment of a condition does not mean that it comes into existence or 'vests' only upon fulfilment of the condition. On the contrary, [when] the right is created, it forms part of the patrimony of the creditor, it 'vests' in the creditor; its enforceability is merely postponed" (356C–D)), but from others it would seem as if he is not so sure (see eg: "When the certificate of completion was issued, it signified the coming into existence of a right to claim performance . . ." (355D); "The personal right exists and forms part of the patrimony of the creditor, but its enforceability is postponed" (355G); and "Thus, at the latest on 27 August 1990, when the 'certificate of completion' was issued, a right of action ('vorderingsreg') subject to a suspensive condition came into being" (357B)).

Olivier JA did not restrict his judgment to this aspect of cession, but went further to hold that cessions *in anticipando* are valid in South African law. Although he did not elaborate on the nature of such cessions, from his references to the relevant pages in my textbook I presume that he accepted the construction propagated there.

An aspect of the law of cession which fascinates me more and more, and which was also highlighted by this case, is the terminology employed to denote the object of cession. As I have indicated above, Joubert JA had defined it, correctly to my mind, in *Johnson v Incorporated General Insurances Ltd supra* as a claim ("vorderingsreg"), whereas he referred to it here as "rights in a movable incorporeal thing". Van den Heever JA also referred to the problem of terminology (350G–H) and preferred to use the terms "debts" and "claims", but she then continued and used the following terms: "rights" (349J 351A 351H 356G–H 357I), "exigible debts" (350C), "personal rights" (351G 352H 353F–G), "the right to institute action" (352B), "incorporeal rights" (352B) and "book debts" (353A). Olivier JA referred to "book debts" (353I 359J 360B), "right" (355E 356B 360A), "claim" (356C 356B), "right to claim payment" (356D), "right of action" (356I 357B 357I) and "future debts" (359I).

5 Conclusion

The majority judgment in this case will no doubt be welcomed in practice, especially by factoring institutions and banks. The judgment is also to be commended from a theoretical point of view.

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GEEN AFSONDERLIKE EIS OM "GRONDWETLIKE SKADEVERGOEDING" NIE

Fose v Minister of Safety and Security 1996 2 BCLR 232 (W)

1 Opsomming van feite en beslissing

In hierdie saak het die eiser beweer dat hy deur lede van die polisie aangerand en gemartel is en daarvoor 'n bedrag van R135 000 geëis vir die normale skadeposte soos mediese uitgawes, pyn en lyding en *contumelia.* Hierbenewens het hy op dieselfde feite ook op sogenaamde "constitutional damages" aanspraak gemaak aangesien die marteling onder meer sy regte op menslike waardigheid, vryheid en sekuriteit van die persoon ingevolge die handves van regte vervat in die (tussentydse) Grondwet van die Republiek van Suid-Afrika 200 van 1993 sou gekrenk het (a 10 11 en 13). Na 'n vergelykende studie van veral die posisie in die Verenigde State van Amerika en Kanada, handhaaf regter Van Schalkwyk 'n eksepsie deur die verweerder dat die eis om "grondwetlike skadevergoeding" nie volgens ons reg bestaanbaar is nie:

> "I am of the opinion that the common law, properly adapted where needs be, provides ample scope for the remedy sought to be invoked by the plaintiff in this case. If punitive damages are to be recovered they should be recovered as part of the plaintiff's delictual claim. There is, in my view, no scope for a separate action, based on the same facts, for a claim for constitutional damages" (246B).

Desnietemin bewys hierdie beslissing dat die Suid-Afrikaanse deliktereg in die toekoms interessante ontwikkeling kan ondergaan ten einde die realiteit te verreken dat talle regte wat privaatregtelike beskerming geniet, tans ook grondwetlik verskanste fundamentele regte is (vgl in die algemeen Neethling, Potgieter en Visser *Neethling's Law of personality* (1996) 83). Voorts is daar sekere ander fundamentele regte wat ook vir privaatregtelike beskerming in aanmerking sal kom. Boonop word in klousule 7(2) van die nuwe (1996-) konsepgrondwet spesifiek bepaal dat "the state must respect, protect, promote and fulfil the rights in this Bill of Rights". Aangesien die staat die regsprekende organe insluit, kan tereg van die howe verwag word om binne die terrein van hulle jurisdiksie en algemene bevoegdhede die deliktereg met die waardes van die Grondwet te harmoniseer. Reeds in 1991 het Burchell ("Delict in a Bill-of-Rights era" 1991 *Businessman's Law* 177) hom so hieroor uitgelaat:

> "The introduction of a bill of rights in South Africa will, in my opinion, affect the scope and the emphasis of the law of delict, which will have to play a part in ensuring that adequate protection is given to constitutionally entrenched rights and will constitute a point of contact between public and private law."

2 Sekere argumente namens die eiser en die verweerder

Daar is *in casu* namens die eiser onder meer aangevoer dat die doel van deliktuele skadevergoeding is om persoonlike restitusie te verkry vir die nadeel wat veroorsaak is. Hierteenoor sou dit die doel van die geëisde "grondwetlike skadevergoeding" wees om: (a) krenking van fundamentele regte te voorkom deur afskrikking; (b) die waardes wat sodanige regte onderlê te "vindiseer" of te bevestig; (c) die skender van die regte (privaatregtelik) te straf; en (d) kompensasie vir gelede nadeel te bied (236A). As gesag is onder meer verwys na die

bekende artikel van Pilkington "Damages as a remedy for infringements of the Canadian Charter of Rights" 1984 *Canadian Bar R* 535. (Sien in die algemeen oor die doel van skadevergoeding en genoegdoening in deliktuele verband Visser en Potgieter *Skadevergoedingsreg* (1993) 158–162 176 ev 439 ev.) Namens die eiser is ook aangevoer dat die gemenereg nie 'n voldoende remedie bied vir gevalle van skendings van fundamentele menseregte soos *in casu* plaasgevind het nie.

Die verweerder het onder andere betoog dat die gemeenregtelike remedies in 'n geval soos die onderhawige toereikend is en dat 'n hof boonop ingevolge artikel 35(1) en (3) van die (tussentydse) Grondwet die bepalings oor fundamentele regte so moet uitlê en die gemenereg so kan ontwikkel dat daar aan die grondwetlike eise voldoen kan word (236H; sien kl 38(1) en (2) van die ontwerpgrondwet wat basies gelykluidend hiermee is). Boonop is die *actio iniuriarum* wyd genoeg om vir genoegdoening met 'n strafelement voorsiening te maak (244I; sien hieroor ook die gesag na verwys in Visser "Genoegdoening met betrekking tot vermoënskade" 1983 *TSAR* 73–76; "Genoegdoening in die deliktereg" 1988 *THRHR* 486–489).

3 Sekere van die hof se argumente

Die hof haal in die loop van sy uitspraak uitvoerig uit die Amerikaanse en Kanadese regspraak aan (en verwys kortliks na die bepalings van die Europese Konvensie oor die beskerming van fundamentele regte). 'n Aantal laer howe in Kanada het wel al "grondwetlike skadevergoeding" toegeken maar die Kanadese Supreme Court het hierdie benadering nog nie goedgekeur nie (238B). Die hof se evaluasie van die Amerikaanse regspraak is soos volg:

> "While the Supreme Court recognises a claim for constitutional damages for violations of constitutional rights and while these are said to be significantly different to and more serious than ordinary common law violations, the remedy has grown out of the peculiarities which are intrinsic to the United States' jurisprudence. The judgments can be looked at for guidance but should, I think, be viewed with care" (242C; vgl ook 237H 242G 244B).

(Sien in die algemeen Van der Vyver "Constitutional free speech and the law of defamation" 1995 *SALJ* 577 vir kritiek op standpunte wat na die Amerikaanse, Kanadese of Duitse reg wil gryp om byvoorbeeld die moontlike toepassingsgebied van ons eie handves te probeer bepaal.)

Regter Van Schalkwyk aanvaar die (korrekte) argument dat 'n radikale aanpassing van die gemeenregtelike deliktereg nie deur die Grondwet vereis word nie (237F). Dit is volgens hom wel waar dat in sekere situasies, byvoorbeeld die skending van die reg om te stem, "grondwetlike skadevergoeding" erken kan word om aan die eise van die Grondwet te voldoen. Nogtans vind die hof dit onnodig om hieroor 'n konkrete mening uit te spreek (244F).

Dit hof meld dat die gemenereg nie 'n delik soos "marteling" ken nie maar voeg nogtans by dat die gemenereg verskillende "grade" van aanranding erken en dat indien 'n eis op grond van byvoorbeeld "marteling" ingestel word, die besondere "malevolence which attaches to such an unlawful act can be accommodated within the common law by an appropriate (and if needs be, punitive) order for the payment of damages" (245D–E; vgl oor die wye betekenis van die aantasting van die *corpus* ingevolge die gemenereg *Neethling's Law of personality* 90 ev).

4 Evaluasie en toekomsblik

Daar kan min twyfel wees dat die hof se beoordeling van die gesag, sy stawende argumente en die uiteindelike handhawing van die eksepsie teen die eiser se aanspraak op "grondwetlike skadevergoeding" basies korrek is.

Ten aanvang moet daarop gewys word dat die hele kwessie van die horisontale werking van die handves van regte (sien bv *Du Plessis v De Klerk* 1996 5 BCLR 658 (CC)) natuurlik nie hier ter sprake gekom het nie aangesien die verweerder die *staat* is wat in elk geval deur die handves gebind word (sien in die algemeen oor horisontaliteit Van Aswegen "Implications of a Bill of Rights for the law of contract and the law of delict" 1995 *SAJHR* 59–65; Strydom "The private domain and the Bill of Rights" 1995 *SA Publiekreg/Public Law* 52; De Waal "A comparative analysis of the provisions of German origin in the interim Bill of Rights" 1995 *SAJHR* 9 ev; Van der Vyver 1995 *SALJ* 572). Alhoewel daar oor die *beginsel* van direkte en/of indirekte horisontaliteit waarskynlik min twyfel kan wees – slegs die aard en grense daarvan moet bepaal word – kan dit probleme skep indien 'n mens belangrike verskille kry betreffende deliktuele aanspreeklikheid en vergoeding na gelang die verweerder die staat of 'n ander nie-staatlike entiteit is. Dit lyk byvoorbeeld in die algemeen onbillik om eisers teen die staat gunstiger te behandel as eisers teen private instellings of persone.

Toe die kwessie van "grondwetlike skadevergoeding" deur Burchell (175) oorweeg is (sien ook die vroeë bydrae deur Neethling "Enkele gedagtes oor die juridiese aard en inhoud van menseregte en fundamentele vryhede" 1971 *THRHR* 240 wat ook hier relevant is), was een van sy gevolgtrekkings die volgende (177):

> "Any bill of rights enacted for South Africa should expressly include a claim for damages in the range of remedies available to the victim of an infringement of its provisions."

Artikel 7(3) van die tussentydse Grondwet wat bloot melding maak van "gepaste regshulp" in geval van die inbreuk of bedreiging, kan beswaarlik as 'n algemene magtiging vir die hof beskou word om "grondwetlike skadevergoeding" as regsfiguur tot stand te bring. Juis hierom was dit waarskynlik dan ook nodig gevind om in die finale Grondwet die volgende bepaling as klousule 8(3) in te voeg:

> "In applying the provisions of the Bill of Rights to natural and juristic persons . . . a court–
>
> (a) in order to give effect to a right in the Bill, must apply, or, where necessary, develop, the common law to the extent that legislation does not give effect to that right; and
>
> (b) may develop rules of common law to limit the right, provided that the limitation is in accordance with section 36(1)" (algemene bepaling waarvolgens grense aan fundamentele regte gestel kan word).

'n Vorige weergawe van hierdie bepalings het in sekere opsigte verder gegaan:

> "When a right in the Bill of Rights binds a natural or juristic person, and there is no law of general application that grants a remedy based on that right, a court must develop the common law to grant a remedy based on that right. In granting a remedy, the court may formulate rules that limit the right, provided that the limitation is in accordance with section 35(1)" (algemene begrensing van regte).

In die lig van die afwesigheid van 'n bepaling soos klousule 8(3) in die tussentydse Grondwet sou regter Van Schalkwyk waarskynlik sy regterlike bevoegdhede

oorskry het deur 'n remedie van "grondwetlike skadevergoeding" te skep en reëls vir die funksionering daarvan te bepaal. Dit is onnodig om hier volledig kommentaar op klousule 8(3) te lewer behalwe deur die volgende algemene waarnemings te maak:

(a) Die kwessie waaroor dit gaan, is om voldoende "effek" aan 'n fundamentele reg te gee. Dit gaan klaarblyklik wyer as bloot skadevergoeding of genoegdoening. 'n Reg kan immers deur die strafreg, administratiefreg of op ander wyses direk en indirek beskerm word.

(b) Klousule 8(3) bedoel klaarblyklik dat waar daar reeds 'n algemene vergoedingsremedie in die gemenereg of wetgewing vir die skending van 'n bepaalde reg bestaan wat direk relevant is, byvoorbeeld 'n persoonlikheidsreg wat ook in die Grondwet verskans word, daardie remedie toegepas moet word (vir sover dit natuurlik moontlik is). Voorts geld die bepaling ook hier dat die hof in die toepassing daarvan die gees en strekking van die Grondwet in ag behoort te neem – artikel 35(1) en (3) van die tussentydse Grondwet kan ook in die finale Grondwet voorkom. Algemene remedies wat bestaan, sluit die normale deliktuele aksies en dan veral die *actio iniuriarum* in.

(c) Waar daar nie reeds duidelik 'n algemene remedie ten aansien van die skending van 'n bepaalde reg in die gemenereg is nie (en hier kan 'n mens dink aan skendings van bv 'n persoon se reg op politieke vryheid, stakingsreg, vrye assosiasie, reg om te betoog, aspekte van die reg ten aansien van die omgewing, aspekte van die reg op onderwys, onbillike diskriminasie waar belediging bv nie sterk ter sprake kom nie) en waar daar dus nie 'n klassieke geval van 'n skending van die *corpus, dignitas* of *fama* ter sprake is nie, bestaan daar interessante ontwikkelingsmoontlikhede. Waar wetgewing nie genoegsame "effek" (beskerming, erkenning ens) aan die reg verleen nie, *moet* 'n hof die gemenereg ontwikkel (en dan toepas) vir sover dit nodig mag wees. Dit sou beteken dat die hof nie totaal nuwe aksies hoef te skep nie maar bloot die strekkingswydte van die bestaande deliktuele remedies kan verbreed in die lig van die algemene vereistes van sodanige aksie(s) vir sover dit toepaslik is. Suid-Afrika is gelukkig dat die *actio iniuriarum* 'n soepele remedie is wat beslis geskik is om uitgebrei te word (sien in die algemeen *Neethling's Law of personality* 51 53 oor die rol van die *boni mores* in die ontwikkeling van die *actio iniuriarum*). Nogtans is dit goed denkbaar dat ook die Aquiliese aksie en die aksie weens pyn en lyding in hierdie verband relevant kan wees.

Wat die posisie van die deliktereg betref in 'n regstelsel waar daar 'n handves van fundamentele menseregte bestaan, is daar onlangs insiggewende navorsing gepubliseer waarna die hof *in casu* ongelukkig nie verwys het nie. Von Bar ("Der Einfluss des Verfassungsrechts auf die westeuropäischen Deliktsrechte" 1995 *RabelsZ* 207 ev; sien ook afdeling 6 van sy leerboek *Gemeineuropäisches Deliktsrecht* (1996)) wys op die besondere aard van die deliktereg, naamlik dat dit in die moderne regstaat 'n wyse is waarop die staat sy verpligting om fundamentele menseregte te beskerm deur "privatrechtlichen Mitteln" nakom (vgl ook Von Bar *Deliktsrecht* par 570). Dit sou onaanvaarbaar wees om 'n handves van regte te hê en die staat daardeur te bind maar daardie regte nie behoorlik te beskerm teen delikte tussen private persone nie. Die staat het 'n plig om fundamentele regte te waarborg onder meer deur 'n behoorlike privaatregtelike skadevergoedingstelsel op te rig en te laat funksioneer, en deurdat die deliktereg inhoudelik ook die waardes van die handves van regte behoorlik weerspieël (sien hieroor Von Bar 207–208; ook in die algemeen Drion "Civielrechtelijke werking

van de grondrechten" 1969 *NedJbl* 589–591). Die duidelike verband tussen die aard van die strafreg (wat as publiekreg ooglopend binne die domein van die staat val en ook ten grondslag het om die gemeenskap te beskerm) en die deliktereg, is ook 'n aanduiding dat die staat nie eenvoudig die deliktereg en skadevergoedingsreg onaangetas mag laat nie maar moet verseker dat daar behoorlike remedies bestaan ten aansien van die skending van regte wat ook fundamentele menseregte is. Onaanvaarbare hindernisse in die weg van aksies, moontlike onrealistiese delikselemente (bv opset of sekere regverdigingsgronde), aantastings van die algemene gelykheidsbeginsel en selfs die toeganklikheid van die regsproses is maar enkele voorbeelde van aangeleenthede wat ter sprake sal kom.

Hoe die horisontale werking van die Suid-Afrikaanse handves ook al gaan wees, moet kennis geneem word van die feit dat selfs in Europese state wat 'n minimum van horisontale werking aanvaar, die deliktereg nietemin 'n uitsondering bied deurdat sterker horisontale uitwerking van fundamentele regte hier toepassing vind (sien Von Bar 1995 *RabelsZ* 211). Von Bar (*Deliktsrecht* par 554) som die posisie so op:

> "Denn mehr und mehr wird das Deliktsrecht im heutigen Europa als eine Form der Konkretisierung der verfassungsrechtlich verbürgten Freiheitsrechte begriffen" (sien verder Markesinis 1990 *MLR* 10 wat selfs praat van die "constitutionalisation of private law").

Deur sekere regte as fundamentele regte te erken, aanvaar die staat dus aanspreeklikheid om as regskepper en -instandhouer te sorg dat 'n behoorlike privaatregtelike vergoedingstelsel tot beskikking van sy onderdane is.

Wat Suid-Afrika betref, betree ons nou maar eers die era waar die inhoud en werking van die deliktereg aan grondwetlike norme en eise getoets sal word en daar geleidelike veranderinge kan intree. Die bepalings van die ontwerpgrondwet waarvolgens hoë waarde aan "human dignity" geheg word, is 'n belangrike impuls en norm vir sodanige ontwikkeling.

Dit is duidelik dat die historiese strafkarakter van die *actio iniuriarum* besondere moontlikhede in hierdie verband bied (sien in die algemeen Visser 1988 *THRHR* 487 oor bv die afskrikkingsgedagte by hierdie aksie). Dit is in die algemeen onnodig vir die Suid-Afrikaanse reg om byvoorbeeld die Amerikaanse voorbeeld van "punitive damages" te probeer naboots. Die veelsydige *actio iniuriarum* met sy verskillende doelstellings is die korrekte remedie solank die aangetaste fundamentele reg maar na die een of ander persoonlikheidsreg herlei kan word. Die tradisionele persoonlikheidsgoed wat veral relevant sal wees, is die *dignitas* (sien bv *Neethling's Law of personality* 48–49). Hierdie *dignitas*-begrip kan moontlik selfs vergelyk word met "human dignity" waarna telkens in die ontwerpgrondwet verwys word (bv kl 1 7 10 35; sien egter ook Cachalia ea *Fundamental rights in the new Constitution* (1994) 33–34 wat meld dat die woord "dignity" ingevolge internasionale menseregte-instrumente verder as die Romeins-Hollandsregtelike betekenis daarvan strek). Dit is waarskynlik moontlik om die krenking van 'n verskeidenheid grondwetlike regte tot die *dignitas*, wyd verstaan, te herlei sonder dat die kwessie van belediging ter sprake kom. Skendings van fundamentele regte met betrekking tot die omgewing kan waarskynlik in bepaalde gevalle na die reg op die *corpus* herlei word terwyl regte betreffende byvoorbeeld vryheid van assosiasie en betoging moontlik met die liggaamlike vryheid, wyd verstaan, in verband gebring kan word. Die een of ander vorm van skade, hetsy in die vorm van vermoënskade of nie-vermoënskade

(persoonlikheidsnadeel) sal natuurlik vereis moet word alvorens daar van skadevergoeding of genoegdoening sprake kan wees. Die skuldvereiste kan ook in gedrang kom en hier sal daar waarskynlik in bepaalde gevalle van opset afgesien moet word en bloot nalatigheid vereis word (sien bv *Neethling's Law of personality* 64–66).

Wat die kwessie van *eisoorsaak* betref (bv Visser en Potgieter 130 ev), moet daarop gewys word dat dit onwenslik sal wees om in geval van die krenking van 'n fundamentele reg waar 'n vergoedingseis relevant is, aparte eisoorsake te erken byvoorbeeld ten aansien van *iniuria* en ten aansien van 'n eis om "grondwetlike skadevergoeding" (sien die verwysing hierna deur Van Schalkwyk R 241H). Die posisie behoort eenvoudig te wees dat waar daar reeds 'n voldoende gemeenregtelike eisoorsaak bestaan, die relevansie van die feit dat die skending van 'n fundamentele reg ter sprake is, bloot is dat dit die kwantum van genoegdoening kan beïnvloed ten einde die ernstigheidsgraad van die delik te beklemtoon (245D–246I). Die bestaande beginsels ten aansien van kwantumbepaling is soepel genoeg om hierdie feit te kan akkommodeer (vgl in die algemeen Visser en Potgieter 402 ev oor die kwantum van vergoeding by nievermoënskade). Waar 'n nuwe eisoorsaak binne die raamwerk van die bestaande deliktereg deur die hof geskep word, kom die vraag van twee eisoorsake nie ter sprake nie aangesien dit dan juis gaan oor die erkenning van 'n eis wat die gemenereg sonder die nodige aanpassing nie sou toestaan nie.

Ten slotte kan gemeld word dat dit verblydend is om kennis te neem van die hof se bevestiging *in casu* dat die huidige Suid-Afrikaanse deliktereg in die algemeen voldoende is om die eise wat die nuwe grondwetlike bedeling stel, te kan hanteer (bv 237E–F). Die bestaande deliktereg is volgens internasionale standaarde in die algemeen 'n gesofistikeerde stelsel wat beslis nie radikale aanpassing nodig het nie. Hierdie feit beteken natuurlik nie dat verdere ontwikkeling, verfyning en akkommodering van die posisie rakende fundamentele regte onnodig is nie. Die geldende deliktereg en die delikteregwetenskap gaan sekerlik voordeel trek uit die nuwe impulse vanuit die grondwetlike terrein. Daarby sal die gemeenregtelike persoonlikheidsreg waarskynlik ook 'n belangrike rol speel in die uitleg en toepassing van gelyknamige fundamentele regte soos die reg op privaatheid, die reg op vryheid en sekuriteit van die persoon ensovoorts.

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TO TAX OR NOT TO TAX: VAT IS THE QUESTION

Strydom v Duvenhage 1996 3 SA 27 (NC)

1 Introduction

Value-added tax (VAT) is a classic example of an indirect tax. Section 7(1) of the Value-Added Tax Act 89 of 1991 provides that the vendor must charge VAT on all taxable supplies made by him. In terms of section 7(2) of that Act, VAT is payable by the vendor who makes taxable supplies. In other words, the vendor

(as the supplier of goods or services) is the taxpayer. The end-result is that the recipient of the taxable supply bears the tax, but the liability as against the fisc rests with the vendor. Transfer duty, on the other hand, is a direct tax. In terms of section 2(1) of the Transfer Duty Act 40 of 1949, transfer duty is levied on the person who acquires property (as defined). In other words, the recipient of property is the person who pays the tax and bears the tax burden.

Where immovable property changes hands, the position is as follows: If VAT is payable, the taxpayer is the supplier of the property (although the supplier will recover the tax payable from the recipient). If transfer duty is payable, it must be paid by the recipient (the person who acquires the property). Although their respective tax bases overlap, VAT and transfer duty cannot be paid on the same acquisition of property. Section 9(15) of the Transfer Duty Act exempts any acquisition of property from transfer duty if VAT was payable and the transferor certifies that VAT has been paid to him by the transferee and has been accounted for by the transferor in a relevant tax return. When the Value-Added Tax and Transfer Duty Acts are read together, section 9(15) of the Transfer Duty Act clearly has the effect that transfer duty is levied only if VAT is not applicable. Where "property" (as defined in the Transfer Duty Act) is acquired, the first issue to be settled from a VAT/transfer duty point of view, is whether the supplier of the property is a registered vendor. If it is a VATable supply, VAT *must* be charged (s 7(1) of the Value-Added Tax Act) by the vendor. If not, VAT *cannot* be charged. In principle, the recipient is then liable for transfer duty. Should a contract for the acquisition of property fail to mention anything about tax liability, the fisc will seek to extract VAT from the supplier (registered vendor) if the transaction is VATable, whilst the recipient will be liable for transfer duty if VAT is not payable.

In terms of the Value-Added Tax Act (hereinafter "the Act") vendors are saddled with various responsibilities regarding the charging, assessing and collection of VAT. In other words, the primary obligation for payment of VAT in terms of this Act rests with vendors. Only under exceptional circumstances will the recipient of a taxable supply be burdened with a direct responsibility against the fisc (s 7(1)(b) and (c) read with s 7(2) of the Act).

2 Facts and decision

In *Strydom v Duvenhage* (also reported as *Strydom v KBI* [1996] 2 All SA 194 (NC)) the court had to deal with a situation where transfer duty was mistakenly paid, instead of VAT.

The applicant bought certain farms from the executrix of a deceased estate (first respondent) at a public auction. The deed of sale provided that the seller would be liable for the payment of the advertising costs, the auctioneer's commission and VAT thereon, and that the costs pertaining to the conditions of sale, *transfer duty*, transfer and small disbursements were payable by the purchaser. The estate's bookkeeper was unaware that the deceased had been a vendor and that, in terms of section 53(1) of the Act, the executrix was therefore deemed to be a vendor in respect of the enterprise previously carried on by the deceased in relation to anything done in connection with the termination of the enterprise. In fact, both the applicant and the first respondent were vendors. Applicant had initially paid transfer duty in respect of the sale and claimed the notional input tax available in terms of the Act (s 1 read with s 16) which amounted to much more than the transfer duty paid by him. Soon afterwards the Commissioner for

Inland Revenue (second respondent) informed the parties that, because first respondent was a vendor, VAT and not transfer duty was payable. The transfer duty was refundable (s 20 of the Transfer Duty Act). As it was now common cause that the sale of the farms constituted a "taxable supply", the question arose: Who was responsible for the payment of VAT? The answer to this question depends on the interpretation of section 64(1) of the Act which reads as follows:

> "Any price charged by any vendor in respect of any taxable supply of goods or services shall for the purposes of this Act be deemed to include any tax payable in terms of section 7(1)(a) in respect of such supply; whether or not the vendor has included tax in such price."

Basson J held that section 64(1) only applies to a situation where a vendor *unilaterally* decides on a price, for example a shopkeeper who sells items in his shop at a specified price. Where a price has been arrived at through negotiation, the provisions of the agreement (rather than s 64(1)) must be considered to determine who is liable for the payment of VAT. *In casu* it was held that the contract provided that transfer duty was payable by the purchaser, in other words that the purchaser would pay an additional amount above the purchase price. Therefore, VAT and transfer duty could be equated, so that the purchaser should pay an additional amount of VAT. The court further held that it was unnecessary to rectify the contract to this effect, as it was a tacit term of the contract that, should VAT be payable (instead of transfer duty), the purchaser would be liable for payment thereof in addition to the price.

3 Comment

3 1 "A rose by any name . . ."

As mentioned above, VAT and transfer duty are two different taxes – despite the fact that their bases overlap. The following statements by Basson J, treating these two taxes on par, are therefore worrying:

> "Hereregte is maar 'n vorm van belasting betaalbaar by oordrag van vaste eiendom. Net so is BTW 'n vorm van belasting betaalbaar in plaas van hereregte in die besondere omstandighede van hierdie saak . . ." (33C–D)

> "Dit kon nooit, en was nooit, die bedoeling van die partye dat die verkoper belasting ten aansien van die transaksie moes betaal as die belasting 'n ander naam (BTW) sou hê nie" (34B).

Although Basson J referred to section 9(15) of the Transfer Duty Act (32I–33A 33G), his viewpoint seems to be that VAT is payable if transfer duty is not (33C). As indicated *supra*, transfer duty is payable when VAT is not. The correct emphasis is important. It may have a bearing on how one interprets the Value-Added Tax and Transfer Duty Acts and how one applies the provisions of these Acts in a particular case. In the case of VAT primary liability rests with the vendor; in case of transfer duty, with the recipient. The obligation which the Act places on the vendor has not, it is submitted, received enough attention in this case.

3 2 "A comedy of errors"

The court's decision *in casu* is based on a very narrow interpretation of the scope of section 64(1). It is important to note that the English text of section 64(1) (quoted *supra*) uses the word "any" with reference to "price", "vendor" and "taxable supply". The Afrikaans text uses "'n". It is submitted that "any" normally

has a much wider meaning than "'n" – which can only be translated as "a". The English text, not referred to by the court, was signed and should thus enjoy preference. The court's interpretation of section 64(1) is too narrow and is incorrect in some respects – as is indicated below.

3 2 1 Literal interpretation of the words used

In terms of the so-called literal approach to the interpretation of statutes, words should generally be accorded their ordinary grammatical meaning within the context in which they are used. Deviation is allowed only to avoid absurdity or to resolve ambiguity (see Devenish *Interpretation of statutes* (1992) 26–33). The ordinary grammatical meaning of the word "any" as defined in *The Shorter Oxford English dictionary* (1973) 84(6) refers to "anyone, anybody ... any persons" (see also Black *Black's law dictionary* (1979) 86(6); Hiemstra and Gonin *Trilingual legal dictionary* (1992) 9. It is also discussed in *Asprint Ltd v Gerber Goldschmidt SA Ltd* 1983 1 SA 254 (A) 261B–G). The word "charge" merely means "to state as the price due for" (see *The shorter Oxford English dictionary* 316 11(10); Hiemstra and Gonin 22; Black 211). There are no indications that the legislator intended that section 64(1) should be limited to certain types of transactions only. If it were the intention of the legislator to limit section 64(1) to situations where the price is set by the seller, surely it would have stated this clearly. It would not have used "any price", "any vendor", or "any taxable supply". The court's restrictive interpretation (32D) cannot be correct. A court may not *mero motu* depart from the literal meaning of words to escape the consequences of the application of the statute which is considered absurd or unjust by subjective standards (see Devenish 11).

Although the literal method of interpretation has been subjected to criticism as it does not facilitate a composite and contextual approach, it is nevertheless still applied by the courts (see *idem* 30).

3 2 2 General purport of the Act

The purposive approach (see Botha *Statutory interpretation* (1996) 33; Devenish 35) in terms of which one looks at the general purport of the Act, read as a whole, also suggests a wider interpretation than Basson J would permit. As stated *supra*, the Act places liability and responsibility squarely on the vendor. If the Act generally saddles the vendor with the obligation to account for VAT, surely section 64(1) strengthens (rather than weakens) this notion.

3 2 3 Distinction between unilateral and negotiated prices

According to Basson J, section 64(1) applies only where a vendor sets a price "unilaterally" (32C–D). In support of his view, he cited the example of a shopkeeper selling goods at certain prices in his shop. It is trite law that one of the parties to a contract of sale cannot *unilaterally* set a price (see Mostert, Joubert and Viljoen *Die koopkontrak* (1972) 13; *Westinghouse Brake & Equipment v Bilger Engineering* 1986 2 SA 555 (A) 574B–C).

If it is Basson J's view that only cases involving a haggling about the price imply a price set by negotiation ("onderhandeling"), it conflicts with the general principles of the law of contract. When a shopkeeper sets prices for the goods in his shop, he is merely inviting offers from the public to conclude contracts of sale (see the *locus classicus* in *Crawley v Rex* 1909 TS 1105 1108). His intention to sell at a specific price does not imply that the price is set "unilaterally". When

a member of the public reacts to this invitation, this is construed as an offer to buy the advertised or displayed goods. If the dealer accepts this offer, consensus is reached on all essential terms (including the price) and a contract concluded. "Accepting" a displayed or advertised price does not rule out consensus. Furthermore, if the shopkeeper's "pricing" is merely an invitation to do business, it is indeed an advertisement. Advertisements are covered by the explicit wording of section 65 (see *infra*). Lastly, if a distinction has to be drawn, what criteria or objective test should be used to decide if a price was set "unilaterally" or through "negotiation"?

3 2 4 "[W]hether or not the vendor has included tax in such price"

According to the court (32G), the last part of section 64(1), namely "whether or not the vendor has included tax in such price", suggests that the section cannot apply to "negotiated" prices because this would imply that, regardless of an agreement between the parties that VAT still has to be added to the price, the price is deemed to include VAT. This deduction is incorrect. This phrase was added to section 64(1) by section 36 of the Taxation Laws Amendment Act 136 of 1992. According to clause 36 of the Explanatory Memorandum (W.P.1–'92) this amendment "negatives (*sic*) any suggestion that where tax is payable, it is not recoverable from the vendor because he has not included it in his price". It was clearly not meant to prevent contracting parties from providing for the payment of VAT (in addition to the price), but to prevent a vendor from claiming that he is not liable for VAT where VAT has *not* been included in the (negotiated) price – for instance because of ignorance or absence of thought.

3 2 5 Interaction between sections 64(1) and 65

Section 65 reads as follows:

> "Any price advertised or quoted by any vendor in respect of any taxable supply of goods or services shall include tax and the vendor shall in his advertisement or quotation state that the price includes tax, unless the total amount of tax chargeable under section 7(1)(a), the price excluding tax and the price inclusive of tax for the supply as advertised or quoted by the vendor . . ."

This section imposes a duty on a vendor ("*shall* include tax . . . and the vendor . . . *shall* state that the price includes tax . . .") and a contravention thereof is an offence (s 58 of the Act). Section 65 refers to the *pre-contractual* phase where vendors use advertisements or quotations. It also pertains to shopkeepers and traders advertising by way of "price tickets" and "displays" who, according to the court *in casu*, sell goods at "unilaterally" fixed prices (32D). Basson J's example of a section 64(1) situation accords exactly with what is envisaged by section 65. If "unilateral price fixers" are provided for expressly in section 65 and section 64(1) does not apply where prices are reached by agreement (according to the court), section 64(1) would in effect be redundant. This does not accord with one of the most important presumptions applied in the interpretation of statutes, namely that legislation does not contain futile or meaningless provisions (see Devenish 207; Botha 53).

3 2 6 Contract between the parties

Basson J believed that if VAT is not expressly mentioned in an agreement, this does not necessarily imply that VAT is deemed to be included in the price (32G–H). According to the court the contract (intention of the parties) must then

determine whether VAT is included in the price. It could be argued that section 64(1) was enacted precisely to prevent litigation on this issue.

The Act is based on the New Zealand Goods and Services Tax Act 1985 (GST Act). In the New Zealand *Taxation Review Authority Case 68* (1990) 15 TRNZ 36 47 the following was stated:

> "Generally the parties do not determine when and if GST is charged. It is charged by virtue of the provisions of the Act and not by virtue of the intentions or terms of the contract made by the parties, although the contract is normally a necessary incident of the application of GST to a transaction."

The New Zealand GST Act does not contain a provision similar to section 64(1). However, in *New Zealand Refining Company Ltd v Attorney-General* (1991) 16 TRNZ 685 it was held that *prima facie*, GST is included in a consideration. Once the consideration has been paid or the supply made, the supplier can have no entitlement to seek a further payment if he has forgotten about the tax.

3 2 7 Terminology

It is not clear to what extent the court was familiar with the all-important VAT concepts of "input tax" and "output tax". These terms are not mentioned anywhere in the judgment. Furthermore, the court's use of the phrase "geagte BTW" ("deemed VAT"), instead of "denkbeeldige insetbelastingkrediet" (notional input tax credit) (30C), is worrying.

4 "Much ado about nothing"?

A few relevant issues, not sufficiently addressed by the court, should be mentioned.

First, the first respondent's negligence as regards her VAT status was not canvassed at all. This is difficult to understand in the light of the purport of the Act generally and sections 46(g), 48 and 49 specifically. A non-registered person who should be registered as a "vendor" is charged with the same obligations and liabilities as a vendor (see "vendor" in s 1 of the Act). It seems strange, then, that a vendor who is unaware of her VAT status should be deemed by the court to fall outside the scope of section 64(1). Surely it was primarily the first respondent's ignorance that resulted in the absence of a reference to VAT in clauses 8 and 16 of the contract?

Secondly, it was inferred by the court that the parties tacitly agreed that the applicant (the purchaser) would be liable for VAT, should transfer duty not be payable. Basson J stated (34H):

> "As in die onderhawige geval vir die partye gevra sou gewees het: 'Wat sal gebeur as hereregte nie betaalbaar is nie maar wel BTW?' sal die partye *vanselfsprekend* geantwoord het dat die koper dan BTW moet betaal."

Although such an inference is possible, it is debatable whether it is self-evident ("vanselfsprekend"). If transfer duty was indeed payable (as was mistakenly thought to be the case), applicant would be entitled to a notional input tax credit amounting to R39 317,82 (ie 10/110 × R432 496,06) while paying only R19 624,80 in transfer duty.

He stood to "gain" R19 693,02 under these circumstances. (This loophole, which existed since the introduction of VAT on 1991-09-30, has been closed by s 9(1)(c) of the Taxation Laws Amendment Act 20 of 1994.) If the executrix's VAT status had been known to the applicant, he may not have been prepared to

pay the original price as well as additional VAT. It is furthermore stated that applicant *denied* that he had agreed to pay VAT in addition to the purchase price (33H). It could be argued that the windfall gain in fact persuaded the applicant to buy. Even a conjecture like this may lead to the conclusion that it cannot be said, on a preponderance of probabilities, that it was self-evident that the parties would have agreed that the purchaser was liable for VAT in addition to the agreed amount. Also, the farms were bought at a public auction by applicant's wife as his agent (29I). To what extent could there have been room to read a tacit term into the contract, where neither of the parties was directly involved at the time the contract was negotiated (34J)? It is submitted that these aspects should have been canvassed in more detail.

5 "All's well that ends well"?

The court implied that the end-result would be inequitable if the applicant were to get away "scot free". However, one could ask whether it is equitable to "circumvent" section 64(1) and allow the negligent executrix to add VAT to a price fixed at a public auction. Section 64(1) of the Act is on the statute book specifically to prevent a vendor who has already concluded a contract from charging any further amount as output tax or from denying liability for payment of output tax because VAT was not charged. Section 64(1) is concerned with equity from the point of view of receivers of taxable supplies generally, rather than equity from the point of view of a specific ignorant vendor making taxable supplies. The fact that first respondent stands to lose a fair amount by way of output tax which is deemed to be included in the price paid (following the broad interpretation of s 64(1)), whilst the applicant only loses his windfall gain on the other (the narrow interpretation favoured by the court *in casu*), should not have clouded the issue.

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REGSONSEKERHEID IN DIE LASTERREG IN DIE LIG VAN DIE GRONDWET – DIE PAD VORENTOE?

Bogoshi v National Media Ltd 1996 3 SA 78 (W);
Holomisa v Argus Newspapers Ltd 1996 2 SA 588 (W)

Hierdie twee beslissings van dieselfde afdeling van die hooggeregshof bevestig die uiteenlopende benaderings van die howe tot die lasterreg in die lig van die Grondwet van die Republiek van Suid-Afrika 200 van 1993. Aan die een kant is daar die beslissings, waarby die *Holomisa*-saak aansluit, wat die standpunt huldig dat die lasterreg in die lig van die Grondwet drasties hersien moet word, veral wat die bewyslas en vryheid van spraak (a 15 van die Grondwet) as verweer betref (bv *Mandela v Falati* 1995 1 SA 251 (W); *Jurgens v Editor, Sunday Times Newspaper* 1995 2 SA 52 (W); *Gardener v Whitaker* 1995 2 SA 672 (OK)).

Die teenoorgestelde benadering, waarmee die *Bogoshi*-saak vereenselwig kan word, word weer deur byvoorbeeld die volgende sake gevolg: *De Klerk v Du Plessis* 1995 2 SA 49 (T); *Potgieter v Kilian* 1995 (11) BCLR 1498 (N). Hierdie tweeledige benadering veroorsaak regsonsekerheid wat die appèlhof hopelik in die afsienbare toekoms sal kan besweer.

In *Bogoshi* was die eiser se aksie op die publikasie van 'n aantal na bewering lasterlike artikels in 'n koerant gebaseer. Die aanvanklike verweer was afwesigheid van *animus iniuriandi* (op grond daarvan dat die verweerders *bona fide* en sonder die bedoeling om die eiser te benadeel, gepubliseer het), en alternatief dat die artikels waar en in die openbare belang was. Daarna beroep die verweerders hulle ook daarop dat publikasie nie onregmatig was nie op grond van artikel 15 van die Grondwet wat vryheid van spraak en van die media waarborg. Alternatief maak die verweerders staat op artikel 15 saamgelees met artikel 35(3) wat inhou dat by die vertolking van enige wet of by die toepassing en ontwikkeling van die gemenereg en die gewoontereg, die gees, strekking en oogmerke van die handves van fundamentele regte (hfst 3 van die Grondwet) behoorlik in ag geneem moet word. Volgens die verweerders wysig die toepassing van hierdie twee artikels die bestaande lasterreg met betrekking tot strikte aanspreeklikheid van die pers (*Pakendorf v De Flamingh* 1982 3 SA 146 (A) 157) en die beginsel dat die verweerder 'n volle bewyslas het om onregmatigheid te weerlê (*Neethling v Du Preez; Neethling v The Weekly Mail* 1994 1 SA 708 (A) 770).

Op die veronderstelling dat die handves van fundamentele regte horisontale werking het wat die lasterreg betref, moet volgens regterpresident Eloff (82F–I) in eerste instansie uitgemaak word of die verweerders reg het dat artikel 15 die gemenereg soos vervat in die *Pakendorf*- en *Neethling*-saak wysig. Die belangrikste gesag waarop die verweerders hulle vir hierdie argument beroep, naamlik *Gardener v Whitaker supra*, word deur regter Eloff verwerp (82I–84F), en wel op die volgende drie gronde:

(a) In teenstelling met wat regter Froneman in *Gardener* beslis, moet volgens regter Eloff geen besondere betekenis geheg word aan die feit dat die reg op die *fama*, anders as die reg op vryheid van spraak, nie uitdruklik in die Grondwet vermeld word nie aangesien eersgenoemde reg onder die reg op waardigheid in artikel 10 tuisgebring kan word. (Oor lg aspek bestaan daar, met die uitsondering van die *Potgieter*-saak *supra* 1529–1530, in die algemeen eenstemmigheid: sien die *Gardener*-saak *supra* 690–691; die *Holomisa*-saak 606E; vgl *Mandela supra* 258–259; sien ook Neethling, Potgieter en Visser *Deliktereg* (1996) 20 vn 130; Neethling en Potgieter "Laster: die bewyslas, media-privilegie en die invloed van die nuwe Grondwet" 1994 *THRHR* 516–517; Van Heerden en Neethling *Unlawful competition* (1995) 14 vn 84.)

(b) Tweedens ontken regter Eloff dat die reg op vryheid van spraak dieselfde gewig as die reg op waardigheid (inbegrepe die reg op die goeie naam) dra. Hy steun veral op die beslissing van die konstitusionele hof in *S v Makwanyane* 1995 3 SA 391 (CC) 451 waar president Chaskalson verklaar dat die "rights to life and dignity are the most important of all human rights . . . [W]e are required to value these two rights above all others". (Soos reeds voorheen aangedui, steun ons hierdie standpunt ten volle: Neethling en Potgieter "Aspekte van die lasterreg in die lig van die Grondwet" 1995 *THRHR* 712–713.)

(c) Derdens verskil hy ook van regter Froneman se standpunt dat die gemenereg vryheid van spraak aan die reg op die goeie naam ondergeskik stel (84A). Regter

Eloff verklaar (met verwysing na *Argus Printing and Publishing Co Ltd v Esselen's Estate* 1994 2 SA 1 (A) 25):

> "I believe that our common law was interpreted and applied so as to achieve an equitable balance between freedom of speech and the protection of a person's reputation."

(Ons vereenselwig ons ook met hierdie standpunt dat vryheid van spraak, soos vergestalt in die tradisionele regverdigingsgronde, in die gemenereg in beginsel op gelyke vlak met die reg op die goeie naam staan (Neethling en Potgieter 1995 *THRHR* 711).)

Gevolglik besluit regterpresident Eloff dat die *Gardener*-uitspraak verkeerd is en dat artikel 15 van die Grondwet bygevolg nie die gemenereg wysig met betrekking tot die aanspreeklikheid van die media vir laster nie (84E–F):

> "The right of free speech is subject to the right of a person such as the plaintiff *in casu* to preserve his reputation unblemished. The defendants can only escape liability (if it is found that the statements are defamatory and were published by the defendants) if they can at least establish that what they said was true. It is no answer to say that the articles were published in good faith and without the intention of defaming the plaintiff, and that the articles concern matters of public interest."

In *Holomisa* het 'n politieke amptenaar sy lasteraksie gebaseer op na bewering valse aantygings in 'n koerant aangaande sy optrede as militêre leier van die Transkei. Die verweerder beroep hom, soos in *Bogoshi*, op artikel 15 van die Grondwet wat volgens hom impliseer dat 'n lasteraksie van 'n openbare figuur (amptenaar) net kan slaag indien die eiser bewys dat daar 'n gesindheid analoog aan *animus iniuriandi* (*dolus eventualis* inbegrepe) by hom aanwesig was (met verwysing na die Amerikaanse beslissing in *New York Times Co v Sullivan* 376 US 254 (1964)).

Regter Cameron (597F) aanvaar dat hoofstuk 3 (fundamentele regte) bedoel was om ook 'n rol te speel in geskille tussen onderdane onderling. Gevolglik besluit hy (598E) dat

> "it would be improper to consider the defences available to a defendant in a defamation action without taking into account, as between defendant and plaintiff, the fact that s 15(1) guarantees *every person* 'the right to freedom of speech and of expression'".

Met verwysing na die verweer dat die eiser *animus iniuriandi* aan die kant van die verweerder moet bewys, is regter Cameron (599A–601G) van mening dat, gesien in die lig van die feit dat die pendulum met betrekking tot sekere gevalle van *iniuria* weg van die dader se subjektiewe gesindheid swaai in die rigting van 'n objektiewe beoordeling van regverdiging ("justification") vir sy optrede, bedoelde verweer nie "*on the defamer's state of mind* (animus iniuriandi) [fokus nie], *but on the objective circumstances that make publication lawful*" (599A). Ten einde aan hierdie benadering gevolg te gee, is die regter van oordeel dat die bestaande lasterreg ingrypend deur die nuwe grondwetlike bedeling geraak word (601G–606B) en dat regverdiging in die lig van konstitusionele waardes (in besonder die reg op vryheid van spraak) (606C–613C) uitloop op 'n nuwe regverdigingsgrond (613D–618E), naamlik dat

> "free and fair political activity is constitutionally protected, even if false, unless the plaintiff shows that, in all the circumstances of its publication, it was unreasonably made" (618E).

By die bespreking van die aard van hierdie regverdigingsgrond – wat ons kortweg *politieke privilegie* noem – is regter Cameron in eerste instansie van mening

dat die Amerikaanse benadering in *Sullivan* ontoepaslik en onwenslik vir ons reg is (613G–615F), veral omdat "it gives wholly insufficient weight to an individual's right of reputation" (615B) (vgl ook ons bespreking oor die hoë premie wat die mens op sy goeie naam plaas in 1995 *THRHR* 712–713). Sy regverdiging vir die erkenning van die nuwe regverdigingsgrond verwoord regter Cameron soos volg (616I–617B):

> "Our constitutional structure seeks to nurture open and accountable democracy. Partly to that end, it encourages and protects free speech and expression, including that practised by the media. If the protection the Constitution affords is to have substance, there must in my view be some protection for erroneous statements of defamatory fact, at least in the area of 'free and fair political activity'. These considerations led the Australian High Court to adopt a standard of reasonableness as a justification for publishing false defamatory statements. The High Court imposed on the defendant the burden of proving entitlement to constitutional protection. As I have already indicated, the structure of the South African Constitution seems to me to indicate that the plaintiff, who seeks to inhibit speech in the area of free and fair political activity, should bear the onus of proving that the defendant has forfeited entitlement to constitutional protection."

Met verwysing na die posisie in Australië en die oplossing wat daar aan die hand gedoen is om die konflik tussen vryheid van spraak en die reg op die goeie naam te beredder, verklaar regter Cameron voorts (617C–E):

> "That resolution, it seems to me, lies in affording constitutional protection to one who exercises his or her right of free speech by publishing even false defamatory statements in the area of 'free and fair political activity', unless the plaintiff shows that the publisher acted unreasonably. In such a case the publisher would forfeit entitlement to constitutional protection.
>
> The reasonableness standard offers a powerful tool for resolving the difficulties inherent in protecting reputation while at the same time giving recognition to the role the Constitution accords free speech and expression. It will not be reasonable to publish most untrue statements of fact. Only due inquiry and the application of reasonable care will mark such conduct out for protection."

'n Aanknopingspunt vir die toepassing van hierdie beginsel van redelikheid in die Suid-Afrikaanse lasterreg, vind regter Cameron in die gesag wat nalatigheid (redelike man-toets) as aanspreeklikheidsvereiste vir laster steun (bv *Hassen v Post Newspapers Pty Ltd* 1965 3 SA 562 (W); Burchell *The law of defamation in South Africa* (1985) 193; sien ook ons bespreking in 1995 *THRHR* 713–714). (Dit spreek vanself – en Cameron R propageer dit dan ook nie – dat nalatigheid en onregmatigheid nie hiermee gelykgeskakel word nie.) Ongelukkig wou die regter hom nie uitlaat oor definitiewe en maklik toepasbare beginsels wat die grense van "politieke privilegie" as nuwe regverdigingsgrond omlyn nie (619G–620C).

Die uiteenlopende benaderings van die *Bogoshi*- en *Holomisa*-saak onderstreep die noodsaak dat die appèlhof so spoedig moontlik duidelikheid moet bring met betrekking tot hierdie belangrike aspekte van die lasterreg. Dat dit inderdaad die taak van die appèlhof is, is in die onlangse uitspraak van die konstitusionele hof in *Du Plessis v De Klerk* 1996 5 BCLR 658 (CC) par 64 bevestig.

Ter oorweging deur die appèlhof wil ons graag die volgende gedagtes opper. Alhoewel ons geen twyfel het nie dat die handves van fundamentele regte wel indirekte horisontale werking op die lasterreg het (soos ook duidelik uit die twee sake onder bespreking blyk; sien ook a 8 van die 1996-Grondwet van die Republiek van Suid-Afrika Wetsontwerp), behoort die appèlhof na ons mening nie

geredelik te aanvaar dat die bestaande lasterreg, wat die kwessies van bewyslas, regverdigingsgronde en skuldlose aanspreeklikheid van die media betref, deur die handves gewysig is nie. In die besonder behoort nie sonder meer aanvaar te word dat die bestaande regverdigingsgronde onvoldoende ruimte aan die media bied om die openbare inligtingsbelang te bevredig nie, veral nie waar die uitbreiding daarop gemik is om die publikasie van *onware* beriggewing te regverdig nie – soos regter Cameron met betrekking tot die politieke terrein aan die hand doen. Soos ons vroeër reeds gesê het, kan die media waarskynlik deur middel van ondersoekende joernalistiek hul vryheid steeds voldoende binne die grense van die bestaande regverdigingsgronde uitleef (Neethling en Potgieter "Openbare belang as selfstandige verweer by laster" 1993 *THRHR* 326; 1994 *THRHR* 516).

Indien daar na die mening van die appèlhof in die lig van die Grondwet egter wel 'n behoefte aan verandering van die lasterreg bestaan, sou die volgende oorweeg kon word (vir 'n meer uitvoerige bespreking sien Neethling en Potgieter 1995 *THRHR* 711–713):

(a) Eerstens sou, wat die bewyslas betref, die status *ante quo* die *Neethling*-saak herstel kon word. Dit beteken dat die eiser die volle bewyslas dra om die skuldoorsaak (laster as *iniuria*) te bewys, maar dat die verweerder 'n *weerleggingslas* het om die vermoede van onregmatigheid (en dié van opset) te weerlê (sien Neethling, Potgieter en Visser 333–334; Neethling, Potgieter en Visser *Neethling's Law of personality* (1996) 153–154).

(b) Tweedens sou, wat die strikte aanspreeklikheid van die media weens laster betref, *nalatigheid* eerder as basis vir aanspreeklikheid aanvaar kon word (sien *Neethling's Law of personality* 181–182 vn 354; Burchell *Principles of delict* (1993) 184; vgl ook *Holomisa* 617F–618C).

(c) Derdens, wat die voorgestelde regverdigingsgronde "media privilegie" (Neethling en Potgieter 1994 *THRHR* 514–516) en "politieke privilegie" (sien hierbo) betref – wat op die oog het dat ook die publikasie van *onware* bewerings in die openbare belang, en daarom geregverdig mag wees – moet die aangeleentheid met die grootste omsigtigheid benader word; noukeurige riglyne moet daarom vir die begrensing daarvan neergelê word en behoort nie, soos regter Cameron doen, bloot op 'n vae "redelikheidsmaatstaf" gesteun te word nie. Ten minste die volgende faktore, benewens die oorwegings wat gewoonweg by die verweer waarheid en openbare belang in ag geneem word om te bepaal of die betrokke bewering in die *openbare belang* is (*Neethling's Law of personality* 166–167), behoort oorweeg te word (vir 'n vollediger bespreking sien Neethling en Potgieter 1993 *THRHR* 324–325):

Die redelikheid al dan nie van die stappe wat deur die verweerder gedoen is om die waarheid al dan nie van die publikasie te bepaal (anders gestel: die publikasie moet sover as wat redelikerwys moontlik is, met die waarheid ooreenstem) (vgl ook *Holomisa* 617E); die erns van die aangeleentheid waarop die laster betrekking het; die dringendheid van die kommunikasie aan die publiek; die feit dat die inligting van 'n betroubare bron afkomstig is; 'n onbehoorlike motief aan die kant van die verweerder; die noodsaaklikheid, nie alleen van die feit van publikasie nie, maar ook van die wyse waarop dit gedoen is; en die omvang van verspreiding en die mark waarop die publikasie gemik is.

Nieteenstaande herhaling wil ons ten slotte die vertroue uitspreek dat die appèlhof die moontlike hersiening van die lasterreg in die lig van die Grondwet

baie versigtig sal benader. Daar moet in gedagte gehou word dat as die deur vir wysigings oopgemaak word wat die reg op die goeie naam onredelik teenoor vryheid van spraak inperk, dieselfde ontwikkeling moeilik ten aansien van ander persoonlikheidsregte, soos dié op privaatheid, die eer, die gevoelslewe en die identiteit gestuit sal kan word.

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ACTIONS FOR WRONGFUL BIRTH AND WRONGFUL LIFE

Friedman v Glicksman 1996 1 SA 1134 (W)

1 Introduction

In this case an action for wrongful birth was allowed, but that for wrongful life was unsuccessful.

The action for wrongful birth is one instituted by the parent(s) of a disabled child against a medical doctor, genetic consultant or other person involved. It is based on the ground that the latter's omission to inform the parent(s) of the possibility that the unconceived or unborn child may be disabled, deprived them of the opportunity to decide whether to have the child or not. The action for wrongful life is, on the other hand, instituted by the disabled child, usually against a medical doctor, because the latter's omission to inform the parents about the disability or the failure (duly) to perform a medical procedure such as amniocentesis, deprived the parents of their choice whether or not they wanted the child. The action is based on the fact that, but for the doctor's omission to inform his or her parents, the disabled child would not have been born.

2 Facts of the case and decisions taken by the court

The plaintiff alleged that, when she was pregnant, she consulted the defendant, a specialist gynaecologist, to advise her about the risk that she might be carrying a potentially abnormal and/or disabled *foetus*. They agreed that the plaintiff wished to terminate her pregnancy if there was any risk greater than the normal of the unborn child being born abnormal and/or disabled. After carrying out certain tests, the defendant advised the plaintiff that there was no greater risk than the normal of having an abnormal and/or disabled child, and that it was quite safe for her to proceed to full term to give birth. This advice, however, was erroneous, and the child was born disabled.

The plaintiff alleged that the defendant had acted negligently in giving his advice, and this negligence was a breach of duty of care, and also a breach of contract. The contract was entered into when the parties agreed that the defendant would advise the plaintiff of the risk of her being pregnant with a potentially abnormal and/or disabled infant, so that she could make an informed

decision on her own behalf, and on behalf of the unborn child, whether to terminate the pregnancy.

The plaintiff claimed first of all in her personal capacity, for expenses of maintaining and rearing the child, and for all future medical and hospital treatment and other special expenses (the action for wrongful birth). Secondly, in her capacity as mother and natural guardian of the child, the plaintiff claimed, on behalf of the child, general damages and future loss of earnings (action for wrongful life).

The defendant excepted to the particulars of claim, as disclosing no cause of action cognisable in South African law. He argued that it would be against public policy to enforce this contract, as it would encourage abortion and thus be inimical to the right to life enshrined in section 9 of the Constitution of the Republic of South Africa, Act 200 of 1993, and also to the generally recognised sanctity accorded by society to life and the process by which it is brought about.

The judge held that there was no substance in this submission as it is in contrast to the Abortion and Sterilization Act 2 of 1975, which states that an abortion may be procured where a serious risk exists that the child to be born will suffer from a physical or mental defect of such a nature that he or she will be irreparably seriously disabled (s 3(c)). The legislature therefore recognised that there are certain instances where it is in the interests of the parents, family and even society that a *foetus* not be allowed to develop into a disabled person with consequential financial and emotional problems. The mother is given the right to decide whether she would rather terminate the pregnancy, or continue to give birth to a disabled child. The judge held that an agreement between a pregnant woman and her doctor that he would advise her whether there was a greater risk than normal that she might have a potentially abnormal or disabled child so that she might make an informed decision on whether or not to terminate the pregnancy, is not *contra bonos mores* but sensible, moral and in accordance with modern medical practice. She is seeking to enforce her right in terms of section 3(c) of Act 2 of 1975 to terminate her pregnancy if there is a serious risk that her child might be seriously disabled (1138H–J).

The defendant submitted that the plaintiff had no cause of action in delict as the disabled child's condition was not caused by any act or omission on his part but was caused by a congenital defect arising at the time of conception. The court held that the defendant was employed to prevent, by way of giving proper medical advice, the birth of a disabled child. Because of his negligence, a disabled child was born, causing the plaintiff to incur considerable expense. The court further held that, if a doctor incorrectly informs a pregnant patient that she is not at a greater risk than normal to have an abnormal or disabled child, or fails to inform her that she is at a greater risk, when she reasonably requires such information in order to make an informed choice whether to terminate such pregnancy, he is delictually liable to her for the damage she has suffered by giving birth to an abnormal or disabled child. The fault element of the delict is to be found in the foreseeability of harm which the doctor-patient relationship gives to the doctor. If proper disclosure is not made, depriving the patient of her option, the damage she suffers by giving birth to a disabled child are caused by the fault of the doctor, provided that she would have terminated the pregnancy if the information had been made available to her. The claim for wrongful birth was thus successful.

As far as the claim for wrongful life is concerned, the court held that the mother, as mother and natural guardian of her abnormal or disabled child, cannot claim general damages and loss of future earnings on behalf of her child from the doctor who agreed to advise her, when she was pregnant, whether she was at a greater risk than normal of having an abnormal or disabled child, so that she could make an informed decision whether or not to terminate her pregnancy, and who incorrectly informed her that she was at no greater risk than normal.

The court held, first of all, that there can be no claim in contract, as the child's legal personality only commences at birth and an agent cannot claim on behalf of a non-existent principal, and secondly that the agreement cannot be a contract for the benefit of a third party, since the third party could only accept the alleged benefit (ie the termination of pregnancy) when it was no longer possible (after she was born) (1140F–H).

After discussing a number of American and English cases, the court held that no cause of action existed in delict either, first of all because the doctor owed no duty to the child to give the child's mother an opportunity to terminate the pregnancy, and secondly because it was impossible to calculate damages, as the only measure that can be used in calculating damages is the difference in value between non-existence and existence in a disabled state. No criteria can exist in law to establish such a difference. The plaintiff submitted that the proper measure of damages is that the child must be compensated for having to live in a disabled state. The court held that this is completely contrary to the measure of damages permitted in delict (1143A–B).

The court correctly held that although it recognised the *nasciturus* fiction as applied by Hiemstra J in *Pinchin v Santam Insurance Co Ltd* 1963 2 SA 254 (W), it was not necessary to apply it in this case, since the disabled child's action arose, not when the pregnancy was not terminated, but when she was born.

The court furthermore held that it would be contrary to public policy for a court to decide that it would be better for a person not to have the unquantifiable blessing of life rather than to have such life albeit marred by disability. It is thus contrary to public policy to say that it would be better for a person not to be alive rather than to live a disabled life.

Lastly the court held that to allow such a cause of action, would open the way of a disabled child to sue his or her parents because, having being informed of the possibility that they may have a disabled child, they nevertheless made an informed decision to have the child.

3 Discussion

The recognition of the action for wrongful birth is to be welcomed. The parent(s) of a disabled child must be compensated for damages incurred as a result of the birth of a disabled child, because a medical doctor, genetic consultant or other person involved failed to inform them of the possibility that their unborn child may be disabled, or wrongly informed them that the child was normal, depriving them of the opportunity to decide whether to have the child or not.

It is, however, far more difficult to recognise an action for wrongful life. First of all, life, in whatever form (disabled eg) is, legally speaking, not regarded as damage. To determine the presence of damage, the condition of the plaintiff before birth must be compared to the disabled condition after birth – no life must

therefore be compared to a disabled life. The court correctly held that this is impossible to do. Public policy decrees that any form of life, whether disabled or not, is better than no life. It is difficult to conceive of a condition of no life, as no life exists where there has never been any life.

There is, however, a new philosophy that has come to the fore that life is not always preferred to no life. It all depends on the circumstances of each case and the degree of disability. There are a few examples of conditions where pain and misery are such that no life is deemed to be preferable to life. (An example is the Lesch-Nyhan syndrome, which is a genetically-orientated-enzyme deviation marked by serious mental illness and motorical defects. Persons suffering from this syndrome usually eat their own lips and fingers, are hostile towards other persons and react to them by biting, hitting and spitting.)

Another problem is the calculation of damages, as the plaintiff must be placed in the position he or she would have been in had no negligent act occurred, in other words, in a condition of "no life". The person is alive (although disabled) and it is thus impossible to place him or her in a condition of no life. According to most courts, including Goldblatt J in the case under discussion, it is impossible to compare no life with a disabled life (eg *Becker v Schwarz* (1977) 400 NYS 2d 119 AD, (1978) 413 NYS 2d 895; *Parker v Chessin* (1977) NY A2d 80). Those courts which have allowed this action, have decided that the child must be compensated for his or her disability, without comparing no life to a disabled life – as the plaintiff in the case under discussion proposed (eg *Curlender v Bio-Science Laboratories* (1980) Cal App 3d 811, 165 Cal Rptr 477).

Another problem is the duty of a doctor towards an unborn child. The doctor has a duty to inform the *parents* of an unborn child that they may have a disabled child so that they may decide whether they would like to keep the child. What duty does the doctor have towards the unborn child? In the United States of America, a doctor has a duty to take care of a *foetus* in the third trimester of pregnancy (*Hartman v Jackson* (1978) Pa CP Phil, as referred to by Werthmann *Medical malpractice law: how medicine is changing the law* (1984) 118). In England, the position is regulated by section 1(2)(a) of the Congenital Disabilities (Civil Liability) Act of 1976, which provides that for a tort to be recognised, a plaintiff need not have been conceived or born when it was committed against him or her. A doctor therefore has a duty towards an unborn child to ensure that the unborn child is not prejudiced. He or she may then even have a duty to prevent or end life with a genetically-inherited defect. Should a doctor, however, have a duty towards an unborn child to prevent that he or she be born disabled, the child may have the right to be born "as a whole and functional human being". No such right can, however, be recognised, as no objective standard exists to determine what is understood by "whole and functional". What is "whole and functional" for one person is not necessarily the same for the next person (Louw "'Wrongful life': 'n aksie gebaseer op die onregmatige veroorsaking van lewe" 1987 *TSAR* 209). In the case under discussion, Goldblatt J thus correctly decided that the doctor owed no duty to the child to give the child's mother an opportunity to terminate the pregnancy.

In conclusion, Goldblatt J correctly decided that, to allow such an action for wrongful life would open the way for a disabled child to sue his or her parents, where they made an informed decision to have a disabled child. This would be immoral and untenable.

It therefore seems highly unlikely that an action for wrongful life will ever be recognised in South African law.

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DIE BORGKONTRAK, AKSESSORITEIT EN VERJARING

Bulsara v Jordan and Co Ltd (Conshu Ltd) 1996 1 SA 805 (A)

1 Agtergrond

Daar is in die verlede lank veronderstel dat stuiting van verjaring teen 'n hoofskuldenaar ook stuiting van verjaring teen die borg tot gevolg het (sien *Cronin v Meerholtz* 1920 TPD 407; *Volkskas Bpk v The Master* 1975 1 SA 69 (T)). Die effek van die beslissings was die volgende: Indien 'n krediteur vonnis neem teen die hoofskuldenaar maar nie teen die borg nie, bevind die borg hom in die onbenydenswaardige posisie dat hy (borg) vir 'n periode van 30 jaar, die verjaringstydperk vir 'n vonnisskuld, teenoor die krediteur aanspreeklik bly. De Wet het lank verkondig dat hierdie standpunt 'n onbillike toedrag van sake daarstel (sien De Wet en Van Wyk *Suid-Afrikaanse kontraktereg en handelsreg* (1992) 124 350–351). In *Randbank v De Jager* 1982 3 SA 418 (K) bevind regter Baker na 'n deeglike ondersoek van die ou bronne dat die standpunt van De Wet korrek is. Die beslissing is ook gevolg in *Bank of Orange Free State v Cloete* 1985 2 SA 859 (OK).

In *Jordan and Co Ltd v Bulsara* 1992 2 SA 457 (OK) onderskei regter Mullins *Randbank v De Jager* egter van die aangeleentheid waaroor hy moes beslis. Hy merk ook op dat hy nie met die bevindings van regter Baker in *Randbank* saamstem nie. Die verweerder (Bulsara) appelleer egter teen hierdie uitspraak na die appèlafdeling. Dié hof het uiteindelik, of so het dit gelyk, die geleentheid gekry om oor die korrektheid van die *Randbank*-saak te beslis.

2 Feite

Die feite van die onderhawige saak was kortliks soos volg (807H–808G): (1) Op 29 Augustus 1985 het Bulsara hom teenoor die krediteur verbind as borg en medehoofskuldenaar vir sekere skulde van die hoofskuldenaar. (2) Op 20 Maart 1987 het die krediteur in die landdroshof dagvaarding teen die hoofskuldenaar uitgereik en beteken vir goedere verkoop en gelewer gedurende September tot Desember 1986. In appèl teen die uitspraak van die landdros het die Oos-Kaapse Provinsiale Afdeling op 23 Mei 1989 uitspraak gegee ten gunste van die krediteur. (3) Op 21 Mei 1990 het die krediteur in die landdroshof aksie ingestel teen Bulsara as borg en medehoofskuldenaar. Die dagvaarding is op 28 Mei 1990 beteken. (4) Op 14 Maart 1991 het Bulsara by wyse van 'n spesiale pleit die verweer geopper dat die krediteur se eis verjaar het. (5) Op 29 Augustus 1991 bevind die landdros dat verjaring wel plaasgevind het en handhaaf die spesiale pleit. Die landdros het verder bevind dat die oorspronklike skuld op 20 Maart 1987 opeisbaar en betaalbaar geword het, naamlik toe dagvaarding teen die hoofskuldenaar uitgereik en beteken is, op welke datum verjaring 'n aanvang

teen die hoofskuldenaar geneem het. Die landdros bevind voorts dat die vonnis op 23 Mei 1989 teen die hoofskuldenaar nie 'n novasie van die oorspronklike skuld tot gevolg gehad het nie en ook nie 'n nuwe eisoorsaak geskep het nie. (6) Die hof *a quo* moes beslis of die vonnis van 23 Mei 1989 teen die hoofskuldenaar 'n nuwe skuld daarstel waarvoor die hoofskuldenaar aanspreeklik is, en indien wel, of Bulsara as borg aanspreeklik is vir hierdie nuwe skuld.

3 Beslissing van hof *a quo*

Die hof *a quo* bevind dat die loop van verjaring teen die hoofskuldenaar kragtens artikel 15(1) van die Verjaringswet 68 van 1969 gestuit is met die uitreik en betekening van die dagvaarding op die hoofskuldenaar op 20 Maart 1987; dat die vonnis van 23 Mei 1989 'n nuwe eisoorsaak teen beide hoofskuldenaar en borg (Bulsara) daarstel; en dat met betekening van die dagvaarding op Bulsara die nuwe skuld nog nie verjaar het nie. Die hof *a quo* handhaaf die appèl van die krediteur met koste.

4 Argumente in appèl

Namens die appellant is geargumenteer dat die bewoording van die borgakte nie wyd genoeg is om 'n vonnisskuld van die hoofskuldenaar teenoor die krediteur in te sluit nie. Voorts is betoog dat die bevinding ten aansien van hierdie submissie afhang van die behoorlike uitleg van die borgakte.

Die respondent se argument was tweeledig. Ten eerste argumenteer hy dat die eis van die krediteur teen Bulsara nie gebaseer is op die borgkontrak vir goedere verkoop en gelewer nie maar gegrond is op die borgakte vir 'n vonnisskuld wat 'n nuwe eisoorsaak daarstel. Tweedens argumenteer hy dat selfs al het die eisoorsaak gebaseer op die borgkontrak ten aansien van goedere verkoop en gelewer verjaar, die krediteur se huidige aksie teen Bulsara gegrond is op 'n onafhanklike nuwe eisoorsaak wat gebaseer is op die vonnisskuld van die hoofskuldenaar. Daardie eisoorsaak het op die vroegste eers op 23 Mei 1989 ontstaan en die dagvaarding teen Bulsara is op 28 Mei 1990 uitgereik – gevolglik kon die skuld nog nie verjaar het nie.

5 Regsvrae

Die eerste vraag wat die hof moes beantwoord, is of die vonnisskuld 'n *nuwe eisoorsaak* daarstel. Tweedens moes beslis word wat die regsverhoudinge tussen die hoofskuldenaar, die krediteur en die borg is. Die vraag handel spesifiek met die kwessie van *aksessoriteit* en moes beantwoord word ten einde die derde vraag, wat met verjaring handel, te kon beantwoord. Laastens moes die hof beslis of die eis van die krediteur teen die borg *verjaar* het.

6 Uitspraak

(a) Nuwe eisoorsaak Appèlregter Joubert bevind dat ten einde die vraag te beantwoord of daar vanweë die vonnis teen die hoofskuldenaar 'n nuwe eisoorsaak ontstaan het, daar uitsluitlik na die uitleg van die borgakte gekyk moet word (809B–809H). Hy verwys vervolgens na die belangrikste bepalings in die borgakte, wat soos volg lui:

> "I, the undersigned, Hammant Bulsara, do hereby interpose and bind myself as surety and co-principal debtor for the due and punctual payment of all amounts or any obligations which may *now or in the future* become due by Bulsara Outfitters

> in respect of goods sold and delivered by the creditor to the debtor or in respect of interest on overdue payments, legal costs or for *any other causes of debt arising out of such transactions*" (my kursivering).

Na uitleg van die bepalings van die borgakte kom die hof tot die gevolgtrekking dat die borgakte baie wyd gestel is en dat die partye bedoel het dat die borg hom aanspreeklik stel vir enige skuld wat sou voortvloei uit die transaksies van verkoop en lewering van goedere, wat ook insluit 'n vonnisskuld van die hoofskuldenaar vir goedere verkoop en gelewer (809H–J).

(b) Aksessoriteit Regter Joubert bevind dat die volgende regsverhoudings tussen die partye bestaan. In die eerste plek bestaan daar 'n regsverhouding tussen die krediteur en die hoofskuldenaar, synde die partye tot 'n koopkontrak vir goedere verkoop en gelewer. Hulle is die enigste partye tot hierdie kontrak wat aanleiding gee tot 'n kontraktuele skuld, ook bekend as die hoof- of oorspronklike skuld.

Die tweede regsverhouding is die kontraktuele ooreenkoms tussen krediteur en borg. Die borgkontrak is egter aksessoor tot die hoofkontrak tussen die krediteur en die hoofskuldenaar. Die hof verklaar tereg soos volg:

> "By signing the deed of suretyship as surety and co-principal debtor and by his renunciation of the exceptions of excussion, division and cession of action, Bulsara did not in law become a party to the principal contract between the creditor and the principal debtor [810C–D] . . . The position here is that the principal contract and the suretyship contract are two separate and distinct contracts existing side by side in respect of the same debt, viz the original debt. They give rise to two distinct obligations on the part of the principal debtor and Bulsara in respect of the original debt" (810D–F).

Die hof bevind dat die krediteur 'n keuse gehad het om beide partye gesamentlik in dieselfde aksie aan te spreek of om hulle afsonderlik in verskillende aksies aan te spreek. Die krediteur het egter besluit om eers die hoofskuldenaar en daarna Bulsara aan te spreek. Die hof bevind voorts dat daar geen verpligting op die krediteur was om beide die hoofskuldenaar en Bulsara gesamentlik op 20 Maart 1987 aan te spreek nie.

(c) Verjaring Die laaste vraag wat die hof moes beantwoord, is of die twee skulde uit onderskeidelik die hoofkontrak en die borgkontrak verjaar het al dan nie. Die hof bevind dat artikel 12(1) van die Verjaringswet bepaal dat verjaring 'n aanvang neem sodra die skuld opeisbaar is. Die betekenis van die woorde skuld en opeisbaarheid word dan uitgelê (810G–811A).

Appèlregter Joubert beslis dat ingevolge artikel 11(d) van die Verjaringswet die termyn van verjaring vir die hoofskuld drie jaar is. Toe vonnis op 23 Mei 1989 ten gunste van die krediteur teen die hoofskuldenaar verkry is, het die verjaringstermyn van 30 jaar toepaslik geraak ten aansien van hierdie eisoorsaak. Die verjaringstermyn ten aansien van skuld deur 'n borgkontrak verseker, is kragtens artikel 11(d) ook drie jaar. Hierdie eis het op 23 Mei 1989 ontstaan en dagvaarding is op 28 Mei 1990 uitgereik en op Bulsara beteken, wat binne die voormelde periode van drie jaar val. Die hof kom tot die gevolgtrekking dat die pleit van verjaring daarom nie kan slaag nie.

Ten laaste wys die hof daarop dat dit vir doeleindes van sy uitspraak onnodig is om te beslis oor die korrektheid van *Randbank v De Jager* 1982 3 SA 418 (K) en *Bank of Orange Free State v Cloete* 1985 2 SA 859 (OK) (811D–E).

7 Kommentaar

Die effek van hierdie uitspraak is dat die beslissing in *Randbank v De Jager* steeds goeie gesag is; die appèlafdeling het dus nie van die geleentheid gebruik gemaak om die korrektheid daarvan te bevraagteken nie. Dit is egter insiggewend dat appèlregter Joubert bevind dat ten spyte van die feit dat die skuld waarvoor die borg homself verbind het 'n vonnisskuld is, ten opsigte waarvan die verjaringstermyn 30 jaar is, die borg se aanspreeklikheid na drie jaar verjaar. By implikasie stem die appèlhof dan tog saam met die *Randbank*-saak aangesien daar beslis is dat verskillende verjaringstermyne ten opsigte van die hoofskuldenaar en die borg geld.

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It follows that I am necessarily of the view that the legal convictions of the community have not yet reached the stage where they can sanction the dissolution of a marriage on paper, as it were, by way of application on motion. Public policy demands that a Court should consider granting a divorce only after it has had the opportunity of hearing the evidence of at least the plaintiff in an action claiming such relief. If it should feel the need for further, or corroborative evidence, it must be free to call for it (per Van Zyl J in *Ex parte Inkley and Inkley* 1995 3 SA 528 (C) 537).

BOEKE

HET VERTROUWENSBEGINSEL EN DE CONTRACTUELE GEBONDENHEID

deur JAN M SMITS

Handelsedisie Gouda Quint Arnhem 1995; xvii en 363 bl

Inleiding

Smits het in 1995 te Leiden gepromoveer met 'n proefskrif getiteld *Het vertrouwensbeginsel en de contractuele gebondenheid. Beschouwingen omtrent de dogmatiek van het overeenkomstenrecht*. Smits bewys hom as 'n baie grondig en wyd belese outeur. In nege hoofstukke behandel hy naas die wil, belofte, vertroue en *causa* as grondslag vir kontraktuele gebondenheid, temas soos die redelikheid en billikheid, die bronne van verbintenisse, die totstandkoming van die ooreenkoms, verryking, saakwaarneming, die *samenhang-criterium* (wederkerigheid) en die eensydige prestasiebelofte (skenking en toesegging).

In die eerste plek is dit interessant dat Smits die vertroue as grondslag vir gebondenheid as "te weinig dogmatisch" verwerp. Hy praat van die "Janusgesig" van die vertrouensbeginsel:

> "Het vertoont aan de ene zijde een aansprekend en daarmee praktisch legitimerend beginsel, aan de andere een gelet op de dogmatische eisen zo algemene maatstaf dat iedere (en dus geen enkele) gebondenheid ermee kan worden verklaard" (341).

Smits sien die vertrouensbeginsel as 'n onnodige omweg om tot gebondenheid te kom. Die proefskrif laat hom dan ook – in sy eie woorde (339) – lees as 'n langgerekte betoog omtrent die *gewenste* grondslae van die kontrakte- en orige verbintenissereg. Die grondslag vir kontraktuele gebondenheid vind Smits dan in die *causa*-leer, waaraan hy 'n eie invulling gee en wat omskryf word as die wederkerige samehang-kriterium of die wederkerige afhanklikheid van die prestasies (233–251).

In die tweede plek is dit interessant dat Smits se opvattings geheel en al ingebed is in sy eie regsvindingsteorie, wat hy in besonderhede in die eerste twee hoofstukke uiteensit.

Hierdie regsvindingsteorie kan 'n nuwe impuls gee aan die wedersydse bestudering deur Suid-Afrikaanse en Nederlandse juriste van mekaar se reg. Immers:

> "Saamwerking van Suid-Afrikaanse juriste met regsgeleerdes uit ander lande waar die reg ook uit die Romeins-Hollandse Reg gegroei het en waar daardie reg nou nog wetenskaplik beoefen word, is volgens ons oordeel die aangewese weg" (1937 *THRHR* 2).

Smits se beskouings aangaande die grondslag van kontraktuele gebondenheid sal binnekort geresenseer word deur Abas in die *Nederlands Tijdschrift voor Burgerlijk Recht* (*NTBR*) en deur Hartkamp in die *Weekblad voor Privaatrecht, Notariaat en Registratie* (*WPNR*). In hierdie boekbespreking kom die regsvindingsteorie aan die orde. Ter wille van duidelikheid is dit die beste om met die onderskeid tussen eenvoudige en moeilike gevalle te begin.

Eenvoudige en moeilike gevalle

Die onderskeid tussen *easy* en *hard cases* kom van die Amerikaanse regsfilosoof Dworkin. Volgens sy insig is 'n *easy case* 'n geval wat direk onder die toepassingsgebied van 'n duidelike regsreël val en wat aan die hand van dié regsreël beslis kan word. Daar is spráke van *hard cases* wanneer (a) daar geen regsreël te vinde is wat die geval kan beslis nie; (b) regsreëls bots; of (c) dit onduidelik is wat regsreëls vereis. Ook in dié gevalle het een van die gedingvoerende partye 'n *reg* op 'n beslissing in sy guns (die sg *rights thesis*) en die ander party 'n verpligting om daardie reg te eerbiedig (Dworkin *Taking rights seriously* (1994) 81 85 ev). Om dié reg te vind en vas te stel, vereis 'n afweging van beginsels (*idem* 114). Verskillende regters kan tot uiteenlopende bevindinge kom; dit misken egter dat een antwoord die beste is, naamlik die een wat in ooreenstemming met *the soundest theory of law* is. Dáárdie antwoord is dan die juiste oplossing (*the right answer*).

Daarmee is die sogenaamde *heuristiek* (die wyse waarop die regter sy beslissings vind) en *legitimasie* (die wyse waarop die regter sy beslissings motiveer vir andere) as 't ware inmekaar geskuif. In die proses van afweeg word die juiste antwoord in 'n enkele deurslaggewende regsbeginsel gevind en daarmee is die antwoord juis en dus gelegitimeer.

Die onderskeid verworpe?

Smits hou vas aan die Dworkiniaanse onderskeid tussen eenvoudige en moeilike gevalle. Hy verwerp nietemin laasgenoemde se siening van die rol van regsbeginsels. Daar sal nie net in 'n moeilike geval op regsbeginsels teruggeval moet word nie; ook by die gewone regstoepassing speel hulle 'n rol "al was het maar om impliciet de aanvankelijk aan de regel gehechte betekenis bevestigd te zien" (69). Die funksie van beginsels is ook dat hulle regsreëls 'n ander inhoud kan gee, kan herinterpreteer en herskryf (Nieuwenhuis *Drie beginselen van contractenrecht* (1979) 39 praat van 'n wisselwerking tussen regsbeginsels en regsreëls). As dit die geval is – en dit word hier aangeneem – is 'n belangrike konklusie dat beginsels die betekenis van regsreëls ook kan wysig en ontken. Die reël, wat *steeds* verduidelik moet word, kan nooit 'n alles-of-niks-karakter besit nie. Die reël het die beginsel nodig om begryp te word en het eweseer as die regsbeginsel 'n element van afweging in hom (*ibid*).

Die afweging wat Smits ten doel het, is kennelik dié van 'n regsreël teen beginsels, of as 'n mens wil, van die een regsreël teen die ander aan die hand van beginsels. Laasgenoemde stem ooreen met wat Dworkin betoog. Die eerste vorm, as dit is wat Smits bedoel om te sê, 'n regverdige kritiek teen Dworkin. Indien die betekenis van 'n onduidelike reël en die vraag of hierdie reël wel 'n reël van die positiewe reg is, gesien word in die lig van regsbeginsels wat daaraan ten grondslag lê (Dworkin 107 110–11 115–116), dan bepaal regsbeginsels of daar sprake van 'n *easy case* is of nie. Dit beteken dat beginsels by die beslissing betrek moet word al dan nie daar waar die betrokke beginsels bepaal

of hulle by die beslissing betrokke moet wees al dan nie. Dit is dan óf 'n sirkelredenasie, óf dusdanig dat die stelling sigself ontken.

"Reëlgevalle" en "problematiese gevalle"

Smits maak van 'n skema gebruik wat na dié van Dworkin lyk. Hy onderskei tussen "reëlgevalle" of standaardsituasies enersyds en "problematiese gevalle" andersyds. In 'n standaardsituasie (of reëlgeval) gaan *heuristiek* en *legitimasie* hand aan hand. In die oorgrote meerderheid gevalle kom dit voor of die reël geskik is en sonder meer toepasbaar op die betrokke geval te wees (74): 'n Standaardsituasie is dus in die regsreël neergelê waaroor, wat die juiste oplossing betref, in beginsel nie langer getwis hoef te word nie. Die regsreël is 'n gestandaardiseerde belange-afweging (75–76). Die omstandighede van die geval hoef nie 'n rol te speel by die bepaling van regverdiging vir die beslissing nie. Legitimasie geskied eenvoudig deur verwysing na die reël.

Maar wanneer die omstandighede van die geval te veel verskil van dié in die reëlgeval, kan nie daarop teruggeval word nie (*ibid*). Dan kom 'n mens by die problematiese gevalle. Volgens Smits speel omstandighede van 'n meer feitelike aard in dié geval 'n rol by die bepaling van die juiste oplossing. Hierin kom die invloed van die sogenaamde *probleemdenken* tot uiting: die feite, nie die regsreëls nie, bepaal watter resultaat juis is. Dit is die heuristiese funksie van die feitelike omstandighede van die geval, wat ooreenstem met die ideë van die "topica" en die hermeneutiek.

Volgens Smits is dit egter verkeerd om die oplossing ook in die feite te *legitimeer*. Daarvoor is die toevallige feitekonstellasies te talryk en uiteenlopend. Ter legitimasie van die beslissing dien na 'n vaster grondslag verwys te word. Daarom moet aanknopingspunte gevind word by die leerstukke van die burgerlike reg, "de vaste eilanden in de zee van het recht" (72–73). In dié leerstukke is die kennis en ervaring van eeue opgeneem.

Reëls en leerstukke

'n Leerstuk (*rechtsinstitut*) moet gesien word as 'n min of meer sistematiese en samehangende geheel van gevalle met bybehorende reëls. Die leerstukke bevat 'n

> "arsenaal aan reeds besliste en met elkaar in verband te brengen gevallen en geven daarmee een schat aan kennis omtrent een rechtvaardige wijze van recht doen".

Deur middel van gevalsvergelyking kan 'n mens in problematiese gevalle tot so 'n regverdig as moontlik oplossing kom (73). Die vergelyking kan verder gaan as die *hic et nunc*. Ook uit *casus*-posisies wat in verwante regstelsels beslis is – en stellig nog meer uit die regsgeskiedenis – kan argumente geput word. Ter wille van duidelikheid: met "argumente" bedoel Smits argumente ten gunste van die legitimasie, nie die heuristiek nie. Om die juiste beslissing te vind, is volgens Smits immers meer 'n kwessie van die afweging van feitelike omstandighede van die geval.

Kritiek op Smits (en Dworkin)

Smits se regsvindingsleer skep in 'n bepaalde opsig verwarring. Weliswaar maak Smits 'n onderskeid tussen die problematiese geval en die standaardsituasie (reëlgeval), maar hy is nie heeltemal konsekwent in hierdie onderskeiding nie. Eweas vir Dworkin, ontstaan daar vir Smits 'n probleem met betrekking tot die afgrensing tussen *easy* en *hard cases*.

In die problematiese geval, dit wil sê die geval waar daar nie 'n enkele standaardsituasie voorhande is nie, voldoen reëls nie en moet op leerstukke teruggeval word. Maar die leerstuk word gesien as 'n versameling van samehangende, deur die hele regsgeskiedenis heen besliste gevalle waar daar *altyd êrens 'n standaardsituasie aanwesig is*. Is Smits se gedagte dat dit nuttig is om te soek na 'n standaardsituasie terwyl dit – per definisie – nie teenwoordig is nie? Die antwoord is uiteraard ontkennend. Met die problematiese geval bedoel Smits die geval waarin *skynbaar* nie by voorbaat 'n standaardsituasie aan te wys is nie. Die werklike onderskeid is derhalwe tussen *verborge* standaardsituasies (problematiese gevalle) en *evidente* standaardsituasies (reëlgevalle, regsreëls) (78–79).

Hieruit volg dat die onderskeid nie eenvoudig te maak is nie. In die daaglikse regspraktyk is daar geen sprake van so 'n tweedeling nie. 'n Mens kan die ryke kasuïstiek wat die regspraak kenmerk op verskillende maniere beskou. In die eerste plek is dit moontlik om die klem te lê op die afbakening tussen vanselfsprekende en verborge standaardsituasies. Sekerlik bestaan daar ook minder ooglopende standaardsituasies, maar met 'n bietjie soek- of dinkwerk kan hulle darem tog gevind word. Gevolglik bestaan daar drie kategorieë gevalle en dus twee afgrensingsprobleme, naamlik tussen *evidente* situasies en situasies wat betreklik eenvoudig "ontdek" kan word, én tussen situasies wat betreklik eenvoudig ontdek kan word en verborge situasies. Dit lê dan meer voor die hand – en dit strook meer met die realiteit – om te aanvaar dat hierdie indeling van die kasuïstiek prakties nie gemaak kan word nie. Die oordeel aangaande vanselfsprekendheid of verborgenheid is nie van nature gegee nie maar hang in hoë mate van die juris se evaluasie af.

Vranken gaan uit van 'n geleideliker oorgang van eenvoudige na moeilik*er* gevalle (Asser-Vranken *Algemeen deel* (1995) nrs 85 88). Hy onderskei vyf groepe wat elk hul eie tipe probleme ken. So is daar die situasies waarin die toepaslike norm gegee is en op sigself nie omstrede is nie, maar nie sonder meer geskik is vir die omstandighede van die konkrete geval nie. Gevalle kan ook problematies word indien die feitelike omstandighede regstreeks onder die reël val, maar die toepaslike norm nie meer toepaslik is nie. Daar moet besin word, in die lig van veranderde of veranderende maatskaplike opvattings, of aanpassing van die norm moontlik is. Vervolgens is daar die situasies waar die norm aangetas is as gevolg van ontwikkelings op samehangende gebiede van die reg (nr 95), asmede wat Vranken noem die "a-tipiese" gevalle: daar is geen reël van die positiewe reg waaronder hulle presies val nie (nr 97). Laastens is daar die gevalle waar 'n toepaslike norm of leerstuk wel tot die regsisteem behoort (nrs 99–100). Namate hierdie probleme toeneem, neem die moeilikheidsgraad toe. Dit lyk vir ons na die mees realistiese insig. Gevalle is nie óf moeilik óf eenvoudig nie, maar daar is sprake van 'n glyende skaal.

Altyd êrens aanwesige standaardsituasies

Die tweede punt van kritiek teen Smits gaan oor die klem wat hy op die "altijd ergens aanwezige standaardsituaties" plaas. Soos almal het Smits eerbied vir die prinsiepe dat gelyke gevalle gelyk behandel moet word en ongelyke gevalle ongelyk na die mate van hulle ongelykheid. (Vgl ook Fikentscher *Methoden des Rechts bd IV* (1977) 203–205 wat die *Gleichgerechtigkeit* ten grondslag lê aan sy "*Fallnorm*-teorie".) Soos reeds aangedui, geld dit vir Smits nie net in die sogenaamde reëlgevalle (*evidente* standaardsituasies) nie, maar ook in problematiese gevalle wat vergelyk moet word met dié in die leerstukke ontwikkelde

standaardsituasies. Uiteraard ontstaan dan in elke konkrete geval, moeilik of maklik, steeds die vraag of dit gelyk is aan die vroeër besliste geval al dan nie. Vir die beantwoording van hierdie vraag gee Smits geen antwoord nie. Sy boodskap vir die regter in die regsvindingsproses blyk so daaruit te sien: daar is altyd een geval te vind wat lyk na dit wat voorhande is; meestal is daar selfs talle. Welke 'n mens kies, maak nie saak nie: wat 'n mens ook al kies, is altyd goed want of die geval in 'n relevante opsig lyk soos die een wat voorhande is, stel 'n mens self vas. *Die keuse legitimeer sigself.* Die "juiste" oordeel waarvan Smits praat, kom dan wel in 'n willekeurige soeklig te staan.

Dit beklemtoon nog meer Smits se visie op die reg, wat saamgevat kan word as "vir elke gevalsituasie sy eie reël" (65). Aangesien elke geval hom tot in die oneindige kan bly voordoen, bly *alle* norme wat ooit geformuleer is, van belang. Nou lyk dit of Smits twee stellings tegelykertyd stel wat onverenigbaar is. Enersyds: daar is altyd 'n standaardsituasie aanwesig. Iedere gevalsituasie het hom al eenmaal voorgedoen: geen gevalsituasie met bypassende norm is derhalwe nuut nie. Andersyds: die versameling gevalsituasies neem voortdurend in aantal toe. 'n Nuut opgestelde reël is innig verbind met die nuwe omstandighede wat hulle in 'n gegewe geval voorgedoen het. Die ou norm maak nooit plek vir die nuwe nie, want 'n nuwe norm word geformuleer *naas* die ou een *vir 'n ander geval.* Die feit dat 'n norm al of nie *hic et nunc* gebruik word, lewer geen bewys dat hierdie norm al of nie "juis" is nie. Sy waarde lê daarin dat hy *op enige tydstip* gebruik sou kon word (65–66). Is Smits se stellings teenstrydig? Die antwoord is nee. Die ambivalensie val weg wanneer 'n mens veronderstel dat nuwe norme (regsreëls) ontstaan deur herskikkings (verfynings of juis veralgemenings) van die gevalle wat reeds plaasgevind het (standaardsituasies). 'n Dergelike sienswyse stem sterk ooreen met dié van die *common law* en die manier waarop dit ontwikkel. Dit laat die vraag wat ook die Engelse reg in verleentheid bring, onopgelos. Kontinentale regstelsels kan verwys na 'n "beginperiode", te wete die tydperk waarin die *Corpus iuris civilis* geresipieer is. In die aanneming van destyds is ons reg in 'n sekere sin gelegitimeer. Die *common law*-regter legitimeer tradisioneel sy beslissings in vroeëre beslissings in vergelykbare gevalle, wat op hul beurt eweneens gelegitimeer geword het deur verwysings na presedente. So ontstaan 'n *regsressus ad infinitum*, wat in die Engelse leer somtyds "opgelos" word deur 'n verwysing na die *immemorial custom of the realm* of *general immemorial usage*, waarmee "dit" alles 'n aanvang sou geneem het (David en Brierly *Major legal systems of the world today* 385 nr 349).

Die vraag aan Smits is: vanaf watter moment in die geskiedenis kan 'n mens sê: "tans het elke geval voorgekom"? Daar moet iewers 'n oomblik uit te wys wees tussen die daeraad van die mensdom en die oomblik vanaf wanneer dit geld. In geval hierdie moment bestaan, beteken dit logieserwys dat daarvóór 'n periode was waarin nog nie alle denkbare standaardsituasies voorgekom het nie. Dit val nie in te sien hoekom in daardie periode geheel nuwe feitelike gevalsituasies voorgekom het maar tans nie meer nie.

Standaardsituasies en *Fallnormen*

Die derde onderwerp van kritiek sluit aan by die voorafgaande. Smits wyk af van die *Fallnorm*-teorie van Fikentscher wat betref die versoenbaarheid van die altyd êrens teenwoordige standaardsituasie met nuwer norme. Fikentscher los die probleem op deur 'n onderskeid te maak tussen die objektiewe reg en die positiewe

reg. Die positiewe reg is die reg wat na die regsbronne herlei kan word. Die objektiewe reg is die versameling van alle in 'n bepaalde regsorde benodigde reëlgevalle (*Fallnormen*), dit wil sê die uit die verlede, hede en toekoms. Daartoe behoort derhalwe ook "diejenige Fallnormen, die bisher zur Lösung von Fällen noch nicht benötigt werden" (Fikentscher 218). Deur middel van dié konstruksie is Fikentscher in staat om te aanvaar dat "nuwe" *Fallnormen*, dit wil sê hedendaagse en toekomstige, tot onlangs nog nie benodigde *Fallnormen*, reeds bestaan in die objektiewe reg. Vir die positiewe reg is hulle nuut, dog nie vir die objektiewe reg nie.

By Smits daarenteen verwys die aanwesige, dus bestaande standaardsituasies – meer in ooreenstemming met die gewone taalgebruik – na hede en verlede maar *nie* ook na die toekoms nie. As egter enersyds altyd êrens 'n standaardsituasie aanwesig is en andersyds die reël 'n bepaalde standaardsituasie beskryf, dan is in die sienswyse van Smits die leerstuk te sien as 'n reserwe van altyd aanwesige, alhoewel verborge *regsreëls*. Daarmee het die ook deur Smits gemaakte onderskeid tussen reëlgevalle en problematiese gevalle geheel en al verval. Hy sê dus eintlik: daar is altyd 'n regsreël aanwesig. Aldus heg Smits wel veel waarde aan die regstradisie en die reëls wat daarin te vind is. In dié sin vorm Smits se visie die amper volmaakte spieëlbeeld van Dworkin se leer: Dworkin se regter het altyd te make met beginsels, dié van Smits steeds met reëls.

Koning Rex

Ten slotte lyk dit sinvol om die wyse lesse van Lon Fuller in gedagte te hou. Fuller beskryf en analiseer in sy *The morality of law* (1969) "eight ways to fail to make law" aan die hand van die lotgevalle van koning Rex, wat nie daarin geslaag het om enige reg (goeie of slegte) te skep nie. Die riglyne van Fuller om die ongelukkige situasie van koning Rex te voorkom, kan in die eerste plek gesien word as wetgewingsriglyne vir die wetgewer. Maar koning Rex was wetgewer en regter tegelyk. Die riglyne kan sonder moeite toegepas word op die regsvinding deur die regter.

Smits kom onses insiens met 'n aantal van hulle in konflik. Dit betref in die besonder algemeenheid, bekendmaking, terugwerkende krag en frekwente wysiging van regsreëls.

Die algemeenheids*desideratum* vereis dat 'n mens werklik tot *reëls* kom sodat dit nie nodig is om elke geval *ad hoc* te beslis nie (Fuller 46). Wil 'n regsreël 'n reël wees, dan moet hy ten minste *algemeen* wees. Dit is kenmerkend vir 'n reël om in meer as een geval toepassing te kan vind. Die beslissing van die regter in 'n konkrete geval moet vatbaar wees vir veralgemening (Asser-Vranken nr 91; Wiarda *Drie typen van rechtsvinding* (1988) 34; Drion "Functies van rechtsregels in het privaatrecht" 1973 *Speculum Langemeijer* 52). Regverdigheid moet soms wyk voor die algemeenheid van die reg wat nie altyd billik *in concreto* kan wees nie (Scholten *Verzamelde geschriften I* (1949) 274 312).

Die teendeel van die algemeenheids*desideratum* van Fuller is die regsvindingsleer van Smits. Dié is saam te vat in die volgende drie "pylers": (a) daar is altyd iewers 'n regsreël aanwesig; (b) elke gevalsituasie het sy eie reël; en (c) die ou norm maak nooit plek vir die nuwe nie, aangesien die nuwe norm geformuleer word langs die ou een vir 'n ander geval. Die kombinasie van hierdie "pylers" blyk 'n vrypas te gee om in elke klein afwyking 'n afsonderlike reëlgeval te ontdek. Daardeur ontstaan 'n oneindige versnippering van die reg aan die hand van alle êrens ooit vorige besliste gevalle. Die gevaar bestaan dat die reg

vervorm word tot "[t]hat wilderness of single instances" (Tennyson, aangehaal deur Hahlo en Kahn *The South African legal system and its background* (1973) 215). Ofskoon Smits toegee dat die geval sy normstellende krag verloor wanneer die inkorporasie van die geval in die reël volledig is, erken hy nie dat die versnippering, wat die gevolg is van sy leer, regsonsekerheid skep en om dié rede bevraagtekenbaar is nie. Inteendeel meen Smits dat die regspraktyk gedien word deur 'n so groot as moontlike arsenaal van reëls, beginsels en gevalle waaruit geput kan word. Die keuse van die regter uit alle Nederlandse en buitelandse vonnisse van die hede en die verlede "kan op geen enkele wijze worden ingeperkt" (66).

Wat die bekendheids*desideratum* betref, meen Nieuwenhuis dat ongeskrewe reg "bestaat en kan worden gekend". Dit kan geken word deur die regter maar ook deur die "justisiabeles" in die samelewing. Daar is reëls wat, hoewel hulle nie gepubliseer is nie, nietemin tot die "publieke domein" behoort. Hulle is sulke "voor de hand liggende" norme dat hulle toeganklik is vir almal wat oor 'n redelike insig beskik (Nieuwenhuis *Confrontatie en compromis* (1992) 12). Indien hierdie toeganklikheid as regverdiging moet dien vir die gebruik van ongeskrewe reg, wat per definisie nie tevore afgekondig word nie, dan is dit wel 'n bietjie skraal. Die regverdiging vereis later 'n nogal vrye interpretasie van wat "voor de hand liggend" was. Dit is dan asof Smits se verborge regsreëls as *evidente* regsreëls geïnterpreteer word.

So kom 'n mens op die terugwerkende krag. Dit is nie noodsaaklik dat die ongeskrewe reg vóór die beslissing in die vorm van regsreëls moet bestaan het nie, soos Nieuwenhuis wél betoog. In *hard cases*, soos Dworkin beskryf (81), is die ongeskrewe reg aanwesig in erkende regsbeginsels en juis nie in regsreëls nie. Regsreëls is verander by Smits, eweas by Dworkin en hulle ontstaan vir bepaalde nuwe gevalle. Hulle word van *hard case* tot *easy case*, van verborge standaardsituasie (problematiese geval) tot *evidente* standaardsituasie (reëlgeval). By Dworkin verander daar ook niks in die reg waaroor die een party beskik om sy hofsaak te wen nie. 'n Mens sou kon stel dat die objektiewe reg in sy vorm wysig maar nie inhoudelik nie.

Dikwels is dit ook so dat die maatstawwe wat die regter vir die eerste keer hanteer, miskien nie reeds as reg bestaan het nie maar nietemin as regsopvattings, morele standaarde, sedes of gesigspunte aanwesig was (vgl Scholten 52–53 57). Kenbaar is en was die gebruikte maatstawwe as algemene of reeds lang aanvaarde opvattings. Hierdie insig ontken nie die terugwerkende krag van ongeskrewe reg nie. Dit verplaas die probleem na die kenbaarheid in die voorfase van die reg en doen 'n beroep op 'n sekere *Vorverständnis* by die burgers.

Dit is nie duidelik hoe Smits dit sien nie. Ook Smits se leerstukke bevat so 'n element van langdurige ervaring en aanvaarding. Maar behoort die verborge standaardsituasies tot die objektiewe reg? Waarskynlik wel. Immers: word daar 'n nuwe reël geformuleer, bly volgens Smits die ou reël bestaan vir 'n ander geval. Die waarde van die ou reël bestaan daarin dat dit nog eens aangewend kan word. Omdat alle gevalle hulle egter al voorgedoen het volgens Smits se insig, kan die nuwe gevalle slegs verfynings en uitbreidings van vorige gevalle wees. Dit beteken dat 'n spesifieke feitekompleks wat eens met die een standaardsituasie gelykgestel is, tans met 'n ander een gelyk geskakel word. Met ander woorde: die reël is nie meer dieselfde nie. Wat is dan die waarborg dat nie elke geval as 'n ander reëlgeval gesien word nie? Indien die regsreël van geval tot

geval kan verander, skep dit regsekerheidsprobleme en "[a] law that changes every day is worse than no law at all" (Fuller 37).

Konklusie

Smits pleit tereg vir aansluiting by die sisteem en die bestaande leerstukke. Dit kan vir oorsigdoeleindes ten goede strek. Maar met die uitleg wat Smits aan reëls en leerstukke gee, word oorsigtelikheid nie gedien nie. Die waarde van Smits se teorie lê veral daarin dat hy meer as vele ander aanknoping vind by die regsgeskiedenis én die ervaringe van buitelandse reg, by die leerstukke van die reg wat hulle deur die eeue gevorm het (hy praat van die "eeuwigheidskarakter der leerstukken").

Baie gevalle het inderdaad êrens in die wêreldgeskiedenis wel al voorgekom. Uit die ervaring daarmee en uit die wysheid waarmee juriste van weleer dié gevalle beoordeel het, kan meer gehaal word as wat 'n mens teenswoordig geneig is om te dink. Van die nut van bestudering van buitelandse reg en regsvergelyking word ons vandag steeds meer oortuig; die rykdom van die regsgeskiedenis word dikwels verontagsaam. Vir diegene wat hulle besig hou met die onderlinge bestudering van die Suid-Afrikaanse en die Nederlandse reg is dit jammer, want hier vervleg hedendaagse reg, regsgeskiedenis en regsvergelyking.

Smits se prikkelende en oortuigende boek is nie net 'n waardevolle aanwins vir die regsteorie nie, maar ook vir die regsvergelyker bied dit interessante perspektiewe. Op Smits se opvattings aangaande die vertrouensbeginsel en die grondslag van kontraktuele gebondenheid is hierbo slegs kortliks ingegaan. Ter afsluiting word volstaan met die opmerking dat ook op hierdie gebied Smits hom bewys het as 'n outeur wat 'n wesenlike bydrae tot die ontwikkeling van die reg lewer.

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WORKPLACE LAW
by JOHN GROGAN
Juta Cape Town Wetton Johannesburg 1996; xx and *258 pp*
Price R115,00 (excluding VAT) (soft cover)

In some ways the advent of a new labour law dispensation is akin to a gold rush. New and experienced diggers line up to be first in the field. John Grogan, an old hand, was first past the post with his work, *Workplace law.*

It is, as he explains, a replacement for his two well-known works, *Riekert's Basic employment law* and *Collective labour law.* Professor Grogan marries individual labour law with collective labour law in the context of the new Labour Relations Act of 1995. The style of the new book mirrors that of its prede-

cessors. It is clear and incisive and written with a journalistic flair (a happy glimpse of a previous career) and an eye for detail. It highlights infelicities in the new Act, raises some challenging questions and explores the past in search of solutions. This adds up to a highly readable text which initiates readers into the new system by leading them from the known to the new. This is done in such a way that first-time readers will also be eased into the new system with sufficient background for them to appreciate the origins of the new system.

The jurisprudence of the former system was largely based on a small and seemingly fragile peg – the concept of the unfair labour practice. The unfair labour practice which conferred on the labour courts their equity jurisdiction gave the courts wide ranging powers to remedy such actions as unilateral amendments of contracts of employment. Now the unfair labour practice has been regulated to a schedule, where it survives only because of the imperative of society to retain a measure for ensuring equity in employment (including affirmative action) until a comprehensive employment equity statute sees the light of day. This is in progress (see The Department of Labour's Employment and Occupational Equity: Policy Proposals in *GG* 17303 of 1996-07-01).

Grogan alludes to the implications of the absence of an unfair labour practice jurisdiction in the context of unilateral implementation of amendments to a contract of service. An employee who refuses to acquiesce in an employer's change may be dismissed by notice at common law. Under the previous dispensation the labour court would investigate the nature of the amendment and interdict an amendment or restore the *status quo* and, if necessary, reinstate the employee. The determination would be preceded by an evaluation of the fairness of the amendment and other relevant considerations.

The new remedy is for the employee to refuse to accept the change and, if the employer dismisses him or her, to complain to a bargaining council or the Commission for Conciliation, Mediation and Arbitration (the CCMA). Here the dispute will be mediated and if necessary arbitrated. Grogan suggests that "he or she will in all probability be reinstated" (28). Reinstatement is the preferred remedy but it follows only if the dismissal was unfair. In deciding on the fairness of the dismissal, the arbitrator will be obliged to make a value judgment which will include an assessment of the merits of the unilateral amendment.

Some amendments may be regarded as fair, and employees who refuse to accept them will do so at their peril. The best approach may be to follow the advice "obey now, grieve later". This approach may not be suited to the individual, however, as this kind of dispute may be mediated but not arbitrated. Industrial action will be available only if enough employees are concerned about the change. Industrial action may be an entirely inappropriate response but it may be the only one available.

Later on in the work, Grogan explores miscellaneous unfair labour practices and revisits unilateral changes in contracts of employment (143). Here he points out that the Labour Appeal Court has sanctioned such changes if there are sound commercial reasons for them and if there has been negotiation in good faith.

In a cross-reference to chapter 20 (wrongly indicated at 28 as a reference to ch 19) the author indicates an intention to deal with unilateral implementation in the context of a strike. What was intended was a discussion of the concept of an automatic *status quo* order like that which prevailed to some degree under earlier Industrial Conciliation Acts and which has resurfaced in the new Act.

Unfortunately this section seems to be missing. The reader can, however, read the relevant section, section 64(5), as an excerpt from it appears on page 212.

The death of an employee results in the termination of the contract of employment. The death of the employer, where the employer is a natural person, is more problematical. The author states baldly (62) as he did in *Riekert's Basic employment law*, that the death of either the employee or the employer terminates the contract. There may be a good case to be made out for this proposition but it does not reflect our law at present. The death of the employer, if the employer is a natural person, is not regarded as terminating the contract of employment in Roman-Dutch law. The statement should, at least, have been qualified.

The sections on dispute resolution are adequate as an introduction but will require more attention once the Labour Court and the CCMA begin functioning. The index is unfortunately inadequate given the depth of the debate, a debate which is often conducted in footnotes. Clearly the author must have agonised about which excerpts from the Act to include. Assuming that, as always, the twin considerations of space and costs were decisive, he has reproduced the most important sections in an annexure.

All in all a useful, enjoyable book. The description on the cover, that it is "[d]esigned as a student text and a work of first reference for employers, union officials and practitioners", is amply borne out by the presentation and treatment of the law.

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HUMAN RIGHTS AND AFRICAN CUSTOMARY LAW
by TW BENNETT
Juta Cape Town Wetton Johannesburg 1995; xli and 174 pp
Price R120,00 (VAT incl)

In this book, Professor Tom Bennett, an eminent scholar in the area of customary law, discusses the impact that the interim Constitution may have on customary law. He explores the manifold conflicts between the African legal tradition and human rights, suggesting means for the resolution of these conflicts and identifying circumstances in which one regime should prevail over the other.

The book is the first in a series on human rights and constitutional law to be published under the auspices of the Community Law Centre of the University of the Western Cape.

As mentioned in the preface, the book is based on an assumption that South Africa is now bound to respect the cultural tradition of those of its people who live according to an African way of life. Such respect implies that state courts may recognise and apply customary law, the legal regime associated with African culture. Once this obligation is acknowledged, conflicts with the fundamental

rights contained in chapter 3 of the 1993 Constitution are bound to arise, for the values encoded in customary law on the one hand and the Constitution on the other, frequently contradict one another.

In chapter 1, which deals with fundamental rights and the African cultural tradition, the author points out that although it is often claimed that fundamental rights represent a universal, and therefore a culturally neutral, value system, they betray their origins in Western law and philosophy at every turn. Rules had no particular value *per se* for African societies. Social harmony was achieved through other means.

Of major importance is chapter 2 in which customary law as a constitutional right is discussed in terms of section 31 of the Constitution which provides:

> "Every person shall have the right to use the language and to participate in the cultural life of his or her choice."

On the basis of this section, supplemented with the authority of international and comparative foreign law, the author argues that an argument can be made that the state is now obliged to recognise and apply customary law in its courts.

Chapter 3 covers the relationship between customary law and the fundamental rights and deals with the contradiction between customary law and fundamental rights, the application of human rights in the private sphere, the interpretation of the fundamental rights, the limitation clause, judicial review of customary law and legislative amendment of customary law.

The application and nature of customary law are discussed in chapter 4. The discussion is divided into the application of customary law, the nature of customary law, the "official" version, social change, and the "invented tradition". In the last part the authenticity of customary law is questioned.

Chapter 5, which deals with traditional leaders, provides a discussion of indigenous government and colonial intervention, legislative functions of traditional rulers under the Constitution and executive and judicial powers of traditional leaders.

Chapter 6 considers the position of women and more specifically patriarchy, resistance and reform, women in the "official" version of customary law, implication of the equality clause and the limits of judicial review under the equality clause.

In chapter 7 an overview is given of the rights of the child with particular emphasis on proprietary and delictual capacity, contractual capacity and *locus standi*, custody and guardianship, adoption, discipline and initiation, as well as legitimacy.

The importance of a uniform code of marriage in South Africa is argued in chapter 8, and the effect of the Constitution on the formation of the marriage, spousal relations, divorce and succession, is examined.

The last chapter deals with property rights and land under the following headings: the problem of describing customary conceptions of property, powers of traditional leaders, individual rights, the constitutional right to property, restitution and redistribution of land.

The content of the book is well structured and reproduced in a concise manner. It contains a case index, bibliography, abbreviations and references to the Constitution.

In conclusion – this is an extremely well written book which will no doubt prove its worth to government officials, law students and the legal profession. Indigenous law teachers should seriously consider including this book in their curriculum.

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PERSONEREGBRONNEBUNDEL/LAW OF PERSONS SOURCE BOOK

deur RA JORDAAN en T DAVEL

Tweede uitgawe; Juta Kaapstad Wetton Johannesburg 1996; xxix en 506 bl

Prys R145,00 (sagteband)

Die eerste uitgawe van hierdie werk het in 1992 verskyn en was bedoel om saam met Van der Vyver en Joubert se *Persone- en familiereg* gebruik te word (sien oor die eerste uitgawe De Jong 1993 *THRHR* 527). Behalwe vir uittreksels uit Engelse beslissings, was die eerste uitgawe uitsluitlik in Afrikaans. Intussen het *Personereg: studentehandboek* en *Law of persons: students' textbook* onderskeidelik in 1994 en 1995 uit die pen van dieselfde outeurs verskyn. Die nuwe baadjie van *Personeregbronnebundel/Law of persons source book* kan toegeskryf word aan die feit dat die werk aangepas moes word om saam met hierdie twee handboeke gebruik te word en die feit dat die werk nou (amper) heeltemal tweetalig is.

Die bundel bestaan uit 'n voorwoord, inhoudsopgawe, lys van belangrikste handboeke aangehaal, vonnisregister, lys van aangehaalde statute en sewe hoofstukke.

Terwyl die inhoudsopgawe van die eerste uitgawe slegs die nommers van die bronne aangedui het wat onder 'n sekere afdeling aangehaal word en glad nie bladsynommers bevat het nie, bevat die inhoudsopgawe van die tweede uitgawe slegs bladsynommers. Dit is baie makliker om dit op hierdie manier te gebruik. Trouens, in die tweede uitgawe word die bronne glad nie genommer nie.

In die register van aangehaalde statute word by elke wet in vetskrif aangedui watter wetsartikels in die geheel aangehaal word (met bladsynommers). Wetsartikels waarna net in die aantekeninge verwys word, word in gewone druk aangedui (met bladsynommers). Dit is ook 'n verbetering op die eerste uitgawe waarin dit nie duidelik was watter artikels van die betrokke wet aangehaal word nie (sien De Jong 1993 *THRHR* 528).

Die hoofkenmerk van die bronnebundel is die tweetaligheid daarvan. Die voorwoord, inhoudsopgawe, aangehaalde statute en aantekeninge verskyn in beide Afrikaans en Engels. Die feite van aangehaalde sake verskyn ook in beide Afrikaans en Engels. Uittreksels uit beslissings wat in Engels gelewer is, verskyn

onveranderd terwyl uittreksels uit Afrikaanse beslissings ook in Engels vertaal is. Hierdeur word veral studente wat glad nie Afrikaans magtig is nie, tegemoetgekom.

In die eerste hoofstuk word hoofstuk 3 van die Grondwet van die Republiek van Suid-Afrika 200 van 1993 aangehaal met 'n baie bondige aantekening oor die invloed van die menseregtehandves op die personereg.

Die ander hoofstukke volg min of meer dieselfde indeling as *Personereg: studentehandboek* en *Law of persons: students' textbook.* Die feit dat opskrifte tot in die sesde vlak genommer is, is verwarrend (bv 4.3.1.5.2.2).

Vonnisse wat tot en met November 1995 gerapporteer is, en wetgewing wat tot en met die eerste week in November 1995 goedgekeur en gepubliseer is, is vir insluiting oorweeg. Heelwat van die ouer vonnisse (bv *Adams v Adams* (1882) 2 SC 24; *Govu v Stuart* (1903) 24 NLR 440; *Jooste v Jooste* 1938 NPD 212; *Wells v Dean-Willcocks* 1924 CPD 89) word in die tweede uitgawe nie meer in die geheel aangehaal nie. Daar word bloot in die aantekeninge na hierdie vonnisse verwys. Aan die ander kant is ook heelwat onlangse vonnisse in die tweede uitgawe ingesluit. Een daarvan is die resente *B v S* 1995 3 SA 571 (A) wat handel oor die ongetroude vader se toegangsbevoegdhede tot sy buiteegtelike kind. Dit val egter vreemd op dat hierdie beslissing nie in die geheel aangehaal word nie, maar *F v L* 1987 4 SA 525 (W) en *Van Erk v Holmer* 1992 2 SA 636 (W) wel.

Die volgehoue ontwikkeling en hervorming waaraan die personereg onderworpe is, word duidelik weerspieël in die keuse van bronne. Daarvan getuig die feit dat 'n hele hoofstuk afgestaan is aan die personereg en grondwetlike hervorming. Die insluiting van die Wet op Voogdy 192 van 1993 aan die begin van die hoofstuk oor die invloed van ouderdom op status is sinvol. Dit bly dikwels agterweë met die gevolg dat die begrip "voog" vir studente onduidelik is. Daarbenewens word studente gewys op die tendens in ons reg om weg te beweeg van juridiese differensiasie wat op geslag gebaseer is (385). Hierdie tendens word geïllustreer deur onder andere te verwys na die Vierde Algemene Regswysigingswet 132 van 1993 en die Wet op Voorkoming van Gesinsgeweld 133 van 1993.

Die aantekeninge plaas die aangehaalde bronne in perspektief binne die breë personeregvakgebied. Daar word ook soms in die aantekeninge aanknopings gevind by vraagstukke wat nie noodwendig in die aangehaalde bronne aangespreek word nie.

Personeregbronnebundel/Law of persons source book is 'n volledige, gebruikersvriendelike werk wat vir beide dosent en student (veral studente wat glad nie Afrikaans magtig is nie) van groot nut behoort te wees. Dit is 'n onontbeerlike aanvullende handboek vir studente wat *Personereg: studentehandboek* of *Law of persons: students' textbook* as voorgeskrewe handboek gebruik.

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**BUTTERWORTHS LEGISLATION SERVICE/
BUTTERWORTHS WETGEWINGSDIENS
RESTITUTION OF LAND RIGHTS ACT 22 OF 1994/
WET OP HERSTEL VAN GRONDREGTE 22 VAN 1994**

Butterworths Durban 1995; loose-leaf format

Price R68,40

This loose-leaf publication is a further one in the series of the Butterworths Legislation Service. The review copy contained only the Afrikaans versions of the Restitution of Land Rights Act 22 of 1994 as well as the (complementary) Expropriation Act 63 of 1975. Also included are tables of cases and indexes.

The contents of the remainder of the volumes in the series are in both English and Afrikaans. I suspect that the review copy is, therefore, incomplete. If not, I would urge the publishers to include the text of the legislation in both languages.

In the light of the currency of the Restitution of Land Rights Act it was timeous to publish it in this format. In view of the importance of this Act it is suggested that the regulations and (some of the) decisions of the Land Claims Court also be included at some stage.

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What erotic material I may choose to keep within the privacy of my home, and only for my personal use there, is nobody's business but mine. It is certainly not the business of society or the State. Any ban imposed on my possession of such material for that solitary purpose invades the personal privacy which s 13 of the interim Constitution (Act 200 of 1993) guarantees that I shall enjoy. Here the invasion is aggravated by the preposterous definition of 'indecent or obscene photographic matter' which s 1 of the statute [Indecent or Obscene Photographic Matter Act 37 of 1967] contains. So widely has it been framed that it covers, for instance, reproductions of not a few famous works of art, ancient and modern, that are publicly displayed and can readily be viewed in major galleries of the world. That s 2(1) clashes with s 13 seems to be indisputable (per Didcott J in *Case and Curtis v Minister of Safety and Security* 1996 3 SA 617 (CC) 656–657).

BRIEWE

The following letter was received by the editor:

Sir,

In 1995 *THRHR* 672 you published a note by Susan Scott, "Notarial bonds and insolvency", containing certain statements which should not remain uncontradicted. Professor Scott's valuable note revisits a topic of great theoretical and practical interest, and helps to elucidate some of the salient points in respect of the position once insolvency interrupts the relationship between the bondholder and bondgrantor under a notarial bond. She also expresses welcome support for some hitherto underestimated proposals, especially those of Sonnekus.

To my mind, however, the following statements need to be reconsidered:

First, Scott states that Van der Walt, Pienaar and Louw, "Sekerheidstelling deur roerende goed – nog steeds onsekerheid?" 1994 *THRHR* 675, "err where they seem to imply that a perfection clause in a bond may make provision for the bondholder to take control of the bonded property without a court order".

In fact, this is an understatement. What those authors were referring to is exactly what is to be found in many standard contract terms that used to (and, sadly, still do) appear in notarial bond documents! The view held by Scott (and others) that such a contract term must surely be regarded as unacceptable and unenforceable, is fully endorsed by Van der Walt. Unfortunately, however, there is often no penalty for drafters or users of standard term contracts who include terms in contracts which are bad in law or (even sometimes) contractually immoral. The seriousness of this situation is only fully realised when one considers that very few disputes about contracts ever come before a court. Where that does happen, of course, as is to be expected, such contract clauses can be scrutinised and struck out, or be made less objectionable by way of interpretation, to mention but one method generally applied. Such misuse of the law with regard to unfair contracts can now also be reported to the Unfair Contract Terms Committee, a liaison subcommittee of the Business Practices Committee, established under the Harmful Business Practices Act 71 of 1988, which has the power to deal with such matters.

However, the result of the inclusion of such objectionable terms in contracts is still that most non-drafting parties (who often do not have the necessary knowledge, or experience, or courage and tenacity, or means and circumstances, or trust in the law to defend themselves effectively) never really challenge the use of such terms. Many non-drafting parties will simply be intimidated by such a term (even if it may be bad in law) when they are made to realise that it actually does appear on the document, which was signed by them – even more so when the meaning of *pacta servanda sunt* is pointed out to them. It really is unfortunate that so little consideration is often given to what may be called the "psychology of standard form contracting".

In conclusion: Whether Scott, or Van der Walt, Pienaar and Louw, or whoever approves of it or not, and whether or not such terms will be enforced by a court

eventually, bad terms do appear in contracts only too regularly. If such a case does not come before a court, for whatever reason, the chances are that most non-drafting parties will abide by whatever appears in the contract document, albeit unhappily. It is, therefore, not Van der Walt, Pienaar and Louw who err in this respect, but those drafters of standard form notarial bond documents who include terms in their contracts which provide for the taking of control without a court order. The authors merely wished to remind readers of the existing malpractice of including such bad terms in contracts of this nature. Naturally, their note was focused on the matter at hand, namely the question whether the legislature has succeeded in alleviating the most important uncertainties in the field of notarial bonds by the promulgation of the Security by Means of Movable Property Act 57 of 1993. That is the only reason why they did not elaborate on the contractual aspects in that note. However, the practice of including such bad terms as those referred to above, is so serious that it could not and still cannot simply be allowed to pass without comment. That, one would think, goes without saying.

Secondly, Scott finds that Van der Walt "Aspekte van die reg insake notariële verbande" 1983 *THRHR* 334 "unconvincingly questions the correctness of the viewpoint that a notarial bondholder in control of the movables should be regarded as a pledgee".

Van der Walt's argument there was that the notarial bondholder in control is in fact in a stronger position than a pledgee, since he still enjoys the usual measure of protection as a notarial bondholder even if he loses control, whereas a pledgee would lose his real security right altogether. It is for this reason that Van der Walt sees the notarial bondholder as being in a stronger position once (and whilst) he is in control of the bonded property, than he would otherwise have been. And even if control is subsequently lost, the notarial bondholder is still in the stronger position, however marginally, than a notarial bondholder is in relation to non-secured and other non-preferent creditors. This is still Van der Walt's opinion, as the existence of a notarial bond is not terminated the moment the bondholder gains control over the movable involved, only to reappear if the (then) pledgee loses such control. Put differently, the notarial bond is not cancelled when the bondholder obtains control over the bonded property – the bondholder's position is merely "enhanced" (per Didcott J in *Barclays National Bank Ltd v Natal Fire Extinguishers Manufacturing (Pty) Ltd* 1982 4 SA 650 (D) 656F) for the duration of his control.

Van der Walt (1983 *THRHR* 335) also points out that in the case of the bondholder-pledgee both the statutory requirements regarding notarial bonds (cf s 61(1) of the Deed's Act) and the common law requirements for a pledge, would have to be satisfied. This strengthens his view that the notarial bond will not simply vanish if the bondholder gains control of the bonded property, to reappear if he were to lose such control. What really happens is that the bondholder's position is improved for as long as his control lasts.

In the light of the above, it therefore seems that Scott and Van der Walt are more in agreement than Scott seems to think.

In any case, Scott states further that Van der Walt seeks support for his argument in the *Barclays Bank* case *supra* 656C–D, in which case, if Scott is understood correctly, the court was of a different opinion. This is not so, as is clear from the quotation from Didcott J's judgment (676) made by Van der Walt and Scott. In fact, Didcott J quite clearly stated that the bondholder gaining control

over the bonded property "improves" his position (656G), thereby coming into an "enhanced" position (656F).

The above comments should not be seen as detracting from Scott's otherwise lucid explanation of the situation pertaining to notarial bondholders upon insolvency, but as intended to assist readers by rectifying some possible misunderstandings.

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I must agree with his [Didcott J's] conclusion that the 1967 [Indecent or Obscene Photographic Matter] Act unreasonably and unjustifiably infringes the constitutional right to privacy. I would, however, respectfully part company from Justice Didcott to the extent that any part of his opinion might be read to suggest that it is not in any circumstances the business of the State to regulate the kinds of expressive material an individual may consume in the privacy of her or his own home. It may be so that, as in England, a 'South African's home is his (or her) castle'. But I would hesitate to endorse the view that its walls are impregnable to the reach of governmental regulation affecting expressive materials (per Mokgoro J in *Case and Curtis v Minister of Safety and Security* 1996 3 SA 617 (CC) 647).